the mere fact that what the pursuer asks for is security for a half-year's rent, which happens to amount to £15, cannot prevent either party bringing up the case upon appeal when the real value of the cause is above £25.

Lord Shand—I am of the same opinion. Though the conclusions are limited to security for a half-year's rent of the subjects, and that only amounts to £15, yet it cannot be said that that fixes the value of the cause as being under £25. No doubt, in the ordinary case it is usual to look at the conclusions of the summons in order to get at the true value of the cause, but the real question may not thus in every case be disclosed. Even supposing a sum less than £25 be expressly mentioned, if it appears that the real value is in excess of the sum concluded for, then the competency will be determined by the true value of the question.

In the present case, though £15 is the sum mentioned, yet it appears that the real question between the parties is one of much more value. I should, even in absence of authority, have come to the same decision as your Lordships, but in spite of Mr Shaw's attempt to distinguish this case from that of *Drummond*, I am clearly of opinion that the present case is very similar to, and falls to be decided in accordance with, the principles there laid down.

Lord Deas was absent.

The Court sustained the competency of the appeal, and on the merits recalled the interlocutor of the Sheriff and reverted to that of the Sheriff-Substitute.

Counsel for Pursuer—Thorburn. Agent—Andrew Wallace, Solicitor.

Counsel for Defender—Shaw. Agent—David Forsyth, S.S.C.

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*Wednesday, January* 10.

## FIRST DIVISION.

[Burgh Court of Stranraer.

## M'LELLAND *v.* GARSON.

*Process—Competency—Royal Burgh, Magistrates of.*

A petition by a landlord to have his tenant ordained to plenish his house, and for warrant for his ejection in the event of his failing to do so, is competent in a Burgh Court.

*Royal Burgh—Procedure in Burgh Court—Act of Sederunt* 10*th March* 1849*—Appeal.*

Where the procedure prescribed by the above-mentioned Act of Sederunt had not been strictly complied with by the magistrates of a royal burgh—*held* that as the penalty of nullity was not prescribed to follow on the non-observance of its provisions, and as the party complaining of the non-observance had acquiesced in the procedure and taken a judgment on the merits, an appeal on the ground that the proceedings were incompetent fell to be refused.

Alexander M'Lelland, farmer, Balyett, was proprietor of a dwelling-house in Lewis Street, Stranraer. He brought this petition in the Burgh Court of the royal burgh of Stranraer against William Ross Garson, solicitor in Stranraer, whom he alleged to be tenant of this dwelling-house under a lease from August 1881 to Whitsunday 1884, to have him ordained to place furniture and plenishing in the dwelling-house equal in value at least to the year's rent, or find caution for the rent, and failing his doing so, for warrant for his ejection and warrant to relet the premises. A condescendence and note of pleas-in-law were annexed to the petition The respondent denied that he was tenant under the lease referred to, and averred that a stipulation with regard to repairs upon the house, which had been agreed on by the parties and inserted in the draft, had *per incuriam* been omitted from the lease. He averred further that it was not in good tenantable condition, and maintained that in these circumstances he was not liable for rent.

He pleaded that the Burgh Court had no jurisdiction in such an application, and also that the proper procedure being a special form provided by Act of Sederunt for such applications, and the petition not being in conformity therewith, it should be dismissed.

The Act of Sederunt 13th February 1845, as to records in the Courts of royal burghs and burghs of barony, provided (sec. 5), that in all summary applications to be presented in the Burgh Courts . . . "the petition shall state generally (as in the present form of a note of suspension before the Supreme Court) the subject of complaint, setting forth specifically in the prayer the remedy craved," and that there shall be annexed to the petition an articulate statement of facts with note of pleas-in-law.

The Act of Sederunt of 10th March 1849, as to prorogation and proofs in Burgh Courts, provides, (sec. 2) with regard to proofs "that the interlocutor allowing proof shall appoint the place where it is to be taken; and the Court shall in every instance, on due consideration of the circumstances of the case and of the matters to be remitted to probation, assign a time for commencing the proof, and another within which the same shall be reported, unless there be in any process some special cause for omitting all or any of these particulars, in which case such special cause shall be distinctly set forth in the deliverance."

The Magistrates repelled the preliminary pleas, and allowed a proof, after which they found that the respondent was tenant of the house under the lease, that it was in good tenantable condition, and that the respondent had failed to occupy and furnish it. They found in law that he was bound to occupy and plenish it, and ordained him to place such plenishing in it to the satisfaction of the Court, and that within eight days. The interlocutor allowing this proof fixed the date of proof, but did not state the place at which it was to be taken.

The defender appealed to the Court of Session, and argued that the proceedings in the Burgh Court were incompetent. It had no jurisdiction in questions of this kind at the present day, as it had been entirely superseded in such matters by the Sheriff Court. Its jurisdiction had been lost *non utendo*. Further, the interlocutor allowing

proof was not in conformity with the Act of Sederunt of 10th March 1849 which was passed to regulate proof in the courts of royal burghs, and which by sec. 2, sub-sec. 1, provides, *inter alia*, as above quoted, "that the interlocutor allowing proof shall appoint the place where it is to be taken" . . . This provision was not complied with.

Authority — *Wright* v. *Wightman*, 3d Oct. 1875, 3 R. 68.

Counsel for the respondent was not called on.

LORD PRESIDENT—There are two points which have been submitted to us under this appeal, both of which have reference to the competency of the proceedings in the Burgh Court. The first of them is whether in a case of this kind that Court has jurisdiction. This is a petition for ejection—a process which is competent in any inferior Court, and therefore perfectly so in Burgh Courts, and that being so, I am quite clear upon the matter of jurisdiction.

The other point which was argued to us related to whether the magistrates had not failed to comply with certain provisions contained in the Act of Sederunt of 10th March 1849 to which we were referred. Now, it is quite possible that they may not have strictly complied with all the provisions contained in this Act, but the question comes to be whether this failure is to result in a quashing of the whole procedure which has followed thereon. I am clearly of opinion it is not. No objection was taken at the time to what was done, and a judgment was obtained on the merits. Had the Act of Sederunt provided the penalty of nullity to follow upon the non-compliance with its provisions, that would have been a very different matter, or had there even been a penal provision effect would have required to have been given to it, but there is neither the one nor the other. I am therefore for refusing this appeal.

LORDS DEAS, MURE, and SHAND concurred.

The Court refused the appeal.

Counsel for Appellant—Rhind. Agent—James M'Caul, S.S.C.

Counsel for Respondent—J. Burnet. Agents—Campbell & Smith, S.S.C.

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*Wednesday, January* 10.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

### HISLOP & OTHERS *v.* THE KELVINSIDE ESTATE COMPANY TRUSTEES.

*Property — Neighbourhood — Nuisance — Burning "Blaes" — Smoke — Offensive Smell — Coming to Nuisance — Superior and Vassal — Interdict.*

The proprietors of an estate, situated on the confines of a large city, commenced to feu out the land in building lots for dwelling houses of a superior class. The coal and ironstone in the lands had previously been worked out, but there remained on the surface of the ground after the workings were abandoned several large heaps of "blaes." After a considerable part of the lands had been feued and many houses in streets and detached villas had been erected by the feuars, the proprietor set fire to one of the heaps of blaes in the immediate vicinity of the houses, and proposed to set fire to others. In a petition for interdict at the instance of the feuars and certain proprietors of houses in the neighbourhood, *held*, after a proof, which established that the fumes emitted by the heaps in the course of combustion, though not directly injurious to health, were in certain directions of the wind productive of material discomfort to the dwellers in the houses, that the petitioners were entitled at common law to have an interdict against the ignition of any other heaps of blaes in the vicinity of their houses, as a nuisance, and the plea that in the circumstances they were barred from complaining because they had come to the nuisance *repelled*.

The Kelvinside Estate Company were proprietors of a large area of land lying to the west and north-west of the city of Glasgow. For many years previously to 1881 the Kelvinside estate had been treated principally as a mineral property for the working of coal and ironstone. About the end of that year the mineral workings were finally abandoned. Some years previously the trustees of the company had commenced to feu out the lands in lots for the erection of self-contained houses and villas of a superior class; and streets had been laid out and houses erected to the extent of forming a new residential suburb of considerable size. But the greater part of the lands still remained unfeued. In consequence of the mining operations the surface of the ground became encumbered with large heaps or bings of mineral refuse, consisting of a kind of clayey shale called technically "blaes." These bings or heaps were of various dimensions. The largest of all contained 102,500 tons of blaes, and the smallest 5100. The combined amount was 263,800 tons, occupying upwards of 9 acres of land. The largest heap was of a maximum height from the ground of 55 feet. The material composing them was for the most part combustible. On 14th December 1881 the smallest heap—that of 5100, situated on the farm of John Semple, an agricultural tenant of the trustees, and known as No. 6 pit—was set fire to, with consent of the trustees, by their mineral tenants, who were under an obligation to remove them at the expiry of their lease.

The present action was raised in the Sheriff Court of Lanarkshire at Glasgow by certain proprietors of houses built on ground feued from the Kelvinside estate, along with some other proprietors in the same neighbourhood who were not feuars of the Kelvinside trustees, to interdict the trustees from continuing to burn or calcine the blaes heap to which they had already set fire, and from again setting fire to it or to any other heap in the lands of Kelvinside.

The pursuers pleaded—"(1) The burning and calcining of the said heap being a nuisance, and injurious to the health and comfort of the pursuers and inhabitants of the neighbourhood, the pursuers are entitled to decree and interdict as craved. (2) The procedure of the defenders being in violation of the rights of the pursuers, both at common law and under their titles,