for the election of a trustee, but should be entitled to vote for his removal. I cannot tell whether the Legislature thought so or not; we are dealing with a statutory enactment, and whatever may have been their mind in this matter, there stands the enactment, and it does not apply to the question of removal of the trustee. Mr Lang's vote was therefore, I think, a good one.

The only other question relates to the competition between Messrs Foulds & Cameron to represent the debt due originally to the firm of Reddie & Crichton. That matter is stated by the Lord Ordinary so very clearly that I do not think it necessary to go into the matter. The partnership between Messrs Reddie & Crichton was dissolved by a minute of agreement in July 1859. It was therein agreed that Mr Crichton should uplift the whole debts due to the said firm, and apply the same, in the first place, in payment of the debts due by the said firm, including all sums drawn from the Bank of Scotland for behoof of the firm under a cash credit opened by Mr Crichton in his own name. After that, Mr Crichton's own estates were sequestrated in 1861, and Mr Foulds was appointed trustee thereon. Mr Foulds continued, in room of Mr Crichton, to liquidate the affairs of the firm of Reddie & Crichton. On the other hand, Mr Cameron claims to vote in virtue of a subsequent mandate directly from Mr Reddie, the other member of the firm. The question is, whether Cameron or Foulds is truly in right of the debt claimed in the present sequestration, and about that I have no doubt. Mr Foulds is the only person with an acting title at all. Therefore, my opinion is that Mr Cameron's vote was bad. There is nothing said in support of Hall's pretended title to vote, and so the consequence is, that there are no good votes at all for the removal of the trustee. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I agree with the opinion delivered by your Lordship in the chair on all points except one, and that is respecting the vote of Mr Foulds, as trustee upon Mr Crichton's estate. I am clear that Cameron had no right whatever to vote. Crichton was constituted the sole trustee of the partnership affairs. He was himself thereafter sequestrated, and Foulds was appointed trustee upon his estate. I have great doubt whether his appointment as trustee upon the individual estate of Mr Crichton conveyed to him Crichton's administrative character with reference to the affairs of the firm. But this doubt does not in any way affect my judgment on the practical result.

The Court adhered.

Appeal dismissed.

Agents for the Appellants—Lindsay & Paterson, W.S.

Agent for the Respondent—John Walls, S.S.C.

Saturday, March 4.

SECOND DIVISION.

STEWART *v.* CLARK.

Process—Reclaiming Note—A. S., 10th March 1870.

In an action for breach of an alleged agreement, *held* an interlocutor by a Lord Ordinary, restricting proof of the agreement to the writ or oath of the defender, does not come under section 2 of the A. S., 10th March 1870, and can therefore be competently reclaimed against more than six days thereafter.

Agreement—Lease—Essentialia. A party alleged that some weeks before the execution of a lease, in which he hired premises and steam-driving power, he had made a verbal agreement with the landlord to supply him with steam for heating purposes, but without fixing at what cost, or for how long. *Held*, if the agreement had been separate, it was deficient *in essentialibus*; but that it was a stipulation of the lease, and only proveable by the defender's writ or oath.

The pursuer is a comb manufacturer, and the defender a turner at Silvermills, Stockbridge. In January 1870 negotiations commenced between the parties for a lease to the pursuer of part of the defender's premises. Eventually, on 31st March and 1st April, a lease was signed by the parties, in which the defender let to the pursuer a specified number of workshops for five years from the term of Whitsunday 1870, which was to be the term of entry. The defender also let to the pursuer part of the driving power of his steam engine. On this subject the lease provided as follows:—"And farther, the said Martin Clark hereby lets to the said John Stewart junior a portion, to the extent of eleven horse-power of the steam-power of the engine to be erected by the said Martin Clark upon the said subjects; and, until the said new engine is erected, he binds himself to furnish the said John Stewart junior with power, to the extent of five horse, from the present engine for the use of the works to be carried on by the said John Stewart junior, and obliges himself to supply the said steam power to the said John Stewart junior, and his foresaids, during the currency of this tack, each week-day, for the usual working time of ten hours, except Saturdays, when the same shall be supplied for six ordinary working hours, and except at such times as it may be necessary to repair the said engine, and the said Martin Clark shall supply and put up the main shaft and driving pulley in connection with the said engine, and shall keep the said engine, and shaft, and pulley in good working order during the currency of this lease at his own expense." The lease also provided for the payment to be made for this steam power, and for a graduated rent in proportion to the amount supplied. The lease made no provision in regard to steam for heating the pursuer's machinery. But the pursuer alleged an agreement had been entered into on the subject in the month of February 1870. The contract, he averred, "as to driving power was afterwards embodied in a written lease, but as the amount of steam which might be required for heating was somewhat indefinite, the contract in regard to it was allowed to rest on the parole contract, it being however distinctly agreed that the defender would supply steam for heating purposes to whatever extent it might be necessary for the pursuer's business of comb-making, the nature of which the defender professed to be acquainted with. . . The contract was, in point of fact, either by express words or overt acts, fully within the defender's knowledge, completely defined in all particulars except as to the price to be paid for the said steam for heating, but the pursuer has all along been ready and willing either to take said steam for heating as an equivalent of part of the steam power to which he was entitled under the

written lease after-mentioned, or to pay the fair value thereof, as the same might be determined, either by agreement or by arbitration, or by some competent Court." The pursuer also alleged that on the faith of this contract, entered into in February, he had been allowed to insert a pipe in the defender's boiler for the purpose of getting heating steam, but that on 19th May the defender had cut off the steam, and also deprived him of the driving power contracted for in the lease. The defender, on the other hand, denied that any such agreement had been made in February, and stated that towards the end of April he had allowed the pursuer at his request to employ the exhaust steam of the engine, and thereafter to insert a pipe in the boiler. But these concessions, he said, had been made gratuitously, and under the express condition that he should have power to cut off the heating steam if he found he was unable to give it. Finding the pursuer was abusing his indulgence to such an extent that occasionally his own machinery had been stopped for want of driving power, he had cut off the heating steam; but he expressly denied having deprived the pursuer of driving power. The pursuer had been allowed to take possession of the premises in March, and said he had put machinery into the premises, and entered into contracts, which had become worthless in consequence of the breach by the defender of the alleged verbal agreement; and he accordingly raised the present action, in which he sought £500 damages. The defender pleaded, *inter alia*—"(1) The averments of the pursuer are not relevant and sufficient to support the conclusions of the action; and (2), The alleged contract to supply steam for heating purposes, in so far as it relates to the time and matters embraced in the lease, can be proved only by the oath of the defender, or his writ subsequent to the date of the said lease."

The Lord Ordinary (JERVISWOODE) on 21st February pronounced the following interlocutor:—

"*Edinburgh, 21st February* 1871.—The Lord Ordinary having heard counsel on the respective pleas, and made avizandum with the debate and process, and considered the same: Finds that the contract for the supply of steam for heating purposes, which is set forth in the second article of the condescendence for the pursuer, and to which contract the second plea in law for the defender relates, can be proved only by the oath of the defender, or by his writ, of a date subsequent to that of the written lease which is referred to in the record, and which forms No. 8 of process, and, with reference to the preceding finding, appoints the cause to be enrolled with a view to further procedure, reserving meanwhile the matter of expenses.

"*Note.*—The question raised under the pleas for the defender to which the present interlocutor relates is not free from difficulty; but if the Lord Ordinary reads aright the opinion of the Lord Justice-Clerk (now Lord Justice-General) as reported in the case of *Walker* v. *Flint*, February 20, 1863 (Macph. 1417) it suffices to warrant, if it does not absolutely rule, the conclusion to which the Lord Ordinary has here given effect."

On 28th February the pursuer obtained leave to reclaim. The defender objected to the competency of the reclaiming note. By section 28 of the Court of Session Act of 1868, it is provided that any interlocutor pronounced by the Lord Ordinary under sub-divisions 2, 3, and 4 of the 27th section shall be final, unless reclaimed against within six days. By section 1 of the A. S., 10th March 1870, it is enacted "that the 27th section of the said Act shall be altered to the effect of substituting for the enactments thereof the following provisions;" and by sub-division 3 it is provided as follows—"(3) If the parties are at variance as to whether there shall be proof, or as to what proof ought to be allowed, or if they or any of them shall maintain that one or more of the pleas stated on the record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the Procedure Roll; and the cause shall be forthwith enrolled in the said roll by the Lord Ordinary's clerk; and, after hearing the parties in the said roll, the Lord Ordinary shall pronounce such interlocutor as shall be just; and may either appoint proof to be taken, or dispose of such pleas on the record as he thinks ought to be disposed of at that stage. Provided always that it shall be competent to the Lord Ordinary, if he shall think right, to appoint the cause to be heard in the debate roll, in place of the procedure roll." By section 2 it is enacted that the provisions of the 28th section of the Court of Session Act of 1868 "shall apply to all the interlocutors of the Lord Ordinary herein before referred to, so far as these import an appointment of proof, or a refusal or postponement of the same."

CAMPBELL SMITH and J. M. GIBSON, for the reclaimer, argued—The reclaiming note is competent, since the interlocutor does not appoint or refuse proof. No day is fixed for proof. The Act of Sederunt was not intended to apply to such an interlocutor as this, but only to one of procedure proper. The pursuer is entitled to proof *prout de jure*, as the agreement is separate from, and independent of, the lease. He could easily have got steam elsewhere for his heating purposes. The price could have been fixed by reference to the market price. The contract is, at any rate, validated by *rei interventus*. The defender's authorities only refer to heritage. Authorities—*Walker* v. *Milne*, 10th June 1823; *Bell* v. *Bell*, 9th July 1841.

LEES, in answer, argued—The note is incompetent. The interlocutor is virtually one appointing proof of a limited nature, and it is not necessary the diet should be fixed. If the restricting of the proof to writ or oath be not an appointment of proof, and only the allowing of parole proof be an appointment of proof, then this is an interlocutor refusing proof. Sub-division 3 of the first section of the Act of Sederunt narrates three matters—the variance of parties as to whether there shall be any proof, or what proof, or that preliminary pleas should be first disposed of; and in dealing therewith the Lord Ordinary is either to appoint proof, or dispose of the pleas. Appointment of proof must therefore be commensurate with whether there is to be any, or what proof; and a variance as to whether the proof should be limited to writ or oath is a variance as to what proof shall be allowed. The second section comprises all interlocutors importing an appointment, refusing or postponing of proof; and to find a meaning for the words appointment or refusal, this interlocutor must fall under one or other. On the merits, the action is bad. Either the alleged agreement is a stipulation of the lease or a separate contract. If separate, it is incomplete, and deficient *in essentialibus*, as no price or duration is fixed; and the action is therefore irrelevant. The alleged agreement can only be made matter of relevant

allegation by reference to the lease, and incorporation with it. If so, it is a stipulation of the lease, and can only be proved by writ or oath. Authorities — *Maxwell*, M. 12,351; *Alexander* v. *Gillon*, 22d January 1847; *Walker* v. *Caledonian Railway Company*, 11th June 1858; *Walker* v. *Flint*, 20th February 1863; *Philip* v. *Cumming's Executors*, 3d June 1869.

At advising—

The LORD JUSTICE-CLERK thought the first point one of importance; but on the whole he considered the reclaiming note competent. The Act of Sederunt of March 1870 made important changes on the 27th section of the Court of Session Act, and carefully detailed the mode in which procedure was to be conducted. The restrictions in the second section, however, only applied to interlocutors appointing, refusing, or postponing proof; and it was evident, therefore, that the section was intended to refer only to interlocutors properly of procedure. But the Lord Ordinary's interlocutor neither refused, postponed, nor appointed proof; and therefore he thought it did not fall under the second section.

On the matter of what proof should be allowed, it was to be observed that the Lord Ordinary had grounded his decision on the view that the alleged contract could only be proved by writ or oath, and that as the parties had made a written contract, they could not import a verbal stipulation into it. This was in fact just a stipulation of the lease, if it was anything. But he preferred rather to go on the ground that there had been no completed contract; and in this view the action would fall to be dismissed as irrelevant. If the contract alleged was made before the lease, it was excluded by it, for it could not stand apart from the lease, its duration being fixed by it. It might be a matter of some nicety whether, if the contract had been formed after the lease, the subject of it would be heritable. But in the circumstances set forth there were no relevant allegations of a contract.

LORD COWAN considered that though the interlocutor was connected with the matter of proof, it was not one appointing or refusing it. It had been ingeniously attempted to bring the interlocutor into the category of one appointing a proof, on the ground that appointing a proof was intended in the third sub-section to correspond to the parties being at variance whether any or what proof should be allowed; but he did not think this was the meaning of the Act of Sederunt.

On the merits, it was plain that the judgment of the Lord Ordinary was correct. The pursuer himself averred that the matters embraced in the alleged parole agreement and in the lease had been arranged at the same time; but that only the latter had been embodied in the written lease executed a month later. But if that were so, the agreement would be just a stipulation of the lease, anterior to it, yet not in it. It was impossible to allow it to modify the lease. And in the incomplete state of the agreement it could not be held there was any relevant allegation of contract separate from the lease. If the pursuer had been induced to enter into the lease by misrepresentations of what he would receive under it, that might be a ground for a reduction of it. But as it stood there was no room for proof of this agreement other than by writ or oath; and of the agreement itself there was no relevant allegation.

LORD BENHOLME thought the question of competency one of considerable difficulty, as the Lord Ordinary had refused parole proof, and in effect appointed proof by writ or oath; but he felt inclined to agree with their Lordships. He was for adhering to the Lord Ordinary's interlocutor as it stood. There was indeed no relevant allegation of an agreement other than as connected with the lease, but it might be proved by writ or oath.

LORD NEAVES said the difficulty as to the question of competency seemed to him to be in the word "import." There were two things involved here—the constitution of the agreement, and the breach of it. The breach would be proved *prout de jure*, and not by writ or oath; but proof of it had not been appointed. The constitution of the agreement could however only be proved by writ or oath, and that was the only point the Lord Ordinary had dealt with. It had been attempted to be argued that the disputes between the parties as to procedure narrated in the first section were commensurate with the appointing, postponing, or refusing proof in the second; but legislators did not always deal with all that they proposed to do, and an interlocutor settling what proof was to be allowed, and restricting it to writ or oath was not one either appointing, postponing, or refusing it. In regard to the alleged contract itself, it was useless for the pursuer to try for a separate contract, as it was deficient in the *essentialia* of a contract, and that was all he had alleged.

The Court adhered, with expenses since the date of the Lord Ordinary's interlocutor.

Agents for Pursuer—J. B. Douglas & Smith, W.S.

Agents for Defender—Gillespie & Paterson, W.S.

Saturday, March 4.

MYERS *v.* GRANT.

Fishery Act, 25 *and* 26 *Vict.*, *c.* 97—*Bye-law—Salmon Ladder.* Circumstances in which a proprietor of a dam-dyke on the river North Esk ordered to make sufficient provision for the free passage of salmon, in terms of the bye-laws of Salmon Fishery Commissioners.

The nature of the question in this case, which was an appeal from the Sheriff-court of Forfarshire, is sufficiently apparent from the following opinion of the

LORD JUSTICE-CLERK—When this case was last before us, after hearing it fully stated from the bar, we repelled the technical objections stated to the constitution of the Fishery Board; and, before deciding the other points raised, we remitted to Mr Stevenson to consider a proposal made on the part of the defender. We have now his report, which is unfavourable, and therefore the case substantially presents itself as it did when decided by the Sheriff.

We may assume, on the authority of the recent case of *Kennedy* v. *Murray*, that the bye-law which the Fishery Board are desirous of enforcing is legal in itself; that it is within the competency of the Board to see it enforced, and that at the owner's expense. I think, also, that neither the titles under which the dam-dyke in question is held by the appellant, nor its past history, can constitute any defence to the requisition of the Fishery Board. The appellant holds the right to this dam-dyke, subject to the obligation of afford-