

at the date of that citation he had not resided forty days in Scotland.

"In these circumstances it appears to me to be hopeless for the defender to maintain that owing to his non-residence in Scotland for forty days before citation this Court has no jurisdiction to try the action. The defender is a foreigner by birth, not naturalised, and he has not, and is not proved to have ever had, any known domicile, residence, or place of business in any part of the United Kingdom. He is just a travelling merchant, and he goes to the pursuer in Scarborough and holds himself out as having no fixed place of abode, and indeed as having no house but the place where he may happen to be for the time. He then buys frames from the pursuer for the purpose of taking them about the country and selling them by auction along with the pictures which they are to hold; he gets some of them before he leaves Scarborough, and directs the rest to be sent to Scotland, and finally he takes the whole, or nearly the whole, to Aberdeen, where he is proceeding to sell them when this action for the price is raised against him. If not in Aberdeen, I fail to see where the pursuer could have sued him, unless at some other place of sale where he might have the chance to find him; and it would be most unjust to hold that, in circumstances like the present, the Courts of Scotland have no jurisdiction over the defender in respect he had not resided in Scotland for forty days before citation. If authority be required it will be found in Ersk. (i. 2, sec. 16), who says—'And if, on the other hand, one be engaged in such a way of life as to have no fixed residence, *ex. gr.* a soldier or a travelling merchant, a personal citation against him is sufficient to establish jurisdiction over him in the judge of that territory where he was cited.'—*Lees*, 12th November 1709, M. 4791. See also the case *M'Niven*, 14th February 1834, 12 Sh. 453. That doctrine is consistent alike with common justice and with common sense, and I am therefore of opinion the plea of '*forum non competens*' must be repelled, and I can see no ground for holding this Court to be '*forum non conveniens*.' This case is ordered to the roll that parties may now be heard upon the merits."

Thereafter, on 28th May, his Lordship repelled the defences on the merits, and decreed for £98 in full of the conclusions of the libel, being of opinion that the articles supplied were of good workmanship, that the price charged was fair and reasonable, and that other claims for deduction made by the defender were, with one exception to which he gave effect, unsupported by fact.

Casadinos reclaimed, and argued—The Lord Ordinary was wrong in thinking that the defender could not be sued anywhere if not in Aberdeen. Under the Judicature Act he might have been sued in the High Court of Justice in England, where the contract was made—Westlake's Private International Law, ed. 206. The case of *Lees v. Parlant*, quoted by Erskine and by the Lord Ordinary, was really decided on the ground that a soldier has a necessary domicile, the headquarters of his regiment. In *M'Niven's* case, cited by the Lord Ordinary, the defender was sued in the place where the contract was entered into—See *Kernack v. Watson*, 9 Macph. 984. If the case were tried, as it ought to be, by

the English law, certain defences were open to the defender which were not open to him by Scotch law. There was here no jurisdiction, either *ratione domicilii*, *ratione rei sitæ*, or *ratione loci contractus*.

Counsel for respondent (pursuer) was not called on.

At advising—

LORD JUSTICE-CLERK—I have no doubt as to the question of jurisdiction, and I do not even think that the facts here raise the general question argued, because I agree with the Lord Ordinary in holding on the evidence that when the bargain was made in Scarborough the defender told the pursuer that he had no fixed residence, and that his residence was where he happened to be for the time. That was part of the bargain. The defender did not say then that he lived in Manchester. In these circumstances where could the seller look to getting his money? He had to follow the debtor. He could do nothing else. I am of opinion that where such a debtor resides there is his *forum* if he has no fixed residence. As to the law of England, there is no allegation on record, and though there had been I should have been of opinion that that law does not apply. I therefore agree with the Lord Ordinary in repelling this defence.

His Lordship then expressed concurrence with the Lord Ordinary on the facts of the case.

LOKDS YOUNG and CRAIGHILL concurred.

The Court adhered.

Counsel for Defender (Reclaimer)—Kennedy.
Agent—John Macpherson, W.S.

Counsel for Pursuer (Respondent)—Rhind—
Millie. Agent—William Spink, S.S.C.

Saturday, June 25.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

M'INTYRES v. ORDE.

Recompense—Local Custom—Feu.

A person having obtained from a proprietor written leave to build upon his ground, built a house thereon. There was no conveyance to him of the ground. In an action by his representatives against the proprietor, who had evicted them from the house, concluding for a sum as recompense, a proof before answer was allowed of averments that the house was built on the faith of the permission, and that by the custom of the district, and particularly of the estate, leave given to build in such circumstances implied a grant of the land on which the building was to be erected, and the building when so erected became the property of the person who so built it.

Donald M'Intyre, teacher at Lochmaddy, Invernesshire, having made application to the factor for Sir John Powlett Orde and Captain Orde, life-renter and fiar respectively of the estate of North

Uist, on which estate the schoolhouse of Lochmaddy is situated, for leave to build at the end of the schoolhouse, the factor on 30th September 1864 wrote to him this letter—"Mr D. M'Intyre, Lochmaddy. Corry, by Broadford, 30 Sept. 1854. Dear Sir,—I have written to Mr Macdonald saying that you have permission to build at the end of the school-house, and I have asked him to see Boyd and ascertain whether he will agree, without a formal warning, to give up part of his lot to you. If he does not consent, I cannot do anything in that matter until Whitsunday.—I am, Dear sir, yours faithfully, A. K. M'KINNON."

Thereafter, in the year 1865, Mr M'Intyre erected on the ground designated in this letter a house of three apartments with a small attic room and thatched roof. In this house he thereafter lived till his death in 1876. From 1868 to that year his sister Mary, and from 1874 his sister Catherine, occupied the house along with him. Shortly after his death in 1876 Captain (now Sir John Orde) gave the sisters Mary and Catherine M'Intyre notice to remove, when they declined to do so except on the footing that he should take the house from them at a valuation. This he refused to do, on the ground that the house was not theirs, and that they and their late brother had only precarious possession of it, terminable at his pleasure. He offered them, however, though admitting no legal liability, a sum of £10. This being refused, he in 1877 obtained a decree of removing against them in absence, and in the end of February 1878 they were removed from possession.

Mr M'Intyre left a deed of settlement, which, after appointing his sisters his executors and universal legatories, contained this clause—"And whereas I erected a dwelling-house at Lochmaddy with the sanction of the then factor, Mr M'Kinnon, Corry, to which it may be objected that I have not a strictly legal title, and that I am anxious to make some provision for my two helpless sisters, one of whom is a cripple and unable to earn her bread, in view of my death, which is now evidently at hand, I implore and beseech our benevolent proprietor, Sir John Powlett Orde, Bart., of whose kindness I have already had experience, to allow my said sisters to remain in that house, and not to disturb them in the possession thereof." The expression of doubt contained in this clause was averred in this action to be due to the fact that Sir John's solicitor who acted for Mr M'Intyre in the execution of his settlement had suggested its insertion therein.

In April 1881 Mary and Catherine M'Intyre raised this action against Sir John Orde, concluding for £100 as the value of the house at the time of the ejection from it. They averred that the letter above quoted was, and was accepted by Mr M'Intyre as, a permission to build a dwelling-house for himself and his sisters; that the house built was a substantial house of stone and lime of the dimensions already stated; that the defender and his factor frequently saw the operations connected with building it, and after its completion expressed their satisfaction with it, and "were well aware that no one of such limited means as the said Donald M'Intyre would be at the expense of permanent erections of the character above described except on the footing of having the rights of a proprietor therein."

They also made the following averment as to the custom of the district:—"In North Uist, and similar districts in the West and North Highlands and Islands of Scotland, it is unusual for large landed proprietors to grant formal dispositions of small pieces of land for building purposes. By the custom and practice in these districts, and in particular by the custom and practice on North Uist estate, at the time the letter was written, when a proprietor gave leave to a person to build on land belonging to him, that implied a grant of the land on which the cottage or building was to be erected, and buildings so erected, and the ground on which they were erected, were in use to be sold and transmitted by the persons who built and their successors as their own property. Many cottages on North Uist estate have been erected and possessed and transmitted to heirs and singular successors with no other title than permissions to build similar to that quoted above, and without any formal title, and the proprietary rights of the occupants thereto have never been called in question." On the faith of this custom, as well as of the letter, they alleged that the house was built. They offered, should their title be thought insufficient, that their brother Samuel, Mr M'Intyre's heir-at-law, should sist himself as concurrent pursuer for any interest he might have, he being desirous that his brother's wishes should be carried out.

They pleaded—"(1) The defender having contracted and agreed with the pursuers' author to make him a grant of the ground on which to build the house in question, and having permitted him to build the same on the faith of the said contract and agreement, and afterwards having resiled from the said contract, the defender is bound to make reparation to the pursuers as concluded for. (2) *Separatim*—The pursuers' author having expended money in building the said house on North Uist estate in the belief induced by the defender that he would have the rights of proprietor in and to the said house and ground on which it was built; and further and *separatim*, the said house having been so built and money expended with the knowledge and acquiescence of the defender, the defender is in the circumstances bound to make reparation to the pursuers, as concluded for. (3) The pursuers having been ejected from the premises in question, and the said house having been taken possession of by the defender, the pursuers are entitled to recompense from the defender, as concluded for, with expenses. (4) Generally, in the whole circumstances of the case, the pursuers have an equitable claim against the defender for the value of the house in question, and are entitled to decree as concluded for, with expenses."

The defender denied the custom alleged. With reference to the house, he averred that it really imported permission to build a byre and not a dwelling-house, and that Mr M'Intyre had gone beyond the permission granted him in erecting any dwelling-house. He also denied the averments of the pursuers as to the factor and the late proprietor having been satisfied with the house when built, and averred that the latter had with difficulty been induced to allow it to remain, and had only done so because Mr M'Intyre's possession was precarious. He also averred that the house was of very much less value than the pur-

suers alleged, and that it was of a temporary and unsubstantial character. He denied that either according to the custom of the district or according to the permission to build given in the letter a grant of the ground on which the house was built was implied, or that Mr M'Intyre so understood the permission granted.

He pleaded, *inter alia*—“(2) The statements of the pursuers are irrelevant and insufficient in law to support the conclusions of the summonses. (3) The pursuers have not relevantly averred any contract for the constitution of a heritable right in favour of their brother; and further, such a contract can only be instructed by the writ or oath of the defender, or the writ of his authors. (4) The custom alleged in article 3 of the Condescendence does not exist; and, *separatim*, being contrary to law and unreasonable, cannot be given effect to. (5) The defender and his author never having agreed to give any recompense or compensation, but having merely allowed a precarious possession of the subjects in question, the pursuers cannot maintain the present action.”

The Lord Ordinary (FRASER) pronounced this interlocutor—“Allows to both parties a proof of their averments, and to the pursuers a conjunct probation: Further, repels the first plea-in-law for the defender to the effect that ‘the pursuers have no title to sue,’ in so far as it is stated as a bar to the action being proceeded with, reserving to the defender to insist upon confirmation before extract of any decree in favour of the pursuers.”

He added this note—“The plea of the defender of no title to sue is based upon the fact that the pursuers have not obtained confirmation in regard to the particular claim now insisted in. The want of confirmation is no bar to the right to sue, although the pursuers cannot get extract of decree in their favour till such confirmation has been obtained. This will be done, no doubt, after the litigation is ended.

“On the relevancy of the action it is thought that the case comes within the rule laid down and exemplified in three decisions reported by Baron Hume (*M' Tavish v. Fraser*, Hume 546; *Clark v. Brodie*, Hume 548; *Mackay v. Brodie*, Hume 549). It is quite true that the brother of the pursuers had no written title to the ground upon which he built his house; but it is averred that he did build the house upon the assurance of the defender's factor that he would have right thereto. And the doctrine of recompense here comes in to support the claim of the pursuers for the value of the house which was taken from them, contrary to the good faith of the agreement which was entered into.”

The defender reclaimed, and argued—The pursuers had set out no valid contract of feu. A contract to give a feu must be constituted or at least proved by writing. Custom cannot control or alter the law. There was not sufficient specification of damage to entitle the pursuer to a proof—Smith's Leading Cases, i. 620, and cases there cited. There could not have been a claim for implement, and there could not therefore be a claim of damages for non-implement.

Authorities—*Bell v. Lamont*, June 14, 1814, F.C.; *Lamont v. Sinclair*, Jan. 23, 1878, 5 R. 548; *Allan v. Gilchrist*, Mar. 10, 1875, 2 R. 597.

The Lords without delivering opinions, varied the interlocutor reclaimed against by appointing the proof allowed to be “before answer,” and *quoad ultra* adhered, finding the pursuers entitled to expenses.

Counsel for Pursuers—Gloag—Kermack. Agent—J. H. Jameson, W.S.

Counsel for Defender—Asher—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 25.

FIRST DIVISION.

[Lord Rutherford Clark,
Ordinary.]

POWRIE v. LOUIS.

(See *ante* p. 533.)

Process—Proof—Expenses—Copies of Evidence for Counsel.

Held, following *Birrell v. Beveridge*, 15th February 1868, 6 Macph. 421, that, except in special cases, a charge for copies of evidence sent to counsel to enable them to debate on a proof will not be allowed as against a party found liable in expenses.

When a Lord Ordinary having heard proof intimated his opinion that counsel should be heard thereon after an approaching Christmas vacation, and the speeches on evidence were ultimately made before another Lord Ordinary about two months after the date of closing the proof, the circumstances were *held* to take the case out of the above general rule, and a charge to the extent of one copy of the evidence, for the use of that counsel who was speaker thereon, was *allowed*.

Counsel for Powrie objected to the Auditor's report in this case, in so far as two sums of £11, 8s. each, for copies of the evidence taken at the proof, to enable counsel to debate thereon, had been taxed off and disallowed.

The proof was led before the Lord Ordinary (CRAIGHILL) on December 13 and 14, 1880. At its close the Lord Ordinary stated his view that counsel should take time to consider the evidence, and that the case would be put out for hearing thereon after the ensuing Christmas recess. On the meeting of the Court after that recess, Lord Craighill having taken his seat in the Second Division, the case came to depend before Lord Rutherford Clark, by whom counsel were heard on the evidence on 16th February 1881.

The objector argued, that the speeches having been delayed on the suggestion of Lord Craighill, and having been ultimately heard by a different Lord Ordinary, the case was one of these exceptional ones contemplated by the Judges, who laid down the general rule on this matter in *Birrell v. Beveridge*, February 15, 1868, 6 Macph. 421. Moreover, the evidence was of a kind which necessitated special and detailed criticism, and therefore a deferred hearing, and copies of the evidence.

Replied for Louis—There was nothing here to take the case out of the general rule laid down in