

party and his foresaids shall not be at liberty to erect upon the back part of the steading of ground hereinbefore disposed any building or buildings of a greater height than 20 feet in the side walls." Now the question is whether the building which the petitioner is proposing to erect fairly complies with these provisions. The model houses, which we have seen, of Galloway & Lumsden, are houses of a very common description in Glasgow, consisting of four stories, some having the ground floors occupied as shops while the upper floors are separate dwellings, others being occupied entirely as dwelling-houses, and none of them being self-contained. The style of the houses is very fairly represented on the plan, but the building or range of buildings proposed to be erected by the petitioner consists in front of only one story, which is to be occupied as shops, but in the middle of the range of shops there is an entrance of a more imposing character conducting to a building erected on the back ground, which is very low in the walls, but enormously high in the roof, and which is intended for a public hall. Of course this roof will be seen over the one story shops, and its aspect to passers by will be of rather an anomalous character, but the question is whether it is in a style inferior to the houses of Galloway & Lumsden, and I do not find that a very easy question to answer, but I am disposed on the whole to agree with the Dean of Guild, and that they are inferior in style, and would rather interfere with the successful feuing of building ground in St Georges Road. I am therefore for adhering to his judgment. I do not go particularly on the question whether the proposed building is in violation of the provision restricting the height of the side walls to 20 feet. That might be difficult to maintain, and though no doubt the roof is enormously high, the side walls do comply with the restriction. The style of the whole plan, however, is objectionable.

LORD DEAS—One stipulation in these titles is, that houses shall be erected on the ground not inferior in style to the class of houses mentioned, which run along the line of St Georges Road, where the proposed shops are to be built. There is no question raised as to M'Lay's interest to complain; the only question is as to the meaning of the stipulation. The proposed buildings are a line of shops one story high, and behind them a building with walls 20 feet high and a roof of 60 feet, and I am clearly of opinion that in dealing with a street, a line of shops with such a roof running up behind them is an inferior style.

The other Judges concurred.

The Court adhered.

Counsel for Morrison—Watson. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for M'Lay—Dean of Faculty (Clark), Q.C., and M'Laren. Agents—Duncan & Black, W.S.

Friday, July 3.

## FIRST DIVISION.

[Sheriff of Forfarshire

ALEXANDER BAIRD v. WM. BRUCE MOUNT.  
*Sheriff—Summary Application—Mora—Act of Sederunt, July 10, 1839.*

In a case where a landlord presented a summary application to the Sheriff for a remit to a person of skill to examine certain fields which he alleged had been badly cultivated by the tenant, whose lease had expired at Martinmas, the petition having been presented in January, held that the petitioner was shut out from the remedy prayed for by *mora*.

Mr Baird of Ury, in January 1874, presented a petition to the Sheriff of Forfarshire in terms of the Act of Sederunt, July 10, 1839, secs. 137, 138, in which he averred, *inter alia*, that the respondent, Mr Mount—"Entered into the possession of the farm at or about Martinmas 1859, and continued to possess the same till expiration of the said tack at Martinmas 1873: That by the said tack the tenant bound himself to properly labour, manure, and crop the farm in a fair and regular manner, and to observe the proper change of crops, and not to waste or deteriorate the farm by miscropping or improper management or culture, but that he should in every respect cultivate and manage the farm according to the most improved practice in the district: That it is improper management and improper culture, and contrary to the rules of good husbandry, and to the practice of the district, to sow turnips in any field without having previously cleaned the land by clearing it of weeds, and it is highly wasting and deteriorating to the land to omit such cleaning, or to perform the same in an imperfect and insufficient manner: That the respondent had three fields in turnip crop during the year 1873, being his waygoing crop: That it is obvious, from the state of the land and the crops thereon, that none of the said fields had been properly cleaned or cleared of weeds, either before sowing the turnips therein, or after the turnips were sown, and the land is thereby wasted and deteriorated, and the petitioner has suffered great loss and damage: That the turnip crops on the said fields are in course of being removed for consumption, and when the turnips are removed the fields will, in ordinary course of management, be ploughed up for the succeeding crop; but before that is done, it is necessary that the state of the fields, and the amount of damage which the petitioner has sustained by the failure of the respondent to properly clean and clear the same of weeds, should be judicially ascertained, and the petitioner is entitled to obtain decree against the respondent for the loss and damage he has thereby sustained, and the present application is therefore necessary." In the prayer of the petition he asked the Sheriff "to remit to a person or persons of skill to inspect and examine the said turnip fields on the farm of Castleton of Eassie, and to report whether the said fields, or any of them, had been omitted to be cleaned, or had been imperfectly and insufficiently cleaned and cleared of weeds before the sowing of the turnip crops therein, or had been imperfectly and insufficiently cleaned and cleared of weeds after the turnips had been sown; and if so, whether the land has been wasted and deteriorated there-

by, and what amount of loss and damage the petitioner has thereby sustained; and thereafter may it please your Lordship to decern against the respondent for payment to the petitioner of the amount of loss and damage so reported, with expenses."

The respondent lodged answers, and pleaded—“(1) Petition incompetent. (2) *Mora*, on behalf of the petitioner, which bars the present action. *Merits*—(1) No good ground of action. Subjects taken possession of, and their state and condition changed since respondent ceded possession."

The Sheriff-Substitute pronounced the following interlocutor:—

"*Forfar, 29th January 1874.*—The Sheriff-Substitute having heard parties' procurators, refuses the prayer of the petition, and decerns: Finds the petitioner liable in expenses, of which allows an account to be lodged, and taxed by the Auditor of Court, to whom remits."

"*Note.*—The petition, if necessary, should have been presented before the crop was removed, and while the ground was in the respondent's possession. He ceded possession several months ago, and the Sheriff-Substitute can see no reason why the petition was not presented at that time, and before the land was touched by the incoming tenant. The petition comes with a bad grace from the petitioner, who has admittedly bought the very turnip crop which this alleged badly-farmed land produced, and paid a fair price for it. He or his tenant has removed or ate off by sheep a great part of it already, and it is too late now, in the middle of winter, to ask for an inspection of weeds, which could have been much better seen before the crop was removed. It does look as if the petitioner wished to harass the respondent by actions. This is the third petition in Court for different inspections. This multiplication of actions must be discouraged; and, without prejudice to any claim of damages the petitioner may make, the present application is refused."

The petitioner appealed to the Sheriff, who pronounced the following interlocutor:—

"*9th March 1874.*—The Sheriff having heard parties' procurators on the petitioner's appeal against the interlocutor of 29th January last, and made *avizandum*, and having considered the petition, minute of defence, and whole process, dismisses the said appeal, sustains the first preliminary plea for the respondent, and, with this addition, adheres to the interlocutor appealed against, and decerns."

"*Note.*—This is a petition of an uncommon nature, and one that ought to have been very clearly and distinctly framed."

"The clause in the lease between the parties on which the petitioner founds is, as stated in the petition, 'that the tenant bound himself to properly labour, manure, and crop the farm in a fair and regular manner, and to observe the proper change of crops, and not to waste or deteriorate the farm by miscropping or improper management or culture, but that he should in every respect cultivate and manage the farm according to the most improved practice of the district.'

"The petition then proceeds to state, as a *major* proposition, 'that it is improper management and improper culture, and contrary to the rules of good husbandry and to the practice of the district, to sow turnips in any field *without having previously cleaned the land* by clearing it of weeds; and it is

highly wasting and deteriorating to the land to omit such cleaning or to perform the same in an *imperfect and insufficient manner.*'

"The petition then proceeds to state, as a *minor* proposition, what the petitioner complains of, 'that the respondent had three fields in turnip crop during the year 1873, being his waygoing crop, that it is obvious from the state of the land and the crops thereon that none of the said fields had been properly cleaned or cleared of weeds, either before sowing the turnips therein, or after the turnips were sown, and the land is thereby wasted and deteriorated,' &c.

"After having carefully considered the terms of this petition, the Sheriff is of opinion that in two respects it is not relevantly stated, and that the respondent's first plea in law falls to be sustained."

"1. The petition, as framed, contains no relevant statement of fact. It does not state clearly and distinctly what the petitioner alleges the respondent either culpably did or culpably omitted to do. All that the petition contains in the shape of an averment is, 'that it is obvious from the state of the land and the crops that none of them had been properly cleaned,' &c. Now, this is a mere inference, and not a statement of fact, necessarily inculcating the respondent. The petitioner does not state, as a fact which he will prove, that the respondent culpably failed to clean his land and his crops. The petitioner merely states what he infers from the state of the fields and the crops thereon. It may or may not be a true inference. The petitioner proposes to judge whether the land has been properly cleaned or not by the quantity of weeds. It may be that there were many weeds, and yet that the respondent failed in no respect in doing his duty. A peculiarly wet season (and it was admitted that the season of 1873 was so), or the seed having come from a neighbour's land, or 'an enemy having done this,' might account for them. As framed, the petition contains no statement of fact which can be remitted to proof."

"2. The complaint in the *minor* does not come up to, and is not embraced by, the *major* proposition. The *major* proposition states that it is improper management, &c., 'to sow turnips in any field without having previously cleaned the land,' that it is wasting 'to omit such cleaning, or to perform the same in an imperfect and insufficient manner.' The *minor* following on this should have been that the respondent sowed turnips in the fields in question without having previously cleaned the land, or that the respondent had omitted such cleaning, or had performed the same in an imperfect and insufficient manner. But the petition does not state this. It makes use in the *minor* of quite different expressions from those used in the *major* proposition. It says merely that it is obvious none of the fields had been 'properly' cleaned or cleared of weeds, &c. This rather seems to imply that the lands had been previously cleaned, but that such previous cleaning had not been 'properly' done, and that the respondent had not omitted such cleaning, but had not done it 'properly.' This word 'properly' seems to the Sheriff to be very vague and indefinite, and might be applicable to almost any farm. To make it a relevant allegation it ought to have been followed by some specification of particulars, such as, that the respondent had culpably failed to harrow the land before sowing, or to drill-harrow it after sowing, &c. If a tenant

has in point of fact cleaned his land to the extent usual in the district, is he to be liable in damages because he did not 'properly' clean his land, judging, not by the extent of his cleaning, but by the growth of the weeds? The petitioner's procurator himself stated that after July it was almost impossible to clear away the weeds, owing to the great growth of the turnips consequent on the moisture of the season. As framed, the Sheriff considers that the minor proposition does not come to or correspond with the major proposition. On the whole, the Sheriff feels bound to sustain the respondent's first preliminary plea.

"The fields cannot have been so very badly cleaned after all, as the turriips in one of them seem to have been valued over to the petitioner at £13, 5s.; another, at £11, 10s.; the third (in which there was finger-and-toe), at £6 per 200 poles."

The petitioner appealed to the Court of Session.

Argued for him—The incoming tenant suffered damage by having his land thrown out of rotation, and that is a relevant allegation of injury. The only questions which arise are (1) whether the process is competent, and (2) whether it is barred by *mora*. The respondent has no reason to urge the latter plea, as the delay was all in his favour.

Authorities—*Gordon's Trs. v. Melrose*, June 25, 1870, 8 Macph. 906; *Fraser v. M'Donald and Jackson*, June 6, 1834, 12 S. 684; *Hall v. M'Gill*, July 14, 1847, 9. D. 1557.

Argued for Mount—Competency in a matter of this kind means appropriateness of remedy. "Extraordinary dispatch" was not necessary and not made use of.

At advising—

LORD PRESIDENT—This petition is framed in terms of the Act of Sederunt July 10, 1839, secs. 137, 138. It states specifically the injury complained of and the remedy which is sought, and that is "to remit to a person or persons of skill to inspect and examine the said turnip fields on the farm of Castleton of Eassie, and to report whether the said fields, or any of them, had been omitted to be cleaned, or had been imperfectly and insufficiently cleaned and cleared of weeds before the sowing of the turnip crops therein, or had been imperfectly and insufficiently cleaned and cleared of weeds after the turnips had been sown; and if so, whether the land has been wasted and deteriorated thereby, and what amount of loss and damage the petitioner has thereby sustained; and, thereafter, may it please your Lordship to decern against the respondent for payment to the petitioner of the amount of loss and damage so reported, with expenses." Now it is obvious that in terms of that prayer the procedure contemplated is that there shall be an examination by a person of skill, and a report as to the facts, and an estimate of the damages, for which the Sheriff shall decern. Now if this had been an action of damages in which the pursuer or petitioner undertook to establish the facts, the course proposed would not have been too late, but being, as it is, a summary application, I think the Sheriff-Substitute took a proper view in holding that it was too late, and I quite agree with him. If the party wanted to do the thing at all he ought to have done it at once. Now the emergency which led to the interest of the petitioner to have such summary despatch arose in October last. If it had been competent or desirable to convert this petition into an ordinary

action of damages and to have a proof, I do not say that January would have been too late to do so, but, as I think that cannot be done, we must refuse it on that ground.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff dated 9th March 1874, and of new Refuse the petition, and decern: Find the respondent entitled to expenses both in this Court and the inferior Court: Allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Baird—Guthrie Smith and Mac-kintosh. Agents—Henry & Shiress, S.S.C.

Counsel for Mount—Robertson. Agent—Neil M. Campbell, S.S.C.

Friday, July 3.

## FIRST DIVISION.

BUTCHER v. MYLES.

Process—Printer.

In this case their Lordships having had their attention called by the respondent's counsel to the disgracefully inaccurate state of the printed papers, and to the fact that no printer's name appeared on them, ordained the printer to appear personally at the bar. He did so accordingly, and stated by his counsel that the state of the print was caused by the neglect of his workmen, during his own temporary absence from illness. After expressing his regret for what had happened, he was warned by the Lord President and dismissed from the bar.

Wednesday, July 8.

## SECOND DIVISION.

LIGERTWOOD AND DANIEL, PETITIONERS.

(*Ante*, vol. v. 329; vol. vii. 527; vol. ix. 20; vol. xi. 491; 6 Macph. 1112; 8 Macph., H.L., 77; 11 Macph. 960.)

Expenses—Appeal.

Circumstances in which the expenses of a petition for applying the judgment of the House of Lords were given to the petitioners.

This was a petition at the instance of John Ligertwood, Sheriff-clerk of Aberdeenshire, and William Daniel, Sheriff-clerk Depute,—to apply the judgment of the House of Lords; to recal the interlocutor of the Second Division of date 28th October 1871, reversed by the House of Lords; "to sustain the defences and assoilzie the petitioners from the whole conclusions of the libel, and decern: Further, to find the petitioners entitled to their expenses incurred in the Court of Session, and the expenses of this application and procedure therein," &c.

The House on 24th April 1874 ordered "that the defenders (respondents in the original appeal) be assoilzied from the conclusions of the summons in the action in which the said interlocutor was