connected with his employment, because he was required by his employment to make use of a stair.

LORD MACKENZIE—I agree with your Lordship, though I have great doubt in coming to the conclusion that there was sufficient evidence in the case to warrant the Sheriff-Substitute in holding that the accident happened as alleged.

LORD JOHNSTON was absent.

The Court pronounced this judgment—

"Find that there was evidence upon which the Sheriff-Substitute as arbitrator was entitled to find for the claimant: Find it unnecessary further to answer the questions of law as stated in the case: Affirm the said arbitrator's determination: Dismiss the appeal, and remit the cause to the arbitrator to proceed as accords," &c.

Counsel for the Appellants—Cooper, K.C. —Low Mitchell. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—G. Watt, K.C.—Mercer. Agent—R. S. Carmichael, S.S.C.

Friday, November 3.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

LORD BROOKE AND OTHERS *v.* MARCHIONESS OF HUNTLY.

Sheriff—Process—Failure to Lodge Defences — Decree by Default — Sheriff Courts (Scotland) Act 1907 (7 *Edw.* VII, *c.* 51), *First Schedule, Rule* 43.

Rule 43 of the first schedule of the Sheriff Courts (Scotland) Act 1907 enacts—"Within six days of the condescendence being lodged the defender shall lodge his defences."

A defender, acting in accordance with a practice which obtained in the local Sheriff Court, delayed lodging defences until after the six days had expired The Sheriff-Substitute, and on appeal the Sheriff, granted decree on the ground of failure to lodge defences, and no sufficient cause being assigned for the delay. The Court *refused* to interfere.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51) provides—first schedule—Rule 34—"Where appearance has been entered the sheriff-clerk shall enrol the cause for tabling on the first court-day occurring after the expiry of the induciæ." Rule 42—"In all defended causes the pursuer shall at the tabling of the cause, or within three days thereafter, lodge a condescendence. . . ." Rule 43 [*v. supra in rubric*], and Rule 56—"In a defended action . . . when any . . . pleading has not been lodged within the time required by statute . . . the Sheriff may grant decree as craved . . . with expenses, but the Sheriff may upon cause shown prorogate the time for lodging any . . . pleading . . ."

Major the Honourable Leopold Guy Francis Maynard Greville, commonly called Lord Brooke, Member of the Royal Victorian Order, and others, trustees under a declaration of trust executed on 5th, 9th, 10th, and 12th November 1908 by them, brought an action in the Sheriff Court at Aberdeen against the Most Honourable Charles Gordon, Marquess of Huntly, and the Most Honourable Amy, Marchioness of Huntly, his wife, and the said Marquess as her husband and her curator and administrator-in-law. In the initial writ the pursuers claimed delivery of the household furniture and other effects specified in an inventory therein described, and they craved the Court to decern and ordain the defenders to deliver to the pursuers within seven days, or such other period as the Court might order, the household furniture and other effects specified in the said inventory.

The following *narrative* is taken from the opinion of the Lord President—"This is an appeal from an interlocutor of the Sheriff of Aberdeen affirming an interlocutor of the Sheriff-Substitute. The action was raised in the Sheriff Court of Aberdeen, and sought decree ordaining the defenders to deliver certain furniture, the property of the pursuers; and in case that order should not be obtempered, the pursuers asked that warrant should be granted to certain persons authorised by the Court to remove the furniture in question. The action was begun by initial writ, and on 14th July the ordinary warrant of citation was granted, upon an induciæ of seven days. On the 20th one of the defenders entered appearance, and on the 26th the case was tabled, which is in accordance with the 34th section of the rules of the Sheriff Courts (Scotland) Act 1907. Now section 42 of the rules provides that 'the pursuer shall at the tabling of the cause, or within three days thereafter, lodge a condescendence.' In this case that was done at the tabling of the case. The next section, 43, is in these terms—"Within six days of the condescendence being lodged the defender shall lodge his defences." Accordingly here the defences became due on 1st August. No defences were lodged on that day. The pursuers, and the defenders' agents then got into communication, and it became apparent that there was a little difference of opinion between them, the pursuers' agent thinking there was no reason why the case should not be taken up on 9th August, the first court-day in vacation, and the defenders' agent objecting to that course on the ground that the Sheriff-Substitute to whom the cause had been apportioned would not be sitting on that day. After conferring about the matter, however, the pursuers' agent consented to withdraw the enrolment for 9th August provided the defenders' agent let him have the defences by 14th August at latest. That undertaking was afterwards taken back by the pursuers' agent upon receipt of

a telegram from his Edinburgh correspondents, who insisted that there should be no delay. Accordingly the case was taken up on 9th August by Sheriff-Substitute Young, who pronounced the following interlocutor:—'In respect of the defenders' failure to lodge defences, and no sufficient cause being assigned why the defences now tendered should be received, ordains the defenders within seven days from this date to deliver the furniture. . . .' Against that interlocutor the defender, who had entered appearance, appealed to the Sheriff, who ordered a reclaiming petition and answers to be lodged. On 21st August, having considered the reclaiming petition and answers, the Sheriff refused the appeal. Against that interlocutor the present appeal is taken to your Lordships."

The defender appealed to the First Division, and argued—The interlocutor appealed against was a final interlocutor, disposing of the whole case. Therefore the defender had a right of appeal to the Court of Session. There was nothing in rules 43 and 56 of the first schedule of the Sheriff Courts (Scotland) Act 1907 (7 Edw VII, c. 51) which excluded the jurisdiction of the Court of Session—Mackay's Manual, 629; *Marr & Sons* v. *Lindsay*, June 4, 1881, 8 R. 784, 18 S.L.R. 535. With regard to the date at which the defences were lodged, the delay in lodging them was in accordance with the practice of the Sheriff Court at Aberdeen. In that Sheriff Court when defences fell due in vacation they were not required to be lodged until the next ensuing court-day — *Brown's Trustees* v. *Milne*, July 17, 1897, 24 R. 1139, 34 S.L.R. 863; *Glen* v. *Thomson*, November 21, 1901, 4 F. 154, 39 S.L.R. 129; Mackay's Manual, 310; *London and Midland Bank* v. *Forrest & Smith*, June 4, 1898, 6 S.L.T. 27.

Argued for the defender—In the case of *Brown's Trustees* v. *Milne* (*supra*) the Court sent the case back to the Sheriff for the purpose of getting him to apply his mind to it, but here both the Sheriff-Substitute and the Sheriff had already applied their minds to the case. Therefore since the Sheriffs had exercised the discretion given them by rule 56 only after due deliberation, this was not a case where the Court should disturb their finding.

LORD PRESIDENT—[*After narrating the facts*]—It is section 56 of the rules of the Sheriff Courts Act that gives the Sheriff-Substitute authority for what he did. That section says this—" . . . [*quotes, v. sup.*] . . . " The pursuers here have not pled that the appeal to this Court is incompetent, any more than they pled that the appeal to the Sheriff was incompetent, and I think they have been well advised not to do so. But even though the appeal is competent, there must be some very good reason shown before your Lordships will interfere in a matter of this kind with the judge before whom the cause depends, for he is in a much better position to deal with excuses for failure to lodge pleadings with punctuality.

A great deal has been said about the difference of opinion as to which Sheriff-Substitute should try the cause, and if that had anything to do with the case before your Lordships, I think, especially considering the granting and subsequent withdrawal of the undertaking which I have mentioned, that I should be inclined to give some weight to it. But it is merely an episode, and has nothing to do with the question to be determined. The defender was in fault as soon as the last hour of 1st August expired, and the other point arose only after the defender was late. It therefore seems to me immaterial whether Sheriff Young should hear the case on 9th August or Sheriff Laing on 27th September. And it seems doubly immaterial when the case gets to Sheriff Crawford on appeal on 21st August. Then the point for him was that either Sheriff Young was right, or that Sheriff Laing would have decided differently in September, and therefore Sheriff Young was wrong. But Sheriff Crawford was in the position of being above both of them, and could take up the merits of the case quite apart from the question as to the date of its first hearing. Well, Sheriff Crawford heard the case, and he says that the defender had no valid excuse, and certainly no excuse has been proponed to your Lordships to-day. Under these circumstances I think we could not possibly interfere with the judgment without thereby intimating to practitioners in the Sheriff Courts of Scotland that they need take no notice of the statutory regulations as to lodging productions or pleadings, provided they are ready for the first court-day after the day required by the Act.

LORD JOHNSTON—This section and its operation in the present case are extraordinarily drastic, and the effect may be to cut off a serious defence, and impose a disability upon an unfortunate defender. But so long as it is understood that the statute means what it says, and so long as its provisions are universally construed as the Sheriffs have construed them in the present case, I think it will do good to the practice in the Sheriff Courts of Scotland. But I am sorry to have to give that judgment in a case where I think the defenders were acting in accordance with a somewhat inveterate, though it may be an indefensible practice in the Sheriff Court, of receiving defences without question when tendered on the first court-day after they are due. As a result of this decision that practice will have to cease.

LORD MACKENZIE—I concur, on the ground that no sufficient reason has been shown to us for the delay in lodging these defences.

The Court dismissed the appeal.

Counsel for Pursuers and Respondents—Macphail, K.C.—Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defender and Appellant—Macquisten. Agents—Alexander Morison & Company, W.S.