applies to the matters specially dealt with by it, and the present petition not being presented under that Act I do not think that the Act can be founded on as affecting the question now under discussion.

This question seems also to have come up for decision before the Lord Justice-Clerk in the case of *Slater & Skae*, which is recorded in the Books of Adjournal under date 19th March 1899. That was a note presented to the Court of Justiciary, and the Lord Justice-Clerk stated that he, a single Judge in chambers, could not competently dispose of the note, it not being an application for bail under the Bail Act, and then counsel for the petitioner withdrew the note. That is an authority of a very important kind, being a decision of the Lord Justice-Clerk to the effect that an application of this sort cannot be entertained by a single Judge, but only by a quorum of the High Court of Justiciary.

I shall accordingly not dismiss the petition as incompetent, but I decide that as a single Judge in chambers I cannot competently dispose of it, and the usual order for hearing before the High Court of Justiciary will now be pronounced.

The Court dismissed the appeal, and as regards the petition pronounced the usual order for hearing before a quorum of the High Court of Justiciary.

Counsel for the Appellant and Petitioner—Crabb Watt, K.C.—Jameson. Agent—C. Strang Watson, Solicitor.

Counsel for the Crown—Lyon Mackenzie, A.-D. Agent—W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Saturday, October 30.

FIRST DIVISION.

[Sheriff of Argyllshire.

THE DUKE OF ARGYLL *v.* MUIR.

Sheriff — Appeal — Competency — Final Judgment of Sheriff-Substitute Changed by Sheriff into Interlocutory Judgment—Summary Cause—"Value of the Cause"—"Important Questions of Law"—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *secs.* 3 (*i*), 8, *and* 28.

The Sheriff Courts (Scotland) Act 1907 enacts—Sec. 3 (*i*),—"'Summary cause' includes—(1) Actions . . . for payment of money exceeding twenty pounds, and not exceeding fifty pounds, exclusive of interest and expenses. . . ." Sec. 8—". . . In a summary cause, if the Sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final." Sec. 28—"Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-Substitute or of a Sheriff, but that only if the value of the cause exceeds fifty pounds and the interlocutor appealed against is a final judgment, or is an interlocutor. . . . (*c*) Against which the Sheriff or the Sheriff-Substitute either *ex proprio motu*, or on the motion of any party, grants leave to appeal. . . ."

In an action raised in the Sheriff Court by a landlord for £30 rent for certain salmon fishings, the defence was that the tenant himself and not the landlord was really the owner of the fishings. The Sheriff-Substitute, on the ground that the question raised by the defence must be decided in a separate and suitable action, granted decree, but on appeal the Sheriff on 23rd July 1909 held that the defence was competent *ope exceptionis* in the Sheriff Court, sustained the appeal, and remitted the cause for further procedure, and on 28th July, on the pursuer's motion, granted him leave to appeal upon certain questions of law stated in that interlocutor.

The defender in Single Bills objected to the competency of the appeal on the ground that this was a summary cause, and that the Sheriff had not stated in either interlocutor that there were important questions of law, and in the operative interlocutor, that of the 23rd July, had not stated any questions of law.

The Court *sustained* the competency of the appeal, holding that section 8 applied only to final judgments, that the turning of the Sheriff-Substitute's final judgment into an interlocutory judgment by the Sheriff was a *casus improvisus* under that section, and that section 28 and not section 8 applied.

Opinion per Lord Kinnear that the cause was not a summary cause.

Opinion per Lord Johnston that the cause was a summary cause.

Observations by the Court on the meaning of section 8.

Sheriff—Process—Landlord and Tenant—Lease — Action for Rent — Defence that Tenant is Owner — Challenge of Lease ope exceptionis — Action of Reduction without a Declarator — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap* 51), *First Schedule, Rule* 50.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 50, enacts—"When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof."

In an action raised in the Sheriff Court by a landlord for rent the defence of the tenant was that the subjects let really belonged to him and not to the

landlord, the lease having been entered into under essential error. He argued that objections to the lease could be stated and maintained by way of exception without a reduction.

Held that the question of proprietorship could not be tried in the Sheriff Court *ope exceptionis*, as the defender had no title to raise a simple action of reduction, but must raise a declarator and reduction; and action *sisted*, with indication that if the defender did not raise the declarator and reduction within three weeks the pursuer might move to have the action for rent proceeded with.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 8, enacts—"In a summary cause the Sheriff shall order such procedure as he thinks requisite, and (without a record of the evidence, unless on the motion of either party the Sheriff shall order that the evidence be recorded) shall dispose of the cause without delay by interlocutor containing findings in fact and in law. Where the evidence has been recorded the judgment of the Sheriff-Substitute upon fact and law may in ordinary form be brought under review of the Sheriff, but where the evidence has not been recorded, the findings in law only shall be subject to review. In a summary cause, if the Sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then, or within seven days from the date of his interlocutor, grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final."

Sections 3 (*i*) and 28, and First Schedule, Rule 50, are quoted *supra in the rubric*.

The Duke of Argyll raised an action in the Sheriff Court at Oban against Esdaile Campbell Muir of Inistrynich, in which he claimed £30 sterling as the annual rent due at Whitsunday 1907 of salmon fishings in the river Awe, under minute of renewal of lease between the pursuer and the defender dated 12th and 30th June 1903.

The following *narrative* of the *facts* as disclosed in the averments of parties, and of the *procedure* in the Sheriff Court, is taken from the opinion of the Lord President:—"In 1894 the late Duke of Argyll, who was the father and predecessor of the present pursuer, entered as proprietor into a lease with the late Mr Campbell Muir of Inistrynich, who was the father and predecessor of the defender, as tenant of some salmon fishings in the river Awe. The original lease was, I think, for a period of four or five years, and it was from time to time extended by minute of renewal, and has gone on up to the present time; and up till Whitsunday 1907 the rent under the lease was duly paid, first by the deceased Mr Muir, and afterwards by the present Mr Muir. The rent, however, due at Whitsunday 1907 was not paid, and the present action has been raised for that rent, the amount of the rent being £30.

"Now the defence to the action which has been put in by Mr Muir is that he finds that upon a true construction of his titles he is really the proprietor of the salmon fishings embraced in the lease, and consequently, that his taking a lease off Argyll was a useless and pleonastic proceeding in order to get possession of those fishings, and that he is entitled to retain the possession—which he admits he has had—of the fishings, not upon the title of lease into which he had undoubtedly entered, but upon the title of proprietorship. The case came before the Sheriff-Substitute (Maclachlan), and the Sheriff-Substitute, in the circumstances which I have detailed, held that the matter could not be decided by means of putting in a defence to the effect that I have stated, but that the defender, having undoubtedly acknowledged the lease and paid rent under it all these years, must, if he wished to resist payment, get rid of the lease by a proper and formal action of reduction.

"The defender appealed to the Sheriff (M'Clure), and the learned Sheriff upon the 23rd of July pronounced this interlocutor—'Sustains the appeal: Recals the interlocutor'—then he has a set of findings dealing with the minutes of renewal and the possession under the lease, which I need not read, with the finding that under the minutes and lease and in virtue of the possession the defender became liable for the rent, and then he goes on—'But further finds that the defender has relevantly averred objections to said minutes of lease and renewal thereof on the ground of essential error, and that said objections may competently be stated *ope exceptionis* in the present action: Therefore repels the second plea-in-law stated for the pursuer, and before further answer remits the cause for further procedure.' He then deals with the matter in a note, and on the 28th of July he pronounced this further interlocutor—'The Sheriff, upon pursuer's motion and under reference to interlocutor of 23rd July 1909, grants pursuer leave to appeal to a Division of the Court of Session upon the following questions of law, viz.—(1) Whether the defender by failing to give due notice in 1906 terminating said lease is barred from withholding the rent payable under said lease at Whitsunday 1907? (2) Whether the defender is entitled to impugn the lease of said fishings granted in his favour by the pursuer on the ground of essential error, without averring that said error was induced by the pursuer? (3) Whether in view of the possession of said fishings by defender and his predecessor under lease from the pursuer it is competent to the defender, by virtue of rule 50 of the Sheriff Court (Scotland) Act 1907, to dispute pursuer's title to said fishings without reducing the lease, or setting up his own alleged title to exclude by declarator or other competent process?' Acting upon that interlocutor the pursuer lodged a note of appeal to this Division, and the appeal was intimated and the process transmitted."

The pursuer on 15th October moved in Single Bills for the case to be sent to the roll.

The defender opposed the motion, and argued — The appeal was incompetent. The action was for payment of money exceeding £20 and not exceeding £50; it therefore fell within the definition of summary cause in section 3 (*i*). Under section 8 it was necessary in order to give an appeal that the Sheriff in his interlocutor of 23rd July should have stated that there were important questions of law and what those questions were. But neither in that interlocutor nor in that of the 28th was it stated that the questions were important. But even assuming that "the same" meant the specific questions, and did not necessitate the statement that they were important, the questions should have been stated in the operative interlocutor of the 23rd. The fact that certain questions were stated in that of the 28th could not avail the appellant.

Argued for the pursuer (appellant)— This was not a summary cause. The mere figure given in the initial writ did not settle the matter. The value of the cause was the real test—*Cunningham* v. *Black*, January 9, 1883, 10 R. 441, 20 S.L.R. 295; *Purves* v. *Brock*, July 9, 1867, 5 Macph. 1003, 4 S.L.R. 174; *Henry* v. *Morrison*, March 19, 1881, 8 R. 692, 18 S.L.R. 438; Dove Wilson, Sheriff Court, p. 567. The value of the cause was, moreover, the test in section 28. It was obvious that if the rental was £30, the capital value must exceed £50.

At advising on 27th October—

LORD PRESIDENT—. . . [*After narrative quoted supra*] . . . Upon the appearance of the case in the Single Bills the competency of the appeal was objected to by the defender and respondent, and that is the matter which has to be disposed of at this stage, raising as it does a question which is certain often to recur upon a construction of the section of the recent Sheriff Courts Act.

Now the section of the recent Sheriff Courts Act which has here to be construed is the eighth. I may remind your Lordships that the recent Sheriff Courts Act repeals all the older Acts, and is therefore a code in itself for procedure; and therefore the question we have to decide here becomes one of general interest. Now the 8th section is this—[*His Lordship read the section, v. sup.*]

The defender here argues, first of all, that this is a summary cause, and secondly, that inasmuch as the Sheriff in his interlocutor of the 23rd July 1909 did not either state that there were important questions of law or state specific questions of law, it was not competent afterwards to grant leave to appeal, as he did by the interlocutor of 28th July.

The reason that he says that it is a summary cause is that in the definition section 3, subsection (i), heading (1), we find that summary causes include actions for payment of money exceeding twenty pounds and not exceeding fifty pounds, exclusive of interest and expenses; and, as I mentioned before, the sum actually concluded for here is thirty pounds.

Now, I am sorry to have to say that I think this section 8 which we have here to construe is a model of bad draftsmanship, and it is all the more regrettable because I think the underlying idea of the draftsman is perfectly clear and very commendable. The idea obviously was that there should be as much dispatch as possible in summary causes; that, as regards the appeal from the Sheriff-Substitute to the Sheriff, there should always be an appeal on law, but there should be only an appeal in fact if the evidence had been recorded, the Sheriff-Substitute before whom the cause first depends being the judge at the moment of whether the case is a proper one in which to direct the recording of the evidence or not; and then, that as regards appeal from the Sheriff to this Court, there should only be an appeal if questions of law were raised and the Sheriff thought it a proper case for appeal. That, I think, is clearly the idea of the section, but most unfortunately the wording makes it very difficult to carry out what is the clear meaning of it, and indeed, as I shall presently show, is really calculated to hamper the Court and litigants in many ways.

But perhaps before I go to that general question I should first take the application of it to the particular case in hand. As regards the particular case in hand, I have without difficulty come to the conclusion that this case is, so far as this section is concerned, a *casus improvisus*. It is evident, if you read the section, that the draftsman has forgotten that there may be judgments of the Sheriff reversing the Sheriff-Substitute which turn a final order into an interlocutory order, whereas it is perfectly clear that the section only deals with final judgments and with nothing else. The section says that "where the evidence has been recorded, the judgment of the Sheriff-Substitute upon fact and law may in ordinary form be brought under review of the Sheriff, but where the evidence has not been recorded the findings in law only shall be subject to review." Now this is badly expressed, because it assumes that there is always evidence to record or not to record, whereas there are cases of course where there is no evidence to record or not to record. Yet one might without difficulty hold that where there is no evidence or the evidence has not been recorded, there will still remain the appeal upon law, which is the only thing that is left; therefore as regards the appeal from the Sheriff-Substitute to the Sheriff there is no great difficulty. But then you come on—"If the Sheriff on appeal is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then, or within seven days from the date of his interlocutor, grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final." Now that of course quite obviously deals with a final interlocutor and a final inter-

locutor only. The draftsman has forgotten that there may be cases like this where the judgment of the Sheriff-Substitute was a final judgment, but by the alteration of the Sheriff it has been turned into an interlocutory judgment.

The way out of the difficulty is, I think, simple enough. It simply is that this is a *casus improvisus* under the eighth section, and that being so I think we are relegated to the twenty-eighth section, which says this—"Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-Substitute or of a Sheriff, but that only if the value of the cause exceeds fifty pounds, and the interlocutor appealed against is a final judgment or is an interlocutor (*a*) granting interim decree for payment of money other than a decree for expenses; (*b*) sisting the action; (*c*) against which the Sheriff or the Sheriff-Substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal, provided that any exclusion or allowance of appeal competent under any Act of Parliament in force for the time being shall not be affected by this or the preceding section." Well, this is a case where undoubtedly the value is over fifty pounds, because upon the old decisions—and there are plenty of them as to value—the criterion of value is not the actual sum sued for but the value of the question raised for decision. Now inasmuch as the question raised here (always upon the assumption that the Sheriff's interlocutor is right) relates to the proprietorship of salmon fishings worth thirty pounds a-year, it is quite evident that anything which is worth thirty pounds a-year in the market is of a capital value of a great deal more than fifty pounds, and inasmuch as by the interlocutor of 28th July the Sheriff has granted leave to appeal, that clearly falls under heading (*c*) —and if I may say so with respect, it was obviously a most sensible view of the Sheriff to allow this to be appealed, because the difference between him and the Sheriff-Substitute goes to the root of the case. If the Sheriff-Substitute is right, then of course a proof upon the question of proprietorship would be entirely thrown away, and therefore it is most proper at this stage to have a judgment upon whether the Sheriff-Substitute's interlocutor was right or not.

Accordingly I do not think the objections taken to the competency of this particular appeal fall to be upheld. I think it is a *casus improvisus* under section 8, and falls under section 28.

But as the matter has been carefully argued, and as this is a question which will come up again and again, I think I should say something about section 8 in order to help Sheriffs in what they have to do.

Here again I am afraid I must repeat that the draftsmanship is very unfortunate. The truth is that the person who drafted this clause had got in his head a sort of muddle between stated cases, of which we have many examples, and appeals. Of course in a stated case it is necessary that certain questions of law should be put, because in a stated case the actual pleadings in the case are not coming up to the Superior Court, but only a precis or a resumé of them, and therefore the questions of law should be attached to the statement of the facts as found by the inferior Judge. But in the case of an appeal, when the whole pleadings are before the Court, it is absurd to state questions of law, for this very simple and good reason that again and again the true question on which the rights of parties depend, and which we must decide if we are to do justice—which is after all the reason for which we are sitting here at all—is a different question of law from what the litigants at the beginning of the matter, or the Sheriff himself, thought it was. I am assuming no supernatural intelligence on our part, because the same thing not infrequently happens to our own judgments in the House of Lords. Anyone can recall countless illustrations of what I mean, where a case is decided here coming from the Sheriff Court on different grounds from what have been thought to be the true grounds in the Sheriff Court; and I can also remember many cases decided in the House of Lords where what was considered to be the true point of the case only emerged in the House of Lords, and was not considered to be the true point of the case which the Court of Session had decided. Now, to suppose that you are to give an appeal, and to tell the Court to whom that appeal is given that although they know perfectly well that the true point is so-and-so, yet they cannot decide it, because the Sheriff below has decided the case on other grounds, seems to be a climax of absurdity.

There is also a good deal of absurdity in the view of making the Sheriff in this matter act *ex proprio motu*. It would be exceedingly simple to leave the matter thus—to say cases shall be final before the Sheriff unless upon motion made within a certain number of days he grants leave to appeal, and that discretion being left to the Sheriff he might be safely trusted not to grant leave to appeal in cases that were not worth the appeal. But as it stands, in every summary cause the Sheriff is put to the ridiculous task, without the parties asking him, of cogitating whether the questions of law are important or not. What the standard of importance is I do not know. I suppose any question is "important" to the parties, the result of which will make one party or the other win. On the other hand, if "important" means of general interest to the legal profession, I do not know how the Sheriff is to carry that standard in his breast. Is he to sit down and load all his interlocutors, which in their nature ought to be short, sharp, and decisive, with a statement of whether he thinks there are important questions of law and what these important questions are, and then the parties, after considering these lucubrations of the Sheriff, are to come back and ask leave to appeal? When you look at it in this way the proposal is fantastic; and I think we must consider whether we should exercise the powers conferred upon us by section

40 in the way in which we have already exercised them in a case where papers were directed to be sent to an official who did not exist, and put the procedure under section 8 into proper form—the underlying idea of it being very sensible in itself.

LORD KINNEAR—I agree with your Lordship that the competency of the appeal must be sustained, and for the reasons which you have given.

Apart from these reasons, I am disposed to think it is at least very doubtful whether this is a summary cause in the sense of section 3, sub-section 1. That provides that the term summary cause shall include actions for payment of money exceeding £20 and not exceeding £50. Now, I apprehend that that must mean actions the operative conclusions of which are limited in the way defined by the statute—that is, actions for a sum of money and nothing more; and therefore if there is involved in the conclusions of the action a claim for a finding to determine a different question from that of mere liability to pay money, I apprehend that would not fall within the definition. Now I agree that upon the face of the conclusion of what is now called the initial writ in this case, there is nothing but a conclusion for a payment of £30. But then that conclusion proceeds upon a statement or demand which is founded upon the allegation of a right in the pursuer as lessor under a lease in favour of the defender—that is to say, of a proprietory right vested in the pursuer. So far as the initial writ goes, that discloses no conflict of real rights at all, because the rights of landlord and tenant are not conflicting real rights, and the landlord's claim under a lease involves in itself no conflict of title or right whatever. The only question that it raises is whether a sum of money is due under the lease. But then when the defender comes to put in his answers it appears to me that if the learned Sheriff is right—and that is a question which we cannot decide at present—the defender has converted this action from a simple action for payment of money into an action for the determination of a competition of real rights, because the substantial defence is that the salmon fishings which form the subject of the lease are not the property of the pursuer at all, but are the property of the defender, and the defender's plea on that point is that he and his authors, "having possessed the said salmon fishings for more than the prescriptive period under a habile title, ought to be assoilzied."

Now if that is the question to be determined in the case, then it appears to me quite clear that it is not merely a question of liability for thirty pounds of money, and that it is not in any sense a summary cause. It is not possible that it should be treated as a summary cause in any reasonable sense, because to suppose that a Sheriff-Substitute, having that question competently before him, is to decide summarily, first, whether he is to take any evidence about it or not, and next, whether he is to record any evidence about it or not, and then to decide the question summarily with or without evidence, would appear to me to be a plain denial of justice. That is not the way justice could possibly be done between the parties litigating this question, and therefore, if the Sheriff is right, I am of opinion that it is not a summary cause in the sense of the section founded upon.

But then, whether that is so or not, I am of opinion with your Lordship that this particular case is not a case provided for by the eighth section at all, and was not in contemplation of the framer of that clause when he constructed it in the way in which he has done. The only alternative, as your Lordship has pointed out, which the Sheriff has to consider under the eighth section of the statute when he is determining whether he shall grant leave to appeal or not, is whether the judgment, which is assumed to be complained of, is to be final or whether it is to be taken to review. If the Sheriff's judgment is not taken to review, then according to the assumption of the Act it is final. Now, the judgment of a Sheriff recalling findings in law and fact and directing further procedure cannot possibly be a final judgment, therefore it seems to me to be quite clear that this is not the kind of judgment which the eighth section contemplates at all. That section does not appear to have taken into account the possibility of a question whether a particular action should be treated as a summary cause or as a cause involving competition of heritable rights, and therefore requiring deliberate inquiry and decision, being raised before the Sheriff-Substitute at all. It assumes that all that is perfectly clear while in fact that is just the question that has to be decided before any further procedure can be taken in this action at all. I am of opinion, therefore, for the reasons your Lordship has given, that the question of the competency of this appeal does not rest upon the eighth section but upon the twenty-eighth section, and that, since the eighth section does not exclude this appeal in respect that it does not deal with this particular kind of question at all, the conditions of appeal set forth in the twenty-eighth section are applicable, and that such an interlocutor is appealable when the Sheriff either *ex proprio motu* or on the motion of a party has granted leave to appeal.

I think it right to add that I agree entirely with the more general observations which your Lordship found it necessary to make upon the eighth section, and in that part of your Lordship's judgment as in the rest of it I entirely concur.

LORD JOHNSTON—It is true that this summons concludes for £30 only, as the rent payable at Whitsunday 1907 for fishing season 1907 of salmon fishings in the river Awe by the defender Muir of Inistrynich, to the pursuer the Duke of Argyll, under a minute of renewal of lease entered into between them on 12th and 30th June 1903. *Ex facie* of the summons, therefore, the action is for payment of money exceeding £20 but not exceeding £50. But the defences disclose that the real question to

be tried in the case is the right to these salmon fishings. The Duke of Argyll has been recognised as proprietor for many years by the defender's father and himself, for they have taken a lease of the fishings and repeatedly renewed that lease, and they have possessed and have paid rent under it. But the defender now avers that he has recently discovered that, after all, the fishings are part of the estate to which he has succeeded, and always have been so. If then he is to avoid decree for the sum sued for, he must vindicate his own heritable right to the salmon fishings in question, and the value of the question at issue is thus seen to be greatly in excess of £50. He himself treats his defence as if it was based on a plea stated *ope exceptionis* to the validity of the lease and its renewals on the ground of essential error. But I do not think that the ground of his defence is properly described as essential error. It is enough for him to say—and this, I think, is really what he does say—that the lease proceeds *a non domino*, and that as the lessor cannot fulfil his side of the agreement, he (the lessee) is not liable in the counterpart. But this only makes it the more clear that while the pursuer sues only for £30 in money, the action really involves a question of valuable heritable right.

The first question then is, Can this action be deemed a "summary cause" in the sense of the new Sheriff Courts Act 1907?

The definition clause, section 3 (i), says "'summary cause' includes (1) actions . . . for payment of money exceeding twenty pounds and not exceeding fifty pounds, exclusive of interest and expenses."

Notwithstanding, therefore, the real nature of the question at issue as disclosed by the record, there is no doubt that this is an action for payment of money not exceeding £50, nor can the Court consider the true value of the cause as deduced not merely from the summons but from the whole record, as was done in the cases quoted—*Purves* v. *Brock*, 5 Macph. 1003, and *Henry* v. *Morison*, 8 R. 692. The language of the statutes there interpreted, viz., the Act of 1810 (50 Geo. III, cap. 112), sec. 28, and 1853 (16 and 17 Vict. cap. 80), sec. 22, was quite different. Not all causes concluding for payment of a sum of money not exceeding £50, but all causes "not exceeding the value of £25 sterling" were thereby restricted to the Sheriff Court and made not appealable. But this admitted of the true value being judged of otherwise than by the mere conclusion of the summons, which the definition of the Act of 1907 excludes.

The present case must therefore be deemed "summary" in the sense of the statute. But the history and nature of this case shows conclusively that the change of phrase which makes the mere conclusion of the summons and not the true value of the cause the criterion of appealability is a dangerous one and should be open to reconsideration.

Now section 8, supplemented by the rules of procedure, section 41, appended to the Act, provides for the trial of so-called "summary causes" in a peculiar and shorthand manner.

The fact is that the draughtsman of this new Sheriff Courts Act has attempted by a stroke of the pen to clear away the Debts Recovery Act 1867, which had long been recognised as ineffectual from its narrowness, and with another stroke of his pen to create a new and simple procedure, with a wider application, to the same end. But he has not thought out his scheme, and by his very brevity has given occasion for question.

In "summary causes" the Sheriff is told that he is to order such procedure as he thinks requisite, though his discretion is, I think, restricted by the rule of procedure to which I have referred, dispensing with the making up of a formal record and with a record of the evidence; and he is further told that he is to dispose of the cause without delay by an interlocutor containing findings in fact and in law. It does not appear to have occurred to the framer of the Act that in such a so-called "summary cause" preliminary pleas of difficulty and complexity should ever arise. How impossible it is to treat a case like the present as a "summary cause" in anything but name, or according to the intent of the statute, is shown by the fact that instead of being disposed of without delay, this case took ten interlocutors, spread over six months, to bring it to a debate upon preliminary pleas, and six more months before the Sheriff-Substitute disposed of them; and that if the merits of the case have to be gone into it may well blossom into an inquiry on ancient titles and possession not unlike that by which the late Duke of Argyll vindicated his right to the fishings in another part of the river Awe against Lochnell in 1891 (*Duke of Argyll* v. *Campbell*), 18 R. 1094.

Ignoring the fact that there might be preliminary pleas and those of a serious nature, the Act makes no provision for interim review of the Sheriff-Substitute by the Sheriff. For the first provision in section 8 for appeal clearly contemplates a concluded cause. It says—"Where the evidence has been recorded the judgment of the Sheriff-Substitute upon fact and law may in ordinary form be brought under review of the Sheriff; but where the evidence has not been recorded the findings in law only shall be subject to review." This, as I have said, clearly contemplates an appeal of a concluded cause, although such is the sketchy nature of the provision for this novel departure from ordinary procedure that, as at present advised, I see nothing to prevent the general provisions as to appeal to the Sheriff from interlocutory judgments, contained in section 27, applying to summary as well as to ordinary actions.

No question arises, however, on the competency of the appeal to the Sheriff, for the Sheriff-Substitute's interlocutor of 8th April 1909 was a final interlocutor. But the Sheriff on appeal recalled it; and finding that the defence stated might competently

be proponed *ope exceptionis* in the present action, remitted the cause for further procedure, which practically meant for proof.

Now with regard to appeals from the Sheriff, section 8 goes on to provide that "in a summary cause, if the Sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then, or within seven days from the date of his interlocutor, grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final." This, again, when read along with the context, clearly implies a final judgment and ignores the possibility of a Sheriff having to pronounce an interlocutory judgment as here. I think also that it aims virtually at a stated case, and tries to tie down the appeal to questions of law preconceived by the Sheriff, and to be stated by him without even assistance from the parties, a most unfortunate attempt according to all experience. For the instances are innumerable in which on appeal it appears that the true question for decision has been misconceived in the Inferior Court. The Sheriff, however, did not state any questions of law in his interlocutor of 23rd July as required by the statute, but only in the interlocutor of 28th July, whereby he granted leave to appeal, and the defender accordingly stands on the provision "otherwise the judgment of the Sheriff shall be final," and maintains that the appeal to this Court is incompetent. So it might be if the interlocutor was a final interlocutor and there was nothing else in the Act but section 8, though I should desire to reserve my opinion even on that point. For we are here met with another unregarded inconsistency in the statute. The final judgment of the Sheriff under section 8 in an action concluding for payment of less than £50 is to be final, but under section 28, if the value of the cause exceeds £50, it is to be appealable. And no one can doubt that the value of this cause, where less than £50 is concluded for, is vastly greater tnan £50.

But we have not to consider a final interlocutor of the Sheriff, but an interlocutory judgment in a cause the value of which exceeds £50. The Sheriff has granted leave to appeal, and the granting is not deleteriously affected by the fact that he has attempted to state questions of law. As he has granted leave to appeal, appeal is made competent by section 28 (*c*), and accordingly I agree with your Lordship in thinking that the appeal, purged of its limitations to certain questions of law, is quite competent, and I must add that, having regard to the real importance of the case, I think that it is fortunate it is so.

LORD M'LAREN was absent.

The Court repelled the defender's objections to the competency of the appeal, sustained the competency, and put the cause to the roll.

The appeal was heard on 30th October 1909.

Argued for the pursuer (appellant)—Section 10 of the Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), introduced the setting aside of deeds by way of exception in certain cases. Section 9 of the Bankruptcy and Real Securities (Scotland) Act 1857 (20 and 21 Vict. cap. 19) extended these provisions to the Sheriff Court. By section 11 of the Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50) deeds or writings founded on might be set aside by way of exception, and that section was virtually re-enacted in the present Act, First Schedule, Rules 50 and 51, the section being now split into two rules. The object was to prevent the expense and delay of an action of reduction. It only applied where the person challenging the deed could bring an action of reduction. Here the defender had no title to bring such an action. He could not of himself change the cause of his possession which must be here ascribed to his lease—*Carnegie* v. *Magistrates of Montrose*, February 7, 1777, M., *sub voce* Possession, App. 1 (following p. 10,615). It was necessary for him to bring an action of declarator and reduction—*Scrabster Harbour Trustees* v. *Sinclair*, March 19, 1864, 2 Macph. 884. (2) Certain correspondence produced showed that the lease had been entered into as a compromise between the parties, so that even if defender were proprietor the rent was due under the compromise.

Argued for the defender (respondent)—(1) Rule 50 of the First Schedule of the Act applied. The objection was to a deed or writing. (2) The correspondence showed that the lease was entered into under essential error. (3) Assuming the Court were against the defender, the case should be sisted to allow him to bring an action of declarator and reduction.

LORD PRESIDENT—I had occasion only two or three days ago to state the facts of this case, and they need not be recapitulated. The question to be taken up to-day is whether the Sheriff is right in holding that this defence of proprietorship, put forward for the first time by a lessee who had been in possession under a lease for many years, could be entertained by way of exception in an action raised for a current term of rent. The learned Sheriff bases his view upon the 50th section of the first schedule of the recent Sheriff Courts Act, which admittedly is the section which rules the matter, the older Sheriff Court Acts having been repealed. That section is in these terms—"When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof." Now the defender in this case says—You are suing upon a lease, therefore you are founding upon it. I object to that deed, and therefore I may be allowed to do so by way of exception without the necessity of bringing a reduction.

Although that sounds a good argument at first, there is really a fallacy lurking in it as stated, for the defender assumes without expressing it that he has a title to raise the reduction. Now, in the circumstances of this case it seems to me that the defender would have no title to raise the reduction unless he can say, as he does say, that he is the true proprietor of the subjects. That is relevant enough, but when you look at it carefully that is not the foundation of a bare action of reduction, but the foundation of an action of declarator and reduction. The very first step before we can go into the question of a reduction is for him to show that he has a title to raise that question by showing that he is proprietor, and showing that he is proprietor is a matter that cannot be done in the defence to an action for rent, but only in an appropriate process. Accordingly I think the Sheriff was wrong here in having allowed a proof upon this matter.

But then comes the question of what is to be done. The Sheriff granted a proof *de plano*, but a motion has been made tentatively by the defender, if we disagree with the Sheriff, to sist process in order that he may bring a declarator. I have had some doubt and difficulty as to this, especially in view of the correspondence which has been produced to us. But on the whole I do not think it would be safe to go upon that correspondence without anything else, and I do not think the motion is a wholly unreasonable one, for the question of who should be for the moment in possession of the £30 does not seem to me to be of very great importance. Therefore I should be disposed to sist the action, in which case we need not send it back but can keep it here, and of course put the defender under terms as to date of raising his action. I do not know that any date need be inserted, because if the action is kept here the pursuer can always move again that it be proceeded with, but I would indicate that as upon his own showing the defender is ready to go on at once with the proof, his action ought to be raised within three weeks.

LORD KINNEAR—I agree with your Lordship in all that you have said.

LORD JOHNSTON—The Sheriff-Substitute says—"The pursuer and his authors have been for many years acknowledged to be the owners of these fishings, and rent has been paid to them on that footing, and to deprive them of that status a special action would be required, and not a mere challenge of the lease in an action raised for one year's rent. To question the pursuer's right to these fishings would involve the consideration of title-deeds and charters more than a hundred years old and the discussion of matters which are undoubtedly unsuitable for this Court. I therefore think that the defender, if he wishes to challenge the lease and renewals as granted under essential error, must, in the first place, prove his right to these fishings as owner thereof by a separate action in the Supreme Court."

I think that there is great sense and justice in what the Sheriff-Substitute there says. The only point to which I take exception is where he talks about the renewals having been granted under essential error—he should rather have said that the lease had been granted by one who was *non dominus*, and who was not entitled to grant it. That, however, only strengthens the view which the Sheriff-Substitute has stated, and I have therefore no hesitation in accepting your Lordship's view.

I would myself have been inclined to sustain Mr Macphail's contention on the correspondence, because I think that that correspondence is not ingenuously dealt with by the defender in his pleadings where he says that these leases were entered into under essential error and in the erroneous belief that the pursuer had a title to the said fishings. The letters show that he was under no such erroneous belief. On their face they show that he had, in fact, some doubt whether the pursuer had a title to these fishings. Those are two very different things, and the defender's real attitude on the correspondence appears to me to justify Mr Macphail's contention; but as your Lordships think it is a convenient course to give an opportunity before disposing of this case of raising this declarator, which might be raised in any case, I do not wish to differ on that matter.

Before parting with the case, however, I should like to reserve my opinion as to whether it is obligatory in a summary cause for the Sheriff-Substitute or the Sheriff, under the 50th rule of the Sheriff Court Act 1907, not merely to hear but to dispose, *ope exceptionis*, of such a question as this. I desire to reserve my opinion as to whether the Sheriff has not power to sist even a summary cause, where that summary cause raises questions such as those raised in defence in the present case; which are clearly questions which are inappropriate to be determined in a summary cause, and, as the history of this case shows, cannot be disposed of in a summary manner.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutors of the Sheriff and Sheriff-Substitute dated 23rd July 1909 and 8th April 1909 respectively, and *hoc statu* sisted process, and found the appellant entitled to the expenses of the appeal.

Counsel for the Pursuer and Appellant—Macphail. Agents — Lindsay, Howe, & Company, W.S.

Counsel for the Defender and Respondent—Munro. Agents—Macrae, Flett, & Rennie, W.S.