interdict from trespassing on the lands and cutting the grass, and had now given up one-half of what he had asked for.

Agents for Complainer—Gibson-Craig, Dalziel & Brodies, W.S.

Agent for Respondents—W. Officer, S.S.C.

Saturday, June 25.

SECOND DIVISION.

GORDON'S TRUSTEES *v.* MELROSE.

Landlord and Tenant—Lease—Fences—Petition—Sheriff. A summary application by the trustees of a landlord to the Sheriff to have a remit made to men of skill to ascertain the existing state of the fences, &c., on a farm, for preservation, with the view to a settlement of questions under the lease between the landlord and the out-going tenant, *held* competent.

This is an appeal from the Sheriff-court of Peebleshire. The case originated by a petition presented to the Sheriff by Gordon's trustees against Robert Melrose, lately tenant of the farm of Stoneypath, in the county of Peebles, and now residing at West Baldridge near Dunfermline. The petition set forth:—"(1) That by conditions of set entered into between the said Richard Gordon, then accountant in Edinburgh, on behalf of Charles Ferrier, Esq. of Badingsgill, and the said Robert Melrose, then residing at Grayknowe, parish of Lasswade, and subscribed by them the 14th day of March 1849, there was set to the said Robert Melrose the farm of Stoneypath, in the parish of Linton and county of Peebles, then belonging to the said Charles Ferrier, now deceased, and that for nineteen years, commencing at Whitsunday 1849 as to the houses and grass, and separation of that year's crop as to the arable land. The said farm was disponed by the said trust-disposition and settlement to the petitioners, as trustees foresaid, and they are now proprietors thereof. The said Mrs Catherine Montgomery Ferrier or Gordon died on the 23d day of May 1867. (2) It was stipulated and agreed to by the said conditions of set that the fences then on the farm should be put into proper order, the same to be maintained during the currency, and left at the termination of the said lease in the like good order; and that such further subdivision fences on the lands contemplated to be in crop should be made for the more commodious occupation of the same as the said Robert Melrose, the tenant, might require, he paying 5 per cent. on the outlay occasioned thereby; and as to which fences it was conditioned that the obligations on his part before stipulated should likewise apply. There was reserved ground for a strip of plantation, extending to 140 feet or thereby in breadth, running north and south between the lands contemplated to be arable and the grazing land to the north and south of the burn between Old and New Stoneypath, also a roundel containing about two Scotch acres on Old Stoneypath for the same purpose; and the fencing of those intended plantations was to be made and afterwards maintained by the landlord, but one-half of the expense of the said after maintenance was to be paid by the tenant. (3) It was further conditioned and agreed by the said conditions of set that the house and steading should be put by the proprietor in habitable and tenantable repair, at the sight of Charles Lawson, mason, and Archibald Ritchie, wright, and that they should be maintained and left by the tenant in proper habitable and tenantable condition. (4) The respondent entered into possession of the said farm, and occupied the same for the said period of nineteen years, under and in virtue of the said conditions of set, and he was allowed by the petitioners to continue tenant of the said farm by tacit relocation as under said conditions for one year after the expiration of the said period of nineteen years. The respondent removed from the houses and grass of the said farm of Whitsunday 1869, and from the arable land at the separation of that year's crop from the ground. (5) The petitioners, on and subsequent to the 21st day of May 1869, acting by their agents, have repeatedly desired and required the respondent to concur with them in appointing two arbiters to inspect the state of the fences, and of the house and steading on the said farm, and to report whether or not they are in the state in which he was bound to leave them by the said conditions of set, prolonged as the same were as aforesaid to Whitsunday 1869, and the separation of that year's crop from the ground, and if not in that state, which the petitioners aver they are not, then to report what sum or sums are requisite to put them into that state, excepting always from such inspection and report the line of old buildings in the court, and reserving all other questions between the petitioners and the respondent entire. The respondent, however, refused, and still refuses, to concur with the petitioners in having the said fences and houses inspected and reported on in any manner of way. The petitioners therefore find it necessary to make the present application to your Lordship." And the petition concluded with the following prayer:—"May it therefore please your Lordship to remit to a person or persons of skill to visit the said farm of Stoneypath, and to inspect the fences and the house and steading thereon (excepting said line of old buildings in the court), and to report what is necessary to put the same respectively into the state mentioned in the said conditions of set as aforesaid, and the probable expense thereof; and thereafter, on considering the report or reports of such person or persons, to approve thereof; and in the event of the respondent entering appearance and opposing this application, to find him liable in expenses, and to decern therefor; or to do otherwise in the premises as to your Lordship shall seem proper, reserving all other questions between the petitioners and the respondent entire."

Condescendence and answers were lodged.

The petitioners pleaded:—"(1) The petitioners are entitled, at their expense and under reservation of all questions, to have the state of said houses and fences judicially ascertained, as prayed for. (2) The application is well founded in fact and in law, and should be granted. (3) The defender is not justified in entering appearance and opposing the prayer of the petition, and therefore he should be found liable in all expenses occasioned by his appearance. (4) The petitioners have set forth sufficient title and interest, and made sufficient averments, to warrant the prayer of the petition. (5) The pleas of the respondent are irrelevant in this action, and, besides, are ill-founded in fact and in law."

The respondent answered:—"(1) The petitioners have no title to raise the present proceedings, and have no title to follow out the same, and

they have neither founded on nor produced any such, in respect there is no evidence produced to establish the state of repair of the fences and buildings on the farm of Stoneypath at the respondent's entry—Hunter's Landlord and Tenant, vol. ii, page 210, and authorities therein referred to. (2) The petition is incompetent, no written lease being therein founded on in support of the petitioner's title and contention. (3) The writing produced with the petition, and marked No. 2 of process, although not referred to in it, is not a lease or missive of lease. It is neither holograph nor tested, and is unstamped, and cannot be referred to or founded on or recovered in evidence. (4) The petitioners are not entitled to approbate and reprobate. (5) The fences, houses, and steading not having been put into a state of repair by the landlord, or by those acting for him, in terms of the agreement between the parties, the respondent has a good claim of damages against the petitioners, in consequence of which action is hereby reserved—*Burrell* v. *Gebbie*, 18th December 1868, Scot. Law Rep., vol. vi., p. 186."

The Sheriff-Substitute (A. C. LAWRIE) pronounced the following interlocutor:—"The Sheriff-Substitute having considered the closed record, and having heard parties' procurators—Remits to Robert Tod, Cardrona Mains, and to George Mills, Horsbrugh Castle, to visit the farm of Stoneypath, in the parish of Linton, and to inspect the fences and houses thereon (excepting the line of old buildings in the court), and to report as soon as possible what is the present condition of the fences and buildings, and what would be the probable cost of putting the fences in good order, and the said buildings in proper habitable and tenantable condition: And ordains the said Robert Tod and George Mills to give notice to the agents for the petitioners and respondent, by post, at least four days before-hand, of the day and hour at which they intend to make the inspection: To this extent sustains the competency of the petition, and repels the first and second pleas in law stated by the respondent in so far as these are inconsistent with the above remit: Reserves entire all pleas of parties or claims which they may have respectively against each other.

"*Note.*—The respondent refused to concur in the above remit, and opposed the petition to the last.

"The Sheriff-Substitute has not granted a remit in the terms prayed for. The petition asks for a report on 'what is necessary to put the fences and buildings into the state mentioned in the conditions of set, and the probable expense thereof.' Now, as the tenant's obligation was not an absolute one to leave the fences and buildings in good order, but only to maintain and leave them in the state in which the landlord bound himself to put them, no one, by a simple inspection in 1870, could determine whether these were in the state mentioned in the conditions of set. To determine that a proof would be necessary. The Sheriff-Substitute hopes that the reporters will report only on the existing state of the fences and buildings, without reference to their past condition or to the stipulations in any lease, whether past or present.

"It is obvious that, if the claims of the petitioners shall ever be the subject of litigation, there are questions between them and the respondent which will require proof. The Sheriff-Substitute consequently felt considerable doubt whether this was a case in which he should make any remit. But he has come to be of opinion that the whole circumstances, and especially the averment that the fences and buildings must immediately undergo alterations under the lease to a new tenant, warrant the qualified remit which he has made. The cases of *Fraser* v. *Mackay*, 13th February 1833, 11 Sh., p. 391; *Halyburton* v. *Blair*, 1st June 1836, 14 Sh., p. 859; *Hall* v. *M'Gill*, 14th July 1847, 9 D. 1557; and *Macintosh* v. *Welsh*, 19th July 1851, 23 Jur. 659; to which he may add the interlocutor in the case of *Irvine* v. *Scott*, 27th June 1856,—seem to the Sheriff-Substitute to justify the course which he has adopted."

The Sheriff (G. NAPIER) altered, and dismissed the petition with expenses. The Sheriff added the following note to his judgment:—

"*Note.*—The Sheriff concurs with the Sheriff-Substitute's observation that the remit granted by him was not in the terms prayed for. He also concurs in the grounds upon which the Sheriff-Substitute seems to have held that a remit in the terms prayed for should not be granted. But however desirable in the circumstances referred to, the qualified remit made by the Sheriff-Substitute, and now appealed against by the respondent, may appear to be for the interests of all concerned, the Sheriff is of opinion that, in the face of the respondent's opposition, it was not competent to grant such remit under the prayer of the present petition.

"Independent altogether, however, of the above grounds for dismissing the petition, a new objection has occurred to the Sheriff, of a character which it is always *pars judicis* to take up when observed, and which of itself appears to him to be fatal to the present petition, namely, that the petition is not framed in the short form prescribed by section 7 and relative schedule (E) of the Sheriff Court Act, 16 and 17 Vict., cap. 80, but sets forth in full detail, and in a series of separate articles, the whole averments in support of its prayer, precisely in the manner previously in use, but expressly superseded by the imparative terms of the section referred to, instead of reserving such averments for a condescendence when ordered, as in the case of an ordinary action."

The petitioners appealed to the Court of Session.

MILLAR, Q.C., and MACDONALD for them.

BALFOUR in answer.

At advising—

LORD COWAN—It is startling to me to hear that when a lease comes to an end the landlord or the tenant may not go to the Judge Ordinary and ask for an inspection of the then existing state of the houses and fences by parties named judicially, in order to have the facts ascertained with a view to the ultimate settlement of their respective rights and obligations under the lease. Such inspections are most useful; and, speaking as having been once Sheriff of an agricultural county, I take leave to say most usual. No doubt here there is the question of liability under the terms of the lease, behind that sought to be reported on, but the report will not be conclusive upon that question. It may be that the landlord's reading of the lease is quite wrong,—we are not deciding that point one way or another. This remit is the best thing for both parties, and although delay in making such an application is always an element, I do not think the delay here has been too great. The Sheriff-Substitute has pronounced a most judicious interlocu-

tor, to which we should substantially revert, recalling the interlocutor of the Sheriff.

The other Judges concurred.

Agents for Appellants—W. & J. Burness, W.S.
Agent for Respondent—A. Gifford, S.S.C.

Tuesday, June 28.

MELDRUM *v.* HORSBURGH.

Road—General Turnpike Act—1 and 2 Will. IV., c. 43—Avenue. A proprietor *held* not entitled at his own hand to shut up a road which Road Trustees had used for four or five years immediately preceding (and also at a former period within forty years), under the General Turnpike Act (1 and 2 Will. IV., c. 43, sec. 80), on the ground of a change of circumstances having brought the road within the statutory exemption of avenues, without having first obtained a judicial recognition of the change of circumstances.

This case related to the right of Turnpike Road Trustees to use a private road for carting materials to repair the roads under their trust.

The action originated in a petition presented in May 1869 to the Sheriff of Fife by Mr Horsburgh, Clerk to the Trustees of the Turnpike Roads in the district of Cupar, and acting on their behalf, against Mr Meldrum the proprietor of Easter Craigfoodie. The petition set forth that in virtue of the powers given by the 80th section of the General Turnpike Act (1 and 2 Will. IV., c. 43), the Road Trustees had for years past been in use to obtain materials from quarries on the estate of Wester Craigfoodie, and to convey the same by a road which leaves the Cupar and Dundee road at the west end of the village of Daisie Muir, and passes between the houses of Easter and Wester Craigfoodie to the quarries; that in the autumn of 1868 Mr Meldrum had obstructed the road by building two walls across it. Warrant was sought to have the obstructions removed, and interdict craved against Mr Meldrum preventing the ingress and egress of the trustees.

The circumstances were as follows:—It appears that the Road Trustees had formerly worked Wester Craigfoodie quarry, but had left it about thirty years ago. In 1864 they resumed their use of the quarry and road, and continued this use till August 1868. Till 1867 Wester Craigfoodie was the property of Mr Fortune. Part of the road went through his property, and the remainder was used by him as an access to his house and steading. Mr Meldrum averred that the solum of this part of the road was in his property, and that Mr Fortune's use was in virtue of a servitude over it in favour of Wester Craigfoodie. It also appears that certain feuars have right by their charters to take stones from the quarry. In 1867 Mr Fortune sold his estate to Mr Cheape, the proprietor of the neighbouring lands of Fingask, who soon after sold a small portion, including the house and steading of Wester Craigfoodie, to Mr Meldrum. At the same time the former renounced all right of property, servitude, or other right over the road. Soon after Mr Cheape completed a new road for the use of his own lands. In May 1868 Mr Meldrum intimated to Mr Horsburgh, as clerk to the trustees, his intention of shutting up the road. In August of that year he proceeded to build two walls across the road, and to plant the intervening space. The subject was laid before the trustees in September 1868. Some communication followed with Meldrum, in which they made an ineffectual attempt to induce him to allow their accustomed access. Accordingly, in May 1869 they presented the petition before mentioned, in name of their clerk.

The Sheriff-Substitute (BEATSON BELL) repelled the defences, and ordered Mr Meldrum to remove the obstructions under certification. His Lordship added the following note to his judgment:—

"*Note.*—The section of the Act of Parliament under which road trustees have power to enter enclosed lands (1 and 2 Will. IV., c. 43, section 80), is a very stringent one. There is no doubt, however, that the trustees, in the exercise of these powers, are subject to the control of a court of equity (*per* Lord President in *Yeats* v. *Taylor*, 9th January 1863, 3 Macph. 224). It might, therefore, very well be that, upon a proper application to a competent Court, the trustees might have been restrained in their use of the respondent's avenue in consideration of the change of circumstances arising out of the transaction with Mr Cheape, provided it could be shown that another convenient access to the quarry was available. But the Sheriff-Substitute thinks that the respondent was in error in supposing that the trustees' right was put an end to in the termination of the servitude in favour of Mr Cheape; and if so, it seems clear that the respondent could not, at his own hand, and by physical obstructions, prevent the trustees from continuing their former use of the road. The act of the respondent was an attempt violently to invert the possession, and whatever remedy may be open to him, it is thought that matters must at once be restored to their former state."

The Sheriff (MACKENZIE) adhered.

Mr Meldrum appealed to the Court of Session.

SOLICITOR-GENERAL and BALFOUR, for him, argued, that the road was an avenue, and therefore protected by statute from the operations of the trustees. They contended that the 80th section of the General Turnpike Act gave no right to the trustees to convey materials over an avenue, even though they had previously been in use of it. The demand of the trustees was unreasonable, as they could get access to the quarry by Mr Cheape's new road.

MONRO and GILLESPIE, for respondent, answered, that the trustees were entitled to be continued in the use of the road which they had enjoyed for some years: that by the 96th section of the Act the appellant had no right to close the road without explicit consent from them, and without judicial authority, that the road was not an avenue in the sense of the statute; and that, even if it was, the limitation to the exemption applied, "unless where materials have previously been in use to be taken by the said trustees."

The Court did not consider it necessary to go very narrowly into the construction of the Act. The evidence showed that up to 1867 the road could not be considered an avenue in the sense of the statute. It was an access common to two properties, whatever may have been the exact legal rights of the parties. Admittedly the proprietor of Wester Craigfoodie had a right to use it as an access to his house and steading. The privacy of the road was clearly not such as to exclude the trustees on the ground of its being an avenue in the sense of the statute. In 1868 the trustees were in lawful possession of the road, and the appellant should have obtained a judicial recognition of the