is a matter of controversy, but whether she fulfils this undertaking now or afterwards, it appears to me that she is not entitled to put any portion of the ground to a use inconsistent with that to which it could be applied supposing the tenements were built. The provision which has just been narrated seems to me to involve this result. Besides, there is another condition in the contract which the erection of the two shops referred to in the petition to the Dean of Guild would contravene. The feu-contract provides that the tenements and others for the erection of which the feu was given out shall "be kept of the same dimensions in architectural style, elevation, and height of roof foresaid by our said disponee and his foresaids in all time coming," the superior and his successors in the remainder of said compartment being bound and obliged to maintain the same architectural style, dimensions, elevation, and height of roof when they come to build thereon. The shops for the building of which authority is desired are of a character of building different from those provided for by the feu-contract. This appears to be a contravention. No doubt the appellant says that the shops are only to be temporary. But what does that mean? If put up now they may be kept on the ground for any number of years, and their toleration would be neither more nor less than a licence to keep the ground, which was feued out upon specified conditions, in a state different from that into which it was to be turned—different from that for which the feu-contract made provision. Had this contract distinguished between temporary and permanent buildings, possibly the appellant's contention as to her right to erect what she calls temporary premises could have been maintained. But there is no such distinction to be found in the feu-contract. The buildings, and the only buildings in contemplation of either party, were those of the character specified, and accordingly upon this ground, as well as the other ground already explained, I am of opinion that the Dean of Guild did right in refusing the authority prayed for in the appellant's petition.

The Court unanimously refused the appeal, holding that the clause relating to the pleasure ground above quoted gave each proprietor a right of common property in the pleasure ground from the date of acquiring his feu, and that the words "when we or they come to build" did not restrict that right.

Counsel for Appellant — Trayner — Pearson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—J. P. B. Robertson —Sym. Agents—Torry & Sym, W.S.

Tuesday, June 14.

FIRST DIVISION.

[Sheriff of Caithness, Orkney, and Zetland.

SMITH *v.* INGLIS.

Sheriff Court Act 1876, *section* 14, *sub-section* 2—*Appeal—Competency—Discretion of Sheriff.*

An appeal to the Court of Session from the judgment of a Sheriff refusing a note tendered by a defender under section 14, sub-section 2, of the Sheriff Courts Act 1876, in explanation of his failure to enter appearance in an action in which decree in absence has been pronounced, is competent, but the Court will not lightly interfere with the Sheriff's discretion in the matter.

David Inglis, farmer, Weisdale, Shetland, sued John Smith, also residing there, in the Sheriff Court of Lerwick for payment of £74, 17s. 3d., as the value of a horse and gig and other goods supplied to him. On 23d February 1881 the Sheriff-Substitute (Rampini), in respect the defender had not entered appearance, decerned against him for that sum with taxed expenses. This decree was extracted and the defender charged thereon. On 4th May a procurator for the defender tendered a note and defences for him in terms of the Sheriff Courts Act of 1876. The note was in the following terms:—"The defender begs to submit to the Sheriff the following explanation of his failure to have the decree in this action recalled within seven days from its date, and also to produce herewith his defences to said action. The defender is a shepherd, and unacquainted with business. He had, however, previously seen summonses, but these being all prior to the Sheriff Court Act of 1876, were signed by the sheriff-clerk. The pursuer was not aware of the change in the initiatory writs in an action in the Sheriff Court, and that under the Sheriff Court Act of 1876 the initiatory writ was signed by the pursuer or his procurator. On the service of the summons the defender communicated with the pursuer's procurator, Mr Macgregor, whom, from his previous knowledge of the mode of signing the initiatory writs, the defender thought was sheriff-clerk; and in that belief, and waiting for an answer to his communication, which never came, allowed decree to be obtained. The first knowledge he had of the decree was when he was charged for payment. The sum of £5 is consigned herewith. For these reasons the defender craves the Sheriff to recall the said decree."

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 14, sub-sec. 2, provides —"Should the defender fail to take within seven days after the date of such decree the steps hereinbefore mentioned, with a view to having the decree recalled or to follow out the same, he may obtain the recall of the decree, whether extracted or not, at any time before implement has followed thereon, or so far as the same shall not have been implemented, by presenting to the Sheriff a written note in which he shall set forth his explanation of his failure to enter appearance in the action, and to take within such seven days the steps hereinbefore provided as aforesaid, or to follow out the same, and producing with such note his defences to the action in which the decree was granted, and any documentary evidence he may have in support of such explanation, and consigning the sum of £5; and it shall not be necessary for the pursuer to lodge any answer to the said note, but it shall be lawful for the Sheriff, if satisfied with the explanation aforesaid, to recall the said decree so far as not implemented, and order payment to the pursuer out of the consigned money of his expenses, including the expense of any charge

or diligence upon the decree, or to refuse the note or do otherwise as he shall think just."

The Sheriff-Substitute, after hearing parties' procurators, refused the note, adding to his interlocutor this note:—"Considering the stage to which this action has been allowed to advance, and the unsatisfactory nature of the excuse for the defender's negligence, the Sheriff-Substitute does not think it desirable to grant the defender's motion."

On appeal the Sheriff (THOMS) adhered, and added this note:—"Looking to the terms of the order for service, and the fact of personal service, the Sheriff agrees with the Sheriff-Substitute as to the unsatisfactory nature of the excuse made by the defender for not attending to his interests in this case. It would just be a premium upon procrastination were a defender, three months after he allows decree to go out against him, to be enabled to begin a litigation which would in ordinary course have been ended by this time."

The defender appealed to the Court of Session.

It was stated at the bar that the pursuer had used arrestments on the dependence of the action, and obtained a decree of furthcoming against the defender.

The pursuer (respondent) objected to the competency of the appeal. He argued that the remedy provided by the Sheriff Court Act was one entirely in the discretion of the Sheriff. If he thought fit to refuse the note, his judgment could not be appealed. The only course open to the defender was to proceed by suspension or reduction of such a decree after extract. The decree of furthcoming was "implement" in the sense of the section in question—*M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085.

Counsel having then been heard on the merits of the appeal—

LORD PRESIDENT—This is a matter in which I should be slow to interfere with the discretion of the Sheriff unless he had clearly gone wrong. There seems to be no evidence that he has done so here.

Of the competency of the appeal I entertain no doubt.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the appeal with expenses, modified to £4, 4s.

Counsel for Pursuer (Respondent) — R. V. Campbell. Agents—Davidson & Syme, W.S.

Counsel for Defender (Appellant) — R. K. Galloway. Agent—Thomas Carmichael, S.S.C.

Tuesday, June 14.

FIRST DIVISION.

[Court of Exchequer.

THE STRATHEARN HYDROPATHIC ESTABLISHMENT COMPANY (LIMITED) *v.* THE SOLICITOR OF INLAND REVENUE.

Revenue—Inhabited-House-Duty—The Customs and Inland Revenue Act 1871 (34 *and* 35 *Vict. c.* 103), *sec.* 31—*Hydropathic Establishment—Hotel.*

A hydropathic establishment is entitled to be assessed for inhabited house-duty at the modified rate of sixpence per £1, under sec. 31 of the Customs and Inland Revenue Act 1871, as being a dwelling-house wherein is carried on "the business of an hotel-keeper or an inn-keeper or coffeehouse-keeper, although not licensed to sell therein by retail beer, ale, wine, or other liquors."

The Strathearn Hydropathic Establishment Company (Limited), appealed to the Commissioners for the General Purposes of the Property and Income Tax Acts against an assessment of £36, 7s. 6d., being inhabited-house-duty on £970 at the rate of 9d. in the pound, made on them for the year ending Whitsunday 1881, in respect of their being occupiers of the Strathearn Hydropathic Establishment at Crieff, and claimed to have the assessment restricted to £24, 5s., the duty on £970 at the rate of 6d. in the pound, on the ground that they carried on in their establishment the business of an hotel-keeper or an inn-keeper within the meaning of section 31 of the Act 34 and 35 Vict. cap. 103. The following facts were stated in the case for the opinion of the Court of Exchequer:—

. . . . "3. The object of the hydropathic establishment is the treatment, under the advice of a resident physician, of patients by hydropathy, and for the boarding and lodging of them in the establishment. The company board and lodge visitors who may not desire to undergo hydropathic treatment.

"4. The patients and visitors are subject to the strict rules of the establishment. They are rung up in the morning at a fixed hour. The meals are served only at certain fixed hours, and any inmate sitting down to table after grace is said, or making allusion to hydropathic treatment during meals, is fined. Family worship is held morning and evening. The front-door is locked at 10·30 P.M., and the gas turned off at 11 P.M., when perfect quietness must be maintained by all.

"5. By the rules and regulations of the company, which are hung up in the bedrooms of the establishment for the information of the public, the officials of the company are empowered to refuse admission and to send away such as they judge unsuitable. No children under six years of age are admitted except under special arrangement.

"6. The company board and lodge patients and visitors at a certain fixed rate per day or per week. Visitors wishing to invite a friend to the *table d'hote* or to spend the evening, require to give notice at the office. The company declined to say that they are bound to supply the travelling public with meals at odd hours, but they stated they had never refused to do so.