

not liquid in the sense that a sum due by bond is. It is a matter of contract in consideration of something to be done. It is paid for possession of the subject let. If the tenant says he has not got entire possession, that is a good answer to the claim for rent." That principle has been affirmed over and over again, and very emphatically in the case of *Muir v. M'Intyres* decided only last year, where a claim for abatement was rested upon the ground of the accidental destruction by fire of a part of the subjects let. The difficulty the Court had to deal with was that there was no fault on the part of either landlord or tenant, and the landlord very plausibly maintained that as the loss of possession was due to a mere accident, he was still entitled to the fulfilment of the entire contract of lease. It was held that the accidental destruction of a part of the subjects let put the case in the same position as if possession of part of the subjects had not been delivered. The case of *Muir v. M'Intyres* is in fact *a fortiori* of the present, and of every case where a landlord has not given full possession of the subjects let. The Lord Ordinary has stated his ground of judgment quite clearly and distinctly, and I have no doubt that it is sound.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent

The Court remitted to the Lord Ordinary to allow the defenders a proof of their averments in support of their claim for abatement of rent, and to allow to the pursuer a conjunct probation.

Counsel for the Pursuer (Reclaimer)—Graham Murray—Shennan. Agents—Gill & Pringle, W.S.

Counsel for the Defenders (Respondents)—H. Johnston. Agent—Peter Adair, S.S.C.

Saturday, November 17.

SECOND DIVISION.

WATSON v. CALLENDAR COAL COMPANY.

Poor's Roll—Appeal from Sheriff Court, and Reporters divided in Opinion.

A pursuer in a Sheriff Court action for damages for personal injury appealed to the Court of Session against a judgment of a Sheriff, affirming the judgment of his Substitute, and assolzieng the defenders. The pursuer applied for the benefit of the poor's roll, and the reporters on the *probabilis causa* were equally divided in opinion. The Court (following the case of *Carr, &c. v. North British Railway Company*, November 1, 1885, 13 R. 113) refused the application.

Samuel Watson, surfaceman, Kerse Lane, Falkirk, raised an action in the Sheriff Court at Falkirk against the Callendar Coal Company, Falkirk, concluding for a sum in name of damages for personal injury alleged to have been sustained by him from the fault of the defenders.

The Sheriff-Substitute (SCOTT MONCRIEFF), after proof, assolzieng the defenders, and his judgment was affirmed by the Sheriff (MURHEAD).

The pursuer appealed, and applied for admission to the poor's roll. A remit was made to the reporters in the *probabilis causa*, who reported that they were equally divided in opinion. It was stated that of the reporters there were one counsel and one agent on each side.

The pursuer moved the Court to admit. He admitted that the circumstances of the case were identical with those of *Carr, &c. v. North British Railway Company*, November 1, 1885, 13 R. 113, in which the First Division refused to admit, but argued that the case of *Marshall v. North British Railway Company*, July 13, 1881, 8 R. 939, was in his favour and that it was in the discretion of the Court to grant the application.

The defenders argued that the question was no longer open, and that the Court were bound to follow the unanimous judgment of the First Division in the case of *Carr v. North British Railway Company*, *supra*.

LORD JUSTICE-CLERK—I think we must refuse this application.

LORD RUTHERFURD CLARK—I am of opinion that we are bound to plead the decision of the First Division in the case of *Carr*, in which the circumstances were precisely similar to those in the present case, unless we are to send this case to the whole Court to discuss, which I think unnecessary.

LORD LEE concurred

The Court refused the application.

Counsel for Applicant—Macnair. Agent—J. D. Turnbull, S.S.C.

Counsel for the Respondent—Dickson. Agents—Peddie & Ivory, W.S.

Saturday, November 17.

FIRST DIVISION.

[Sheriff of the Lothians.

NICOL v. JOHNSTON.

Process—Sheriff—Failure to Lodge Defences—Prorogation—Discretion of Sheriff—Sheriff Court Act 1853 (16 and 17 Vict. c. 80), sec. 6—Sheriff Court Act 1876 (39 and 40 Vict. c. 70), sec. 48.

The Statute of 1853, sec. 6, provides—
“When any condescendence or defences . . . or other paper shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just.” . . .

In an action in the Sheriff Court the Sheriff-Substitute decerned against the defender in respect his defences were not timeously lodged. On appeal the Sheriff, after

hearing parties, recalled this interlocutor, and allowed the defences to be received on payment of ten shillings of expenses. In an appeal to the Court of Session, held that the Sheriff had exercised a discretion conferred upon him by the statute of 1853, sec. 6, of which he had not been deprived by the statute of 1876, and that the Court would not inquire whether or not the Sheriff had exercised aright his statutory discretion.

The Sheriff Court Act 1853, sec. 6, provides that "When any condescendence or defences . . . or other paper shall not be given in within the period prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just." . . .

The Sheriff Court Act 1876 alters in certain ways the periods prescribed for the lodging of written pleadings, and sec. 48 thereof repeals sec. 15 of the Sheriff Court Act 1853, which provides for the dismissal of actions not prosecuted within a certain time.

On 15th September 1888 James Nicol, Edinburgh, raised an action in the Sheriff Court of the Lothians and Peebles at Edinburgh, against Robert Fleming Johnston, W.S., Edinburgh. Defences were due on 2nd October, on which date the Sheriff-Substitute, on the motion of the defenders, adjourned the diet for lodging defences for seven days, and granted leave to appeal.

On 19th October the Sheriff, having heard parties, recalled this interlocutor, and remitted to the Sheriff-Substitute to proceed with the cause. On 23rd October the Sheriff-Substitute, in respect defences were not timeously lodged, held the defender as confessed, and decerned against him in terms of the prayer of the petition.

The defender appealed to the Sheriff, who on 31st October pronounced the following interlocutor:—"The Sheriff having heard the agent for the appellant (defender) and the pursuer, on the appeal for the defender, Recals the interlocutor of the Sheriff-Substitute, dated 23rd October 1888, and allows the defences to be received on payment by the defender to the pursuer of the sum of ten shillings sterling, and remits to the Sheriff-Substitute to proceed with the cause."

The pursuer appealed to the Court of Session, and argued—The last day on which the defences were due was the 2nd October. Though this was the first Court day after the serving of the petition, the *inducia* for defences had expired, so a further prorogation for eight days was incompetent. As to the interlocutor of 31st October, the Sheriff was wrong in allowing the defences to be received on payment of a fine of 10s.; either no penalty should have been imposed, or one of £2 should have been exacted in terms of sec. 14, sub-sec. 1 of the Act of 1876. The Act of 1876 took away the discretion which the Sheriff had under the Act of 1853, sec. 6, for the periods for lodging pleadings, to which

that discretion applied, had been altered by the former Act—*M. Gibbon v. Thomson*, July 14, 1877, 4 R. 1085; Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), secs. 14, 16 and 20.

Argued for the respondent—The interlocutor of the Sheriff-Substitute of 2nd October was admittedly pronounced in error and could not be defended. The case depended upon the provisions of the Act of 1853, which being not expressly repealed by the Act of 1876 remained, except when altered, in force. By sec. 6 of the Act of 1853 the Sheriff was vested with a discretion which he had exercised, and the Court would not interfere—*Bainbridge v. Bainbridge*, January 18, 1879, 6 R. 541.

At advising—

LORD PRESIDENT—The sixth section of the Sheriff Courts Act of 1853 provides—[*His Lordship here read the clause quoted above*]. Now, there can be no doubt that under this section the Sheriff is vested with a wide discretion as to prorogating the periods for lodging papers in the cause, provided the party in default offers a reasonable excuse for his delay. If this Act, then, is still in operation, and is applicable to the interlocutor of 31st October, it is clear that the Sheriff has exercised his discretion, and has allowed the defender to tender his defences on payment of a penalty of ten shillings.

It is urged, however, by the appellant that the provisions of sec. 6 apply only to the failure to lodge papers at the times specified in the Act of 1853, and that as these times have been altered by the Act of 1876, this clause can in no way regulate the procedure which ought to have been followed in the present case. The question, therefore, comes to be, whether the Act of 1876 does repeal the Act of 1853. Now, the 48th section of the Act of 1876 expressly repeals sec. 15 of the Act of 1853, and in so far also as the latter Act alters the former, it thereby repeals the earlier statute. To this, but to no further extent, the Act of 1876 can be said to repeal the Act of 1853. The discretion conferred upon the Sheriff by the earlier statute accordingly remains, and in the exercise of that discretion the interlocutor of 31st October was pronounced by the Sheriff. As to whether the Sheriff exercised his discretion rightly, that is a matter into which we shall never inquire. I am therefore for refusing this appeal.

LORD MURE and LORD WELLWOOD concurred.

LORD SHAND and LORD ADAM were absent from illness.

The Court refused the appeal.

Counsel and Agent for Appellant—Party.

Counsel for Respondent—C. S. Dickson
Agent—Robert A. Robertson, S.S.C.