pleted in Edinburgh. It might have been that in consequence of being unable to get stock in Edinburgh the brokers might have been obliged to get in London the stock they wanted. The rules of the London Stock Exchange would not have applied to that transaction, and just in the same way I do not think that the rules of the Glasgow Stock Exchange can apply here.

I think that when the Edinburgh firm purchased these shares from the Glasgow firm the transaction was one between principals. Ritchie & Hardie employed the Glasgow firm to purchase the shares as principals, and Mackenzie & Aitken in the execution of that order were entitled to regard Ritchie & Hardie as principals. This view is, I think, corroborated by the course of dealing between the parties. We have not had produced in the case the letter by which the transfer was transmitted from Glasgow to Edinburgh, but a form of the letter in which this was done has been printed, the letter having reference to another transaction. That letter is just in the terms that an employee would use in addressing his employer. No doubt Mackenzie & Aitken might have acquired a preference by giving only a qualified title when they sent the transfer. If, for example, this had been added to the letter, "which stock is transmitted to you for the purpose of delivery to your client upon the condition that you send us his cheque by return of post," then I think the appellants' claim to a preference might have been sustained, but in the absence of any such condition I think it must fail.

LORD ADAM—I concur, and I think that our judgment practically gives effect to what was the ordinary course of dealing between the parties.

The Court affirmed the interlocutor of the Lord Ordinary.

Counsel for Appellants—Jameson—Goudy. Agent—F. J. Martin, W.S.

Counsel for Respondent—Comrie Thomson—Dickson. Agents—Dove & Lockhart, S.S.C.

Friday, January 22.

FIRST DIVISION.

[Court of Exchequer.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* THE SOLICITOR OF INLAND REVENUE.

Revenue—"Conveyance on Sale"—Sum Assessed as Compensation for Loss of Business—Stamp Act 1870 (33 *and* 34 *Vict. cap.* 97), *sec.* 70.

Under a proceeding to obtain compensation for premises taken by a railway company, there was assessed (1) a sum as the value of the land taken; (2) a sum as the value of the buildings and machinery thereon; (3) a sum as compensation for loss of business which the proprietors were there carrying on on the land. *Held* (*diss.* Lord Shand) that the compensation for loss of business was not part of the consideration paid by the company for the "conveyance on sale" of the property, and therefore fell to be excluded in estimating the *ad valorem* stamp-duty payable for the conveyance on sale.

This was a Case under the Stamp Act of 1870, for the Glasgow and South-Western Railway, in a question between them and the Commissioners of Inland Revenue. The Case stated the following facts:—In a proceeding under the Lands Clauses Consolidation (Scotland) Act 1845, before the Sheriff of Renfrewshire and a special jury, for the purpose of assessing the compensation payable by the railway company to the firm of Sommerville & Company, timber merchants, Caledonian Saw-Mills, Greenock, for the land or property and others taken by the company, the special jury found Sommerville & Company entitled to the sum of £28,586, 2s. 1d. as the value of the land about to be taken by the railway company under the powers contained in and for the purposes of their private Act. They further found Sommerville & Co. entitled to the sum of £14,572, 16s. 3d. for the value of the buildings, machinery, and plant upon the said land; and to the sum of £9499, 8s. 3d. as compensation for loss of business. These three sums amounted in all to £52,658, 6s. 7d.

The instrument under which this question arose, an abstract of which was set forth in the Case, was entitled a conveyance, and bore, that considering that by verdict of the jury they found Sommerville & Co. entitled to £28,586, 2s. 1d. as the value of the land taken, £14,572, 16s. 3d. as the value of the buildings, machinery, plant, and others upon the land, and the sum of £9499, 8s. 3d. as compensation for loss of business, "said three sums amounting in all to the sum of £52,658, 6s. 7d.; and seeing that the said Glasgow and South-Western Railway Company, incorporated by the Glasgow and South-Western Railway Consolidation Act 1855, have, pursuant to the Glasgow and South-Western Railway Act 1881, paid to the said Sommerville & Co. the said sums of £28,586, 2s. 1d. and £14,572, 16s. 3d. as the value of the foresaid land or property, and of the foresaid buildings, machinery, plant, and others, of which two sums they, the said Sommerville & Company, thereby acknowledged the receipt, and that the said railway company has also paid to them, the said Sommerville & Company, the said sum of £9499, 8s. 3d., conform to separate receipt and discharge granted by them therefor: Therefore the said Sommerville & Company, and individual partners, do hereby sell, alienate, dispone, and convey, assign, and make over from them, their heirs and successors, to the said railway company, their successors and assigns, forever, according to the true intent and meaning of the said Acts," the pieces of ground known as the Caledonian Saw Mills, and minerals therein, and whole buildings and heritable and moveable machinery therein.

The Railway Company, on 8th July 1885, presented to the Commissioners of Inland Revenue the deed of conveyance of the property in order to have the amount of stamp-duty due thereupon determined. The Commissioners were of opinion that the instrument was chargeable with *ad valorem* conveyance on sale duty; and that the amount or value of the consideration for the sale consisted of the total sum of £52,658, 6s. 7d. paid, being the aggregate of the three sums above mentioned. The Commissioners accordingly assessed the *ad val-*

orem conveyance on sale duty of £263, 10s. upon the instrument in respect of the £52,658, 6s. 7d., which included that duty on the £9499, 8s. 3d. The said Glasgow and South-Western Railway Company declared themselves dissatisfied with the determination of the said Commissioners, so far as regarded their assessment of conveyance on sale duty on the said sum of £9499, 8s. 3d., on the ground that neither in form nor in substance was the sum in question any part of the amount or value of the consideration of the sale or of the consideration of granting the conveyance to them, and that the view adopted by the Commissionors was contrary to the Stamp Acts.

They therefore took this Case for the opinion of the Court.

An abstract of the "Receipt and Discharge for £9499, 8s. 3d.," referred to in the foregoing quotation from the conveyance, formed part of the Case. The discharging clause of it was—"Therefore the said Sommerville & Company, and partners thereof, do hereby exoner, acquit, and simpliciter discharge the said railway company, not only of the said sum of £9499, 8s. 3d., and whole claims and demands competent to them in respect thereof under the Railway Companies Act, or the foresaid verdict, but also of the said verdict itself, and all that has followed or may be competent to follow thereupon."

Section 70 of the Stamp Act 1870 provides—"The term conveyance on sale includes every instrument and every decree or order of any Court, or of any commissioners, whereby any property, upon the sale thereof, is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf, or by his direction." The relative schedule fixes the *ad valorem* duties on "conveyances and transfers on sale" of any property.

Argued for the Railway Company—The determination of the Commissioners was wrong, because loss of business could not be the subject-matter of a sale and a transfer; only land, and the buildings thereon, with their contents, could be dealt with. To prevail the Commissioners would require to show that the sum obtained by Sommerville & Co. was for the subjects sold, but it included more. In determining the stamp-duty payable the two points to keep in view were, 1st, to what extent was there a sale; and, 2d, what was the consideration paid for a thing sold?

Replied for the Commissioners—The whole three items which went to form the £52,658 entered into the question of the value of these subjects to their owner, and so the whole sum fell under the stamp-duty. The whole of the lands were conveyed, and there was no authority in the statute for the jury making a separate allowance for loss of business as they had done here.

Authorities—Act 33 and 34 Vict. cap. 97, sec. 70; *Peile* v. *Peile*, L.R., 3 Ch. Div. 36.

At advising—

Lord President—The question raised by this case is, what amount of stamp-duty is payable upon a deed of conveyance granted by Sommerville & Company, saw-millers in Greenock, to the Glasgow and South-Western Railway Company? It is admitted that the stamp must be an *ad valorem* stamp, and the amount of it of course depends upon the amount of the consideration paid by the purchasers to the seller for the conveyance upon the sale. The words of the Stamp Act (sec. 70) are—"The term 'conveyance on sale' includes every instrument and every decree or order of any court, or of any commissioners, whereby any property, upon the sale thereof, is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf, or by his direction."

Now, these words of the statute, I think, make it clear that the subject in respect of which the consideration is payable must be a subject which is transferred by the instrument, and is by the force of the instrument vested in the purchaser or some other person on his behalf, and of course the consideration must be the value given for the subject so transferred and nothing else.

In the present case the conveyance proceeds upon a verdict of a jury under a compensation trial between Sommerville & Company and the railway company, and the verdict of the jury was that the company were to pay £28,586 for the value of the land taken, and £14,572 for the value of the buildings and machinery upon that land. They also awarded a sum of about £9500 as compensation for loss of business to Sommerville & Company, and the question is, whether the consideration for the conveyance embraces that sum of £9500, or whether that falls to be excluded in estimating the amount of the *ad valorem* duty? The Commissioners expressed their opinion that the instrument was chargeable with an *ad valorem* conveyance on sale duty, and that the amount or value of the consideration for the sale consists of the total sum of £52,658 paid, that sum embracing the £9500 which was given for compensation for loss of business.

I am not able to agree with the conclusion of the Commissioners, because I do not think that the £9500 given as compensation for loss of business is in any proper sense of the term a part of the consideration given for the conveyance upon the sale of this estate. The railway company were not here taking a portion of any subject, but they were taking the whole property belonging to Sommerville & Company, and the value of the land and houses together amounted to £28,586 *plus* £14,572, and that appears to me to be the consideration paid for the property which was transferred to and vested in the railway company by force of the conveyance.

The circumstance that Sommerville & Company not only were the owners of the property taken, but also that they occupied that property as a place of business, carrying on the work of saw-millers, is an accident. It might quite well have been that the property and the occupancy were vested in different persons altogether. No doubt it is not very common in a work of this kind for the property to be owned by one person and occupied by another, because it is much more convenient that the manufacturer or merchant, or whatever he may be, should be owner of his own property, and in letting a subject like this we have all seen in cases of a different description how very difficult it would be to fix a rent. But still the two interests are perfectly distinct and separable—the interest of the proprietor and the interest of the person who as tenant or otherwise is carrying on the business on the premises.

Now, if Messrs Sommerville & Company had been the owners of the estate merely they could not have had this sum of £9500 awarded to them by the jury, because they would have lost no business. The loss of business would have been entirely a loss to their tenants, and accordingly the consideration which they would have received for this conveyance, if they had not been occupying these business premises and carrying on their business there, would have been the sum of £28,000 for the land and £14,000 for the buildings and machinery, and the £9500 would have been awarded to their tenants for the loss of business which they sustained by being turned out of the premises. It is very clear that in that case the £9500 payable to the tenants would not have been any part of the consideration given to the proprietor of the land for the conveyance upon the sale, nor would it have been a sum that could have been subjected to an *ad valorem* duty in any other way. The only document or writ that would have required to pass between the parties in regard to that sum of compensation for loss of business would have been a receipt or discharge by the tenants of the premises granted to the railway company, and that receipt or discharge would have borne a simple ten shilling stamp and nothing else. There could have been no ground, so far as I can see, for charging any other stamp upon it whatever.

Now, does it make any difference that the two characters of proprietor and tenant or occupier are combined in the same person, or does that circumstance of the combination of these two characters affect the nature of the compensation for loss of business which was awarded by the verdict of the jury? I think not. I think, as I said before, that in so far as the question of consideration for conveyance upon a sale is concerned the circumstance that the proprietors are also occupiers is a mere accident, and has nothing to do with the question arising upon the Stamp Act, and I therefore come to the conclusion that the consideration for the conveyance upon the sale here consists of the two sums paid for the land and for the houses and machinery respectively, and no more.

Lord Mure—I concur with your Lordship in the interpretation to be put upon section 70 of the statute, upon which this question turns. Your Lordship has explained that by the words of the statute the property on the sale of which the stamp is exigible must be a subject that is transferred to the party at the time. There is some difficulty in this case occasioned by the somewhat peculiar terms of the instrument by which the property was here conveyed, because it sets out by narrating the verdict of the jury as a sort of general consideration in respect of which the transference is made. But upon more careful examination of the deed itself I am satisfied that this is not sufficient to bring the case into this position, that the sum of £9500 awarded as compensation for loss of business is to be regarded as part of the consideration money for which the transference was made because it does not relate to any particular subject or part of the property transferred. There is no transference made with regard to it at all. The proprietors carried on business as a company upon these premises, but this is a sum given to them expressly as compensation for the loss of the business that they were carrying on.

It is quite clear that if the premises had been let to a tenant, the sum would have been paid to the tenant for the forcible taking possession of the property by the railway company, and it never could come into the position of being a consideration for any part of the property transferred. That to my mind is perfectly clear, and looking to the phraseology used in other parts of the instrument, I find that the parties themselves seem to have taken a distinction between the two larger sums that were given for the land or property taken, and for the value of the buildings and machinery upon it; they separate them when they come to specify the sums pretty distinctly as a specific sum of money that was to be paid upon a receipt and discharge—different altogether from the sum of money that was to be paid for the conveyance of the property.

It appears from the narrative in the case that the property disponed (and it is for the property so conveyed or disponed that the duty is to be charged) consists of "All and Whole those pieces of ground and shore ground, &c., and the minerals therein, and also the whole buildings and heritable and moveable machinery thereon." That is all that is transferred. There is no transference that has any relation to the compensation for loss of business, for that is not a tangible thing that admits of being transferred. There is just a sum of money to be paid; that money was paid and a separate discharge granted, which is just what would have been done if there had been a tenant or company separate from the proprietor carrying on the business.

On these grounds I come to the same conclusion as your Lordship, that by the terms of the 70th section the £9500 was not part of the consideration for which this subject was conveyed.

Lord Shand—I am of opinion that the determination of the Commissioners in this case, which seems to me to be a case of considerable importance, is right, and I am therefore unable to concur in the judgment which your Lordships are about to pronounce.

The grounds of my opinion may be shortly stated.

The term "conveyance on sale" is defined or interpreted in section 70 of the Statute 33 and 34 Vict. chap. 97. The deed in question is within the description of a conveyance on sale there given, and this being ascertained or admitted, as it is in the present question, section 70 has no further bearing on the matter in dispute. The deed in question is undoubtedly a conveyance on sale within the meaning of the statute, because certain "property upon the sale thereof is thereby legally transferred to or vested in the purchaser," the property being certain land and buildings, machinery, plant, and others thereon, all of which belonged to the sellers and disponers Sommerville & Company, timber merchants and saw-millers, Greenock.

The question between the parties really turns on the terms of the schedule to the Act—"conveyance or transfer on sale of any property . . . where the amount or value of the consideration for the sale does not exceed £5, — 6d., and so on." The stamp is to be *ad valorem* on "the

amount or value of the consideration for the sale," and the point for determination is, what was "the amount of the consideration for the sale" of the property acquired by the Glasgow and South-Western Railway Company. I am of opinion that this amount must include the sum of £9499, 8s. 3d. allowed by the jury under the head of compensation for loss of business.

The question is, what consideration did the Glasgow and South-Western Railway Company give in order to acquire the property; what was the price they gave? — what the price which Sommerville & Company received? The sum which the railway company had to pay in order to get a title to the land, buildings, and machinery unquestionably amounted in all to £52,658, 6s. 7d., and embraced the sum of £9499, 8s. 3d. In return for that sum they acquired the property, buildings, and machinery, and nothing more. The sum of £52,658, 7s. 6d. was the price of their acquisition. So, on the other hand, what the sellers got as the consideration for their parting with the property was that price.

The price was made up of different elements, and one of these was compensation for loss of business. Although so stated, the sum of £9499, 8s. 3d. was in my opinion none the less part of the price given and received. A property in the hands of its owner has often to him a peculiar value owing to its particular situation or locality, or for some other special reason. A public-house, for example, may be in a central locality, at a corner of a crowded thoroughfare in a populous district, and it may have acquired a peculiar value to the owner in connection with the business carried on in it. If a railway company or an individual applies to the owner to sell such a house, he will, in stating the value of the property, include a sum for the loss of business in having to give up the property and go elsewhere. The property has to him that element of value, just as to another man amenity, a fine view, or a most convenient situation, may be an important element of value in reference to a country house or property, which he would certainly take into consideration as an element of value if he come to sell as increasing the price. In such cases if the seller be asked what is his price he will add a sum, and may state that he adds a sum because of a special advantage which the property possesses in point of situation over others in the neighbourhood, or because of special advantages which the property has for him. The total price agreed to, however, is, as it appears to me, whether one looks at the matter from the sellers' or the buyers' point of view, the amount of the consideration for the sale. It is the consideration which the seller demands. It is the consideration which the purchaser gives. It is not, I think, possible because the seller in his own mind, or even on paper, has put down the different elements making up his price, and has communicated these elements to the buyer, to separate one or more of these elements on any sound principle, and to say these are not part of the consideration. It is enough that they enter into the price which the seller insists on having, and without which he will not part with his property.

Thus, to take the case in hand, suppose the railway company had applied to Messrs Sommerville & Company to ascertain for what sum they would agree to sell their property, buildings, and machinery, and that that company had replied —We value our land at so much, and our buildings and machinery at so much, but to us the property has another element of value. It is peculiarly well fitted for our business, and if we give it up we shall lose business, and so we must ask a sum for that—what is this but raising the price, giving at the same time the reason for doing so? I think it is nothing else or more. Nothing but the property, buildings, and machinery is acquired or conveyed, and for the acquisition of this the purchaser pays the full sum asked. The consideration for his purchase, or, in the words of the statute, the consideration for the sale, and which induces the sale, is the full sum, without payment of which the property would not be sold. It can make no difference that the various elements making up the consideration which the railway company has to give are stated, and the amounts fixed or assessed by a jury. In the present case the property of Sommerville & Company had a peculiar and special value to them as proprietors because of its advantages for the conduct of their business, and under the head "loss of business" the jury have assessed or fixed the amount to be given on this account. That sum seems to me to be simply a part of the consideration given and taken on the sale of the property. In the words of the statute it is part of the consideration for the sale. If it be so, I do not see why the railway company have to pay the amount, for the only subject or property which they acquire is the land, buildings, and machinery.

It has been said that in the case of the purchase of a tenant's right to the possession of premises and machinery, and payment for loss of profits, an *ad valorem* stamp as for a conveyance on sale could certainly not be required. I am not satisfied of this, nor am I satisfied that the cases are precisely the same in principle, though I believe them to be so. I should desire before expressing a final opinion on any case of the kind to have the special circumstances before me. It is difficult, if indeed it is possible, to deal with a case of that kind in the abstract. I am disposed however to differ from the view which your Lordship has expressed as applicable to that case. Suppose that the premises of Sommerville & Company had been in the hands of a tenant who had right to a lease for a series of years, and that they were to him of considerable and special value because he had long carried on business in them—in that case the company requiring the property would have to acquire the lease, and I suppose there can be no doubt that if the company served a notice upon the tenant that they desired to take the property under lease, and they did take it under their notice, they would be making a purchase, or acquiring a property within the meaning of the statute—section 70. The word conveyance on sale is thereby declared to include every instrument, and every decree or order of any court or any commissioner, "whereby any property upon the sale thereof, is legally or equitably transferred." Even the goodwill of a business has been held to fall under that clause, and the lease itself or the interest of the tenant under the lease, being a valuable property which the company acquires,

the instrument by which the right is transferred must be considered as a "conveyance on the sale" of a property. If that be so it would matter nothing if the company chose in acquiring the property to take the title in the form of a discharge of the lease which might be sufficient to vest them in the tenant's right after they had become landlords of the premises. The form of the title or of the instrument could not alter or affect the liability for stamp-duty. If the substance of the transaction be the acquisition of the lease, the purchaser cannot claim exemption from an *ad valorem* duty, or evade that duty by avoiding the form of a conveyance and taking another instrument and discharge which would have all the effects of a conveyance as on a purchase by them.

If it be further supposed that the premises have beyond their ordinary value to a tenant a special value to the existing tenant because they are specially suitable for his business, or because he has a large connection which will be injured by his removal to other premises, he will reasonably claim a sum for loss of business, this it seems to me is merely an element which goes to enhance the value of the lease to him, and which must therefore enhance the price, or enlarge the consideration which the purchaser of the lease must pay for his acquisition. I am unable to draw any distinction between such a case and that in which the value of a property is enhanced by the business carried on in it by the owner and seller, and accordingly in that case, as in the present, I should be disposed to hold that the gross sum paid in the one case to the landlord, and in the other to the tenant, must be held to be the amount of the consideration paid by the company for the acquisition of the property in the one case, or the right of tenancy in the other.

On the whole, I am of opinion that the determination of the Commissioners is right and ought to be confirmed.

Lord Adam—Your Lordship has pointed out that the 70th section enacts that a conveyance on sale includes every instrument whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser. Now, I think the only thing we have to deal with is the instrument before us here, viz., this conveyance, and the 70th section takes us back to the dispositive clause of the conveyance to see what is thereby conveyed. That is very clearly set forth, for it is 'All and whole those pieces of ground and shore ground situated on both sides of the Port-Glasgow Road, Greenock, and known as the Caledonian Saw-Mills, Greenock, and the minerals therein, and also the whole buildings and heritable and moveable machinery thereon."

Now, that is all that in terms of the 70th section is "legally or equitably transferred to or vested in the purchaser." And when we go back to the narrative of the deed to see what was the price paid for the subject so disponed we find that very clearly set out. It narrates the verdict of the jury; it narrates that they found "the sum of £28,586, 2s. 1d. as the value of the said land or property taken;" then it goes on to say that they found "the sum of £14,572, 16s. 3d. for the value of the buildings, machinery, plant," &c.; and then it goes on to say, as I think quite properly, that the Glasgow and South-Western Railway Company have paid to the sellers, Sommerville & Company, these two sums of £28,500 and £14,500 as the value of the land, buildings, machinery, and so on, and very properly these are the only sums discharged in this deed.

Now, I think it is as clear as anything can be, looking at the conveyance, what the subjects disponed to and vested in the purchasers are, and what was the price paid, and the only price paid, by them for such sale and conveyance. Looking therefore to this deed, I think it is clear on the face of it that the sum upon which duty ought to be paid is a sum consisting of these two sums alone.

But it is said that it appears from the narrative also that there is a further sum of £9499 which was found due by the railway company as compensation for loss of business. Now, I could quite understand that if this additional sum went in any way to enhance the value of the property disposed of, it might be very fairly said that it should be taken as part of the consideration for the deed, and Lord Shand has given an illustration of such a case. If, for example, this property had been situated in any particular position which gave the property itself an enhanced value in the hands of the purchaser, I could quite well have fancied that the consideration given for such a thing as that ought to be taken into consideration. But that is not the case that we have got to deal with. This sum of £9500 is given as compensation for loss of business, and it humbly appears to me that the compensation for loss of business in no way enhances the value of the property conveyed by this deed. In my opinion it is quite a distinct and separate thing from the property. And accordingly I think it was quite proper in this case that a separate discharge was granted for it. The loss of business was not a thing which could be the subject of assignment or conveyance to the debtor. All the debtor had to do with this claim for compensation, as with any other claim for compensation, was simply to pay the money and receive a discharge. It is impossible to say that this claim for compensation is vested in the company, the purchaser, by this conveyance; and it is equally impossible to say that it ought to have been a matter of assignation in any form or shape. The proper way of dealing with it in my view is exactly the way in which it has been dealt with. It might no doubt have been assigned. Sommerville & Co. might have assigned this to a third party, who would have had a perfectly good claim against the company; and it would have been no answer for the company to say—when they were asked for payment of it—"We will produce this deed, and that claim has gone as part of the property." They would still have to meet the claim, and I do not see that that enhances or increases the value, or enters into consideration for the sale at all. The complication has arisen, as your Lordship has pointed out, entirely from the fact that in this particular case the owners of the property happen also to be the tenants. If there had been separate tenants the jury would have awarded to Sommerville & Co. the two sums of £28,000 and £14,000 as the value of the property and machinery, and no more. That is exactly what this deed says has been paid for the property, and I cannot see how we can go beyond the deed and say that a

further sum of £9500 is to be paid for the claim for loss of business, which is not and could not be vested under this deed in the purchasers.

Upon these grounds I entirely concur with your Lordship that the judgment of the Commissioners in this case is wrong.

The Court pronounced the following interlocutor:—

"Reverse the determination of the Commissioners: Declare that the sum of £9499, 18s. 3d. is not to be reckoned part of the consideration for the sale on which the conveyance mentioned in the case was granted: (Ordain the Commissioners to repay to the appellant the sum of £47, 10s.); and decern."

Counsel for the Glasgow and South-Western Railway—Mackintosh—Pearson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Inland Revenue—Sol.-Gen. Robertson — Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Saturday, January 23.

FIRST DIVISION.

[Sheriff-Substitute of Ross, Cromarty, and Sutherland.

MITCHELL *v.* SUTHERLAND.

Process—Appeal—Jury Cause—Proof—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40.

A tenant having sued his landlord in the Sheriff Court for damages in consequence of injury done to his crops by rabbits, and a proof having been allowed, the defender appealed for jury trial, but on the case being called in the summar roll, moved that the case should be tried in the Court of Session by a Judge. The Court *refused* the appeal, and remitted to the Sheriff-Substitute to proceed with the proof.

William Mitchell held an agricultural lease, dated in 1868, of the lands of Pulrossie and others from Mr Sutherland of Skibo. The lease contained a clause reserving to the proprietor the whole game upon the lands, hares and rabbits included, and also the whole fishings in the waters passing through or bounding the lands thereby let, with the sole and full right to the proprietor, either by himself or others to whom he might give authority so to do, to hunt, shoot, and course on the lands thereby let, and to fish in or upon the waters, with the right of using the banks along the same for that purpose, and that without paying to the said William Mitchell or his foresaids any damage therefor. And it was thereby agreed that the said William Mitchell or his foresaids should not have any claim against the proprietor for any damage which might be done to his crops, either by game, hares or rabbits, the proprietor, however, keeping down the rabbits to the best of his ability to a fair and reasonable stock.

In 1885 Mitchell brought an action against Mr Sutherland in the Sheriff Court of Ross, Cromarty, and Sutherland at Dornoch for £433 in name of damages. He alleged that during 1884 and 1885 the stock of rabbits on the said lands had been increased by the defender, or suffered to exist to an unfair and unreasonable extent, and that he had in consequence sustained damage to the extent of the said sum sued for.

The defender pleaded—"(2) The defender should be assoilzied in respect the claim is excluded by the lease, and in respect the defender has not failed in the performance of any obligation incumbent on him. (3) The stock of rabbits during the period complained of not having been more than fair and reasonable, and *separatim*, the defender having kept them down to the best of his ability to a fair and reasonable stock, he should be assoilzied."

The Sheriff-Substitute (MACKENZIE) pronounced this interlocutor—"The Sheriff-Substitute having heard parties' procurators, reserves consideration *hoc statu* of the defender's plea that the present demand for damages is excluded by the lease between the parties, and before answer allows the pursuer a proof of his averments (so far as denied or not admitted), and the defender a conjunct probation, and directs that the case be put to the roll of the 3d November next, to have a diet of proof fixed.

"*Note.* — The foundation of the pursuer's claim is that he has suffered damages from rabbits, which the defender has allowed to increase beyond what was ever contemplated by the lease. He is thus entitled to an opportunity of showing that the restrictive clause in that lease (upon which the defender founds his plea) is inapplicable to the actual state of matters about which he complains, and a proof before answer has accordingly been allowed him."

The defender appealed to the Court of Session for jury trial, and the pursuer accordingly lodged a proposed issue in the following terms:—"It being admitted that between 1st January 1884 and 1st July 1885 the pursuer was the defender's tenant, under lease dated 27th April and 5th May 1868, in All and Whole the lands and mains of Pulrossie, and the lands of Newton and Balnoe, and Polnahard, all lying in the parish of Creish and shire of Sutherland, together with the pasturage of the woods of Newton, Balnoe, and Sheneval, but excepting and reserving from the said lands the portions described in the said lease, and that the pursuer had right to the crops and pasture on the lands let to him by said lease between the two dates above mentioned — Whether during the whole or any part of said period the defender wrongfully kept or suffered to exist on the lands let to the pursuer, or any part thereof, rabbits in excess of a fair and reasonable stock, to the loss, injury, and damage of the pursuer?"

On the case being called in the summar roll, the defender (appellant) moved to have the case tried before a Judge in the Court of Session, on the ground that a difficult question of construction of the lease was involved—*Cadzow* v. *Lockhart*, 2 R. 928, 3 R. 666.

The pursuer argued—This was plainly not a *bona fide* appeal for jury trial, but an attempt by a landlord to increase expense and litigation by having the case conducted in the Court of Session, and rendering an appeal to the House of Lords possible. Such a course of procedure,