Tuesday, March 3.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

BARBOUR AND OTHERS *v.* D. & J. CHALMERS & COMPANY.

Landlord and Tenant—Lease—Term of Endurance, Proof of, by Parole—Action of Ejection.

In a lease of urban subjects no term of endurance was inserted in the body of the writ, but at the end of the clause of attestation the following declaration was appended—"But declaring the term of lease to be for the term of nineteen years complete from the date hereof." Possession followed upon the lease for four years.

In an action of ejection by a singular successor, *held* that the tenant could competently prove by parole that the term of endurance was inserted in the lease prior to its being delivered to him.

Process—Appeal—Competency—Suspension—Lease—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 44.

In an action of ejection the defender maintained that he was a tenant of the subjects under a subsisting lease. The Sheriff ordained him to remove. He appealed. The pursuer objected to the competency of the appeal, maintaining that the review, if any, should have been by way of suspension in respect of section 44 of the Judicature Act 1825. The Court *repelled* the objection and *sustained* the competency of the appeal.

Alexander Barbour, M.D., Edinburgh, and another, raised an action of removing in the Sheriff Court of the Lothians at Edinburgh, against D. & J. Chalmers & Company, van and lorry builders, North Back of Canongate, Edinburgh, praying that the defenders might be removed and ejected from the subjects Nos. 11, 13, and 17 North Back of Canongate, presently occupied by them.

The pursuers averred that they were heritable proprietors of the subjects described in the summons, and that the defenders without right or title occupied and possessed the coach-house and stables immediately below the tenement of houses belonging to the pursuers, and that they refused to quit possession.

The pursuers acquired their right to the subjects from a heritable creditor, who sold them under a bond in June 1889.

The defenders averred that they were and had been since June 1885 in possession of the subjects under a lease from David Chalmers, then heritable proprietor of the subjects, and that by a clause validly inserted in the said lease it was declared that the period of the lease was to be for a term of nineteen years complete from the date thereof. The defenders also alleged that "the said lease was duly intimated to and recognised by the pursuers' alleged authors, before the alleged conveyance by them to the pursuers—to whom also the whole terms of said lease were duly intimated before the date of the conveyance in their favour, and before they had concluded the purchase of the subjects. On 26th June 1889 the defenders appeared at the salerooms of Messrs Lyon & Turnbull, auctioneers, Edinburgh, where the said subjects were exposed for sale by the heritable creditors, and on the articles and conditions of sale thereof, containing a clause excluding current leases from the warrandice, having been read over, the defenders publicly produced said lease, declared its terms, and protested against any person becoming purchaser in ignorance thereof."

The lease (No. 33 of process) was as follows—"Lease between David Chalmers senior and D. & J. Chalmers & Company, dated 3rd June 1885.—It is contracted, agreed, and ended between the parties following, viz., David Chalmers senior, van builder, Number Four North Back of Canongate, Edinburgh, heritable proprietor of the subjects after mentioned, on the one part, and D. & J. Chalmers & Company, van and lorry builders, Number Four North Back of Canongate, Edinburgh, and David Chalmers junior and John Chalmers, both van and lorry builders, and residing at Number Four North Back of Canongate, Edinburgh, the only partners of the firm of D. & J. Chalmers & Company, on the other part—That is to say, the said David Chalmers senior, in consideration of the sum of Twenty pounds yearly, he hereby lets to the said D. & J. Chalmers the coach-house Number Eleven North Back of Canongate, with cellarage behind, also Number Thirteen, being a four-stalled stable, and Seventeen, which is a coach-house, the yearly rent being as above stated: The premises hereby referred to are commonly called the Solum of the White Horse Close property: The term of entry being the third day of June Eighteen hundred and eighty-five years: And the rent is to be payable half-yearly at the usual terms:" [*Here followed a testing clause, and then the words*]—"But declaring the term of lease to be for the term of nineteen years complete from the date hereof."

The pursuers pleaded, *inter alia*—"(5) No period of endurance being specified in the said lease, and the same being otherwise defective in essential particulars, as condescended on, it cannot be pleaded as a burden on the title of a singular successor in the subjects."

The defenders pleaded, *inter alia*—"(4) The defenders being in possession under a valid current lease burdening the proprietors' title, the tenants are not liable to be summarily removed and ejected. (7) Even if the lease were defective, it has been validated by homologation and *rei interventu*."

Besides the lease the defenders produced receipts for rent paid to Daniel Chalmers at each half-year from Martinmas 1888 till Martinmas 1889.

The pursuers had executed a peace-warning against the defenders upon 10th March 1890 requiring them to remove.

On 7th July 1890 the Sheriff-Substitute (HAMILTON) sustained the fifth plea-in-law for the pursuers, and granted warrant of removing.

"*Note.*—A glance at the document No. 33 of process is sufficient to show that it is not a good lease, no period of endurance being therein specified. That being so, the whole defence falls to the ground."

To this interlocutor the Sheriff (CRICHTON) on 21st July 1890 adhered.

"*Note.*—In this action the pursuers ask for a warrant to eject the defenders from certain subjects in the Canongate. In defence to the action the defenders found upon the document No. 33 of process, and they plead that under it they are tenants of the subjects for nineteen years from June 1885. The pursuers contend that this document is not a valid lease for nineteen years, the term of endurance being stated at the end of the testing clause in these terms, 'But declaring the term of the lease to be for the term of nineteen years complete from the date hereof.' This contention, the Sheriff is of opinion, is well founded.

"The cases founded upon by the defenders, in support of their contention that the declaration as to the term of endurance, although occurring in the testing clause, must receive effect, were—*Johnston* v. *Coldstream*, 5 D. 1297, and *Dunlop* v. *Greenlea*, November 2, 1863, 2 Macph. 1—*aff.* June 2, 1865, 3 Macph. (H. of L.) 46. In the latter case, however, of *Smith* v. *Chambers' Trustees*, November 9, 1887, 5 R. 97, opinions are expressed by all the Judges to the effect that a substantive provision, such as occurs in this case, inserted in the testing clause, cannot be regarded as part of the deed."

The defenders appealed to the Court of Session. The pursuers objected to the competency of the appeal, and the objection was heard along with the merits.

The defenders argued—The lease in question was a probative document upon which possession had followed for four or five years. It must therefore be viewed as a valid writ—*Dunlop* v. *Greenlees' Trustees*, June 2, 1865, 3 Macph. (H. of L.) 46. The circumstance that the term of endurance was inserted after the testing clause did not take from the validity of the writ, as the testing clause was part of the deed—*Smith* v. *Chambers' Trustees*, November 9, 1877, 5 R. 97; Rankine on Leases, p. 201. In any view, there was here an informal missive containing the period of let, and followed by possession, and that was enough. The actings of parties showed that there was here an intention to grant a lease for a period of years, and the defenders were entitled to a proof at large to show what the intention of parties was—*M'Leod* v. *Urquhart Hume*, 840; *Russel* v. *Freer*, May 14, 1835, 13 Sh. 752; *Wilson* v. *Mann*, March 2, 1876, 3 R. 527.

Argued for respondents—1. *On Competency*—Under the Judicature Act 1825, the present appeal was incompetent; the process should have been a suspension, as the defenders had been duly peace-warned. Section 44 of that Act enacted that "when any judgment shall be pronounced by an inferior court, ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply . . . by bill of advocation . . . but only by means of suspension as hereinafter regulated." 2. *On the Merits*—The lease was not effectual against a singular successor, as it had no ish. Besides, the term of endurance being added after the testing clause, rendered the document invalid. Authorities cited by the Sheriff.

At advising—

LORD PRESIDENT—The petition in the Sheriff Court was to grant warrant to officers of Court summarily to remove and eject the defenders, and their goods, gear, and effects, from the subjects situated at Nos. 11, 13, and 17 North Back of Canongate, and the ground of the application was, that the defenders had no right to possess the subjects, and never had the right, because the lease under which they professed to possess was defective in a material part and was not pleadable by them.

An objection was taken to the competency of this appeal under the 44th section of the Judicature Act of 1825, on the ground that the only remedy which the defenders had was by way of suspension. It appears to me however that that statute has no application to the present case. That the section in question provides for the case of a tenant, the lawful term of whose possession has come to an end, and who seeks to retain possession in spite of a warning to quit. But the case of the pursuer as represented in the Inferior Court is quite opposed to that.

The question which the Sheriffs have decided on the merits, and which appears from their interlocutors and notes before us is this—the Sheriff-Substitute sustained the 5th plea-in-law for the pursuers, and the ground upon which he went is stated in the short note appended to his interlocutor of 7th July 1890, in which he says, "A glance at the document is sufficient to show that it is not a good lease, no period of endurance being therein specified. That being so the whole defence falls to the ground."

On appeal the Sheriff took the same view. The fifth plea-in-law for the pursuers which the Sheriffs sustained is in these terms—"No period of endurance being specified in the said lease, and the same being otherwise defective in essential particulars, as condescended on, it cannot be pleaded as a burden on the title of a singular successor in the subjects." Now, the matter of fact with regard to the lease stands thus, that in the ordinary place in which the term of endurance of the lease ought to be inserted, no term is to be found; but that at the end of the testing clause the following clause was inserted—"But declaring the term of lease to be for the term of nineteen years complete from the date hereof." The Sheriff-Substitute and the Sheriff hold that this being the only evidence of a term of endurance, it cannot be supplemented in

any way, and that as no term is mentioned, the lease therefore becomes a nullity.

I am not prepared to assent to that. On the contrary, it appears to me that the duration of the lease, although writing is necessary to the constitution of the contract, may be established by other modes of proof.

That there was to be a lease for some period is clear from the form of the document, in which the subject, the rent, and the term of payment are all specified. All that is awanting is the term of endurance. If a document of that kind was delivered by the landlord to the tenant, and was delivered in the condition in which it has now been produced by the tenant, which is not denied, that would constitute on the landlord's part an act confirming the document as a whole including the testing clause and incorporating the term of endurance.

The record is perhaps not well framed to bring out the matter of fact, but it is sufficiently clear to this extent, that the tenant published to the world the fact that he held a lease. This he did in the auction room when the property was exposed for sale, and there is no allegation that the document is different now from what it was when delivered into his hands. I therefore think that the tenant can competently prove by parole that the term of endurance was inserted prior to its being delivered to him. It appears to me therefore that we should recal the interlocutors of the Sheriff and Sheriff-Substitute, and allow the defenders to prove that the lease was delivered to them as it now stands.

LORD ADAM—The Sheriffs seem to have considered that this was a very clear case. I am of the same opinion, but I reach exactly the opposite result from that at which they arrived.

The defenders here were at the date of the present action in possession of the subjects from which it is now sought to eject them, and the grounds upon which decree of removing is prayed for are narrated by the pursuers in article 1 of their condescendence.

When the case came before the Sheriff-Substitute he granted the warrant craved, and the Sheriff, on appeal, adhered to that interlocutor.

An argument was submitted to us on the question of the competency of this appeal, and it was urged that the procedure should have been by way of suspension and not of appeal. Under the Judicature Act of 1825 there is no doubt that an action of removing can be brought under review only by means of a suspension and not by an advocation, and as appeals took the place of advocation, so an action of removing cannot competently be appealed, but can be dealt with only in a suspension and not by way of advocation.

But this is an action of ejection directed against certain persons who the pursuers say have no title to possess the subjects, and it was recently held that in such circumstances an appeal was an appropriate remedy. I therefore entertain no doubt as to the competency of the present proceedings.

As to the merits of the question the defenders have produced a lease dated 3rd June 1885, under which they aver that they have been in possession of the subjects, and they produce a series of receipts which bear to have been granted by the landlord to them. The Sheriffs have held that the lease was bad in consequence of there being no valid term of endurance specified therein, the only mention of a term being in a declaration after the testing clause to the effect that the lease was to be for nineteen years from the date thereof—that is to say, from June 1885.

We had a good deal of argument upon the question whether clauses of this kind were valid when inserted, as in the present case, in the clause of attestation, and whether they were enforceable, but I do not think that we require to determine that question here.

While a lease for a term of years requires to be constituted by writing, no more is required than that the person who seeks to enforce it shall be able to prove its duration by the writ of the landlord if, as here, it is the tenant who seeks to enforce it. Here, it is not alleged that the contract of lease when delivered to the defenders did not contain the clause following the testing clause. The landlord signs the lease, and hands it to the tenant, who now produces it. I think it is clearly a writ of the landlord's, especially when we take along with it receipts granted by the landlord for rent paid for the subjects under the lease. These, taken together, form, I think, a lease for a period of years against the landlord, *i.e.*, against the present pursuers, who have come in the landlord's place.

There are various matters in this case, which have been referred to in argument, which have not been dealt with by the Sheriffs in their interlocutors. These it will be necessary to have some information about, and I accordingly agree with your Lordship that we should recal the interlocutor appealed against and remit the case to the Sheriff for further procedure.

LORD M'LAREN — There are cases in which the Court has considered the validity of a deed irrespective of anything other than appears on the face of it, or of any evidence of what has followed upon it. In such a case I reserve my opinion as to whether a substantive provision inserted in a clause of attestation can receive effect as part of the deed. For example, when a deed has been executed, containing a power which is to be implemented by a deed either holograph of the granter or tested, it is plain that the granter of the power could not be bound if the power were not implemented in conformity with the mandate. Also, in the case of a will, the validity of which has to be determined without any reference to extrinsic evidence, or of an instrument of sasine, where the witnesses attest not only the subscription of the notary but the giving of earth and stone;

in these cases we have to look to the testing clause only, for it is by it alone that the granter of the deed professes to give authority to what has preceded it. But the present deed belongs to a class of writs to which the law allows great indulgence; and there is hardly any in which the granter is so much held bound by unwritten evidence of consent as in the case of a lease. If there had been no testing clause here, and if at the end of the deed these words had occurred, "period of endurance nineteen years," evidence of possession under the lease would have been all that was required. If, then, this declaration is found in the body of the testing clause, is less weight to be attached to it? I think not. I consider this deed to belong to a class of informal writs which are held to be confirmed by *rei interventus*.

LORD KINNEAR — I am of the same opinion. I do not think it necessary to deal with the point whether this document by itself constitutes a complete and binding contract. If it were necessary to decide that point, it would, in my opinion, require very serious consideration having regard to the observations of Lord Gordon in the House of Lords in the case of *Smith* v. *Chambers' Trustees*. On the other hand, it is very familiar law that although a contract of lease for a period of years may not be constituted except by writing, still all its terms may be proved otherwise by the writ of parties.

If a document such as that now before us has been subscribed by the landlord and the tenant, and has been delivered by the landlord to the tenant, and if possession has followed, I think it is open to the tenant to prove by the landlord's writing that it is a good contract for nineteen years. The fact that the lease itself contains such a declaration is to my mind conclusive evidence of such a term of endurance. If there be any question as to whether this declaration was inserted before or after subscription, I think this should be remitted to probation, but when the tenant produces the lease, and the landlord makes no allegation that the declaration in question was not inserted before subscription, it does not appear to me that there can be any room for doubt.

The Court recalled the interlocutor of the Sheriff-Substitute dated 7th July 1890, and of the Sheriff dated 21st July 1890, and found that the delivery of the lease by the landlord to the tenant in its present state may be competently proved *prout de jure*.

Counsel for the Pursuers — Howden. Agents—Wishart & Macnaughton, W.S.

Counsel for the Defenders—Jameson—Crole. Agent—Edward Nish, Solicitor.

Wednesday, March 4.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BREWIS (CUMMING & COMPANY'S TRUSTEE) *v.* ROBERTSON & BAXTER.

Sale—Right in Security—Bankruptcy—Act 1696, *c.* 5.

X, a wholesale wine and spirit dealer, being in need of funds, entered into this arrangement with R. & B., wine and spirit brokers, with whom he had business dealings, viz., (1) X, who had wines and spirits in a licensed store of which he was tenant, sent to R. & B. an invoice for certain of these goods at invoice prices, as if they had bought these goods, and he granted delivery-orders in their favour addressed to the Excise officer. On the other hand, they advanced to him a bill for a certain sum (almost amounting to the invoice price), which they had agreed to advance, and wrote to him a letter stating that they held the stock in security, that they would charge him a certain rate of interest, that after he had granted them the delivery-orders for the stock, they would on receiving his cash for the value of any of the goods he required for his trade grant him delivery-orders therefor.

This arrangement was acted on. Such goods as he required for his customers X got out of store on paying for them to R & B. Subsequently he became bankrupt. Within sixty days of that time R & B had got delivery from him of part of the remaining goods, and put them in another store under their own power, but part remained in his own store.

Held (1) that the transaction was not a sale, but an attempt to create a security; (2) that with regard to the goods of which R & B had got actual possession, the delivery to R & B was void and null under the Act 1696, c. 5, not being delivered in pursuance of a prior obligation; (3) that with regard to the goods remaining in X's own store, R & B had no security over them, in respect that X retained possession of them down to the date of sequestration.

Robert Rhind, who had carried on business under the name James Cumming & Company, wholesale wine and spirit merchants, Edinburgh, having become bankrupt, his estates were sequestrated on 11th July 1889. John Brewis, C.A., was appointed trustee in the sequestration. For some time before his bankruptcy Rhind had had certain transactions with Messrs Robertson & Baxter, wine and spirit brokers in Leith and Glasgow.

In January 1890 Mr Brewis raised an action against Robertson & Baxter. The leading conclusions were (1) for reduction,