ground of implied contract. These cases appear to me to have no application to the present. The transfer which the defenders refused to part with was in their possession for the special purpose of forwarding it to the pursuer, and of thus completing the transaction which they had already been paid to carry through. It would have been entirely different if documents of title had been transferred to them in security, for they could then have made their claims effective, not by retention of the documents themselves, but by realising the property to which they held an *ex facie* absolute title. Further, the transfer ought to have been delivered long before any question could have arisen with regard to the second transaction. The defenders cannot take benefit from the circumstance that they had failed to perform their duty to their client by delivering the transfer, and so were in possession of a document which they had no right to retain. On all these grounds, therefore, I have come to be of opinion, differing from the Lord Ordinary, that the defenders' claim to retain the documents cannot be sustained, and that the pursuer is entitled to decree in terms of the conclusions of the summons. . . . [*His Lordship dealt with a question which is not reported.*] . . .

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against: Find that the defenders had no right, as at the date of the action, to retain the transfer of the 100 fully-paid ordinary shares in the Globe and Phœnix Gold Mining Company, Limited, having its registered office at No. 12 Old Jewry Chambers, London, E.C., purchased by the defenders upon behalf of the pursuer on or about 19th August 1909; but in respect the said transfer has already been delivered to the pursuer, find it unnecessary to give effect to the conclusions of the summons, and dismiss the cause: Authorise the pursuer to uplift the sum of £55 consigned in bank, and grant warrant to the Accountant of Court to deliver the consignation receipt to the pursuer, and to The North of Scotland and Town and County Bank, Limited, to pay the sum therein with all interest thereon to the pursuer or his agents, and that on a certified copy of this interlocutor," &c.

Counsel for Pursuer (Reclaimer)—Solicitor-General (Hunter, K.C.)—Morison, K.C.—W. T. Watson—Guild. Agents—Sharpe & Young, W.S.

Counsel for Defenders (Respondents)—Sandeman, K.C.—Munro, K.C.—C. H. Brown—Smith Clark. Agents—W. & F. Haldane, W.S.

Wednesday, November 30.

FIRST DIVISION.

[Sheriff Court at Oban.

CAMPBELL'S TRUSTEES *v.* O'NEILL.

Process—Sheriff—Appeal—Competency—Removing—Summary Ejection—Application for Warrant—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 37—*The Court of Session Act (Judicature Act)* 1825 (6 *Geo. IV, cap.* 120), *sec.* 44.

The Sheriff Courts (Scotland) Act 1907, sec. 37, enacts—"In all cases where houses, with or without lands attached, not exceeding 2 acres in extent . . . are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant: Provided always that notice under this section shall not warrant summary ejection from the subjects let to a tenant, but such notice, whether given to or by or on behalf of the tenant, shall entitle the proprietor to apply to the Sheriff for a warrant for summary ejection in common form against the tenant and everyone deriving right from him. . . ."

The Judicature Act, sec. 44, enacts—"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 [as previously provided] by bill of advocation to be passed at once, but only by means of suspension. . . ."

In an application for a warrant for summary ejection of a tenant to whom notice of the termination of his tenancy had been duly given, the Sheriff-Substitute, after proof, granted decree as craved, and on appeal the Sheriff adhered. The defenders having appealed, the pursuers objected to the competency of the appeal.

Held that as the Sheriff Courts (Scotland) Act 1907 had left unrepealed section 44 of the Judicature Act 1825, decrees in actions of removing, which this in reality was, could only be reviewed by suspension, and the appeal was therefore incompetent and must be dismissed.

Removing—Notice of Termination of Tenancy—Validity of Notice—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 37, *and First Schedule, Rule* 112, *Form J—Removal Terms (Scotland) Act* 1886 (49 *and* 50 *Vict. cap.* 50), *sec.* 4.

The Sheriff Courts (Scotland) Act 1907, sec. 37, enacts—"In all cases where houses, with or without land attached, not exceeding 2 acres in extent, . . . are let for a year or more, notice of termination of tenancy shall be given in writing to the tenant by or on behalf of the proprietor, or to the proprietor by or on behalf of the tenant, . . .: Provided that the notice provided for

by this section shall be given at least forty days before the fifteenth day of May, when the termination of the tenancy is the term of Whitsunday, and at least forty days before the eleventh day of November when the termination of the tenancy is the term of Martinmas."

Rule 112 of the First Schedule enacts —"Notices under section 37 of this Act shall be as nearly as may be in the Form J hereto annexed. . . ."

Form J is — "You are required to remove from . . . at the term of Whitsunday [*insert year*] [*or Martinmas, as the case may be, inserting after the year the words, being the 15th day of May or the 11th day of November, or the 28th day of May or the 28th day of November, as the case may be*]."

Held (*diss.* Lord Johnston) that a notice of removal given to a tenant under section 37 of the Sheriff Courts (Scotland) Act 1907, forty days before 15th May 1910, requiring him to remove "at the term of Whitsunday 1910," but which did not specify that Whitsunday meant the 28th and not the 15th of May, was a good notice, no special paction between the tenant and the proprietor with regard to notice of removal being averred.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 37, First Schedule, Rule 112, and Form J, and the Court of Session Act (Judicature Act) 1825 (6 Geo. IV, cap. 120), sec. 44, are quoted *supra in rubrics*.

On 2nd June 1910 Richard Watson and another, trustees of the late Dr Campbell, Oban, brought an action in the Sheriff Court there against Francis O'Neill, draper and clothier, 4 Argyll Square, Oban, in which they craved the Court "to grant warrant . . . summarily to eject the defender" from the said premises. The pursuers' complaint, as stated in the initial writ, was that though the defender's occupancy had expired at Whitsunday 1910, and though he had, in terms of section 37 of the Sheriff Courts (Scotland) Act 1907, been duly warned to remove, he had refused to do so.

The notice of removal served upon the defender was as follows:—"Sir, you are required to remove from the shop 4 Argyll Square, Oban, presently tenanted by you, at the term of Whitsunday 1910."

O'Neill lodged defences, in which he averred that he was by agreement, subsequently incorporated in a missive signed by him, entitled to six months' notice of the termination of his tenancy.

He pleaded—"(1) The action is incompetent. (2) The defender not having got the notice contracted for, should be assoilzied."

On 30th July 1910 the Sheriff-Substitute (WALLACE) repelled the defender's first plea-in-law, allowed him to instantly verify his defence, and appointed a diet of proof.

A proof having been taken, the Sheriff-Substitute on 25th August 1910 found that the defender had failed to prove that any such notice had been stipulated for, and granted decree as craved.

The defender appealed to the Sheriff (M'CLURE), who on 24th September 1910 adhered.

The defender appealed.

The respondents objected to the competency of the appeal, and argued—(1) *On the Competency*—The present action, though described in section 37 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), as an action of "summary ejection," was in its essence an action of removing. Decrees in such actions were only reviewable by suspension—Judicature Act 1825 (6 Geo. IV, c. 120), sec. 44—and this appeal therefore was incompetent. Prior to the Act of 1907 the merits in such actions were discussed in the action of removing raised forty days before the termination of the tenancy, the decree obtained therein if not implemented being followed by a warrant or precept of ejection, as described by Lord Curriehill in *Hally* v. *Lang*, June 26, 1867, 5 Macph. 951, at p. 954, 4 S.L.R. 146. Such warrants or precepts were purely ancillary processes, and were the appropriate legal diligence for enforcing the decree. The Act of 1907 had reversed the order of procedure, for the notice of removal now took the place of the action of removing, leaving the merits to be discussed in the so-called "summary ejection." The summary ejection, therefore, of section 37 was in substance if not in name an action of removing in the sense of the Judicature Act 1825, sec. 44. *Esto* that prior to the Act of 1907 appeals in actions of ejection had been entertained, these appeals were in processes of ejection properly so called, viz., the summary ejection of a squatter or a person possessing without a title. Such processes were entirely different from the separate and independent action of removing applicable to the case of a tenant at the due termination of his tenancy. (2) *On the Merits*—(*a*) The procedure in the Sheriff Court had been in accordance with the statute. This was a "summary application" in the sense of section 3 (*p*) of the Act of 1907, and the procedure prescribed by section 50 for such applications had been duly complied with. (*b*) The notice was in proper form, for the Act did not provide that notices not strictly in the form prescribed should be invalid. The notice given was not ambiguous, for where a tenant's term of removal from a house or shop was Whitsunday that meant the 28th of May—Removal Terms (Scotland) Act 1886 (49 and 50 Vict., c. 50), sec. 4. (*c*) The appellant had failed to prove that he was entitled to six months' notice.

Argued for appellant—(1) *On the Competency of the Appeal*—The appeal was clearly competent. *Esto* that prior to 1907 this appeal would have been incompetent, that Act had altered the procedure as regards review, for sec. 37 allowed a landlord to apply for warrant of summary ejection "in common form," and if he chose to proceed by initial writ he must take the consequences, one of which was

that an appeal was thereby rendered competent—Act of 1907, secs. 27 and 28. (2) *On the Merits*—(*a*) The procedure in the Sheriff Court had been wrong, for the Sheriff-Substitute had followed that applicable to sec. 38, which related to cases where the let was for a period less than a year—*vide* Rules of Procedure in First Schedule to the Act, rules 115-122. That being so the Court could interfere even although the appeal were incompetent. (*b*) The notice of removal was not in the statutory form, viz., Form J, appended to the Act of 1907, and therefore the whole proceedings following thereon were inept — *Johnston* v. *Pettigrew*, June 16, 1865, 3 Macph. 954; *Somerville* v. *Kinnaird*, December 18, 1905, 8 F. 335, 43 S.L.R. 337; *Brown* v. *Kinnaird*, December 18, 1905, 8 F. 340, 43 S.L.R. 340. (*c*) The evidence showed that the appellant was entitled to six months' notice, and this he had not received.

At advising—

LORD JOHNSTON—The Sheriff Courts Act 1907, in sections 34-38, makes provision for removings which, whether intended as a complete code or not, is manifestly very incomplete. But it does more. In its general repeal of statutes it purges a good deal of previous legislation on the same subject, *e.g.*, the Act of 1838 (1 and 2 Vict., cap. 119), secs. 8-14, the Act of 1853 (16 and 17 Vict., cap. 80), secs. 29-32, the Act of 1889 (52 and 53 Vict., cap. 26), secs. 6, 7, while it leaves standing the admittedly obsolete Act of 1555, the Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 44, and the Agricultural Holdings Act 1883 (46 and 47 Vict. cap. 62), secs. 27, 28, and of course does not touch various Acts of Sederunt, particularly the important Act of Sederunt of 1756, bearing on the subject. The result has been, I am persuaded, to throw the whole matter, which was by no means devoid of confusion at any rate, into still greater confusion. If nothing else, the repeal of the Act of 1853, sec. 29, without substituting anything in its place, is a retrograde movement which will some day cause trouble. But in the present case we are concerned only with a novel shorthand method of removing, introduced by section 37 of the Act of 1907, in cases where houses without land attached, or with land not exceeding two acres attached, or lands not exceeding two acres without houses, or mills, fishings, shootings, &c., are concerned. Where these are let for a year or more, removing is to be in this manner: For the action of removing, or at least for that portion of it which concludes for a decerniture to remove, there is to be substituted a mere notice to remove, in form provided by rules of procedure, sections 112-114, and Schedule J, given at least forty days before 15th May or 11th November, whichever is the termination of the tenancy. It is therefore assumed that all such tenancies terminate on one or other of these dates, which is far from being the case, leases of fishings and shootings, for instance, seldom terminating then. But though the notice is substituted for the decerniture to remove, it is provided "that notice under this section shall not warrant summary ejection from the subjects let to a tenant, but such notice, whether given to or by or on behalf of the tenant, shall entitle the proprietor to apply to the Sheriff for a warrant for summary ejection in common form against the tenant and everyone deriving right from him." Now "summary ejection" in a popular sense is an intelligible thing, though I doubt whether the statement that the notice shall not warrant summary ejection really bears that simple explanation. But an application "for a warrant for summary ejection in common form" is an expression difficult of construction. Whether the application or the warrant is to be in common form, what is meant by "common form?"

At the date of the Act there was such a thing known as a warrant for summary ejection. But it had nothing to do with tenants. Its purpose was to eject those who were possessing without title—*vi, clam, aut precario*. It was a substantive action, in no way accessory to any other proceeding, and it was essentially summary, for it proceeded without forty days' or any other notice. But the application for it and the warrant following thereon may properly be said to be "common form." I do not, however, think that there is any other warrant for summary ejection or any application for such which could be so described.

Now the awkwardness created by this loose use of language is that by the Judicature Act (6 Geo. IV, cap. 120), sec. 44, a decree of removing is not subject to advocation, now appeal, but only to suspension, with its accompanying requirements of caution, &c., whereas a decree of summary ejection is open to appeal—*Robb* v. *Brearton*, 22 R. 885, following on the cases of *Fletcher*, 2 R. 71; *Clark*, 17 R. 1064; and *Barbour*, 18 R. 610.

In the present case an application in the form of an initial writ, under the Act of 1907, was presented to the Sheriff-Substitute at Oban, craving him summarily to eject the defender from certain premises there, the rent of which was £80. The Sheriff-Substitute evolved a course of procedure for himself, and ultimately granted decree as craved, and the Sheriff adhered. The defender has appealed. There is no difficulty as to the value of the cause. But the primary question is, whether the defender's appeal is competent, or whether his only remedy was not a suspension.

I do not think that the question can be properly dealt with without consideration of the history of process in this matter.

The Act of 1555, cap. 12, for the first time regularised removings, though it was applicable only to the removing of properly agricultural tenants. The essentials were a forty days' warning to the tenant, which has remained the period of notice to this day. Failing the tenant obeying the warning, on production of an execution thereof either to the Court of Session or to the Sheriff, the landlord might obtain a decerniture to remove, with certification

that on failure to do so "letters shall be direct *simpliciter* upon them in the said matter." The statute also provides for the defence to be instantly verified, and for no other defence to be entertained, except on caution for violent profits, which has also remained the rule. But this statute only provided for a decerniture to remove, and for a charge upon that decerniture, and not for ejection. The statute is now obsolete, and may be said practically to have been so since the passing of the Act of Sederunt of 1756, for no one would unnecessarily undertake the cumbrous method of warning dictated by it. But when the Statute of 1555 was in use and the proceedings were taken in the Court of Session, the function of that Court came to an end with the decree of removing. If a charge on that decree was not obeyed, it fell to the Sheriff to enforce it. The pursuer might either proceed by letters of removing, obtained on a bill presented in the Bill Chamber. These letters (Jur. Styles, iii. 377) did not operate directly, but charged the messenger to command and charge the Sheriff of the bounds to eject the defender "after the form and tenor of the said decree of removing and registered charge following thereon." Or after executing and registering a charge on the decree of removing, the pursuer might apply to the Sheriff direct for a warrant of ejection.

The Act of Sederunt of 14th December 1756, section 2, introduced a less elaborate procedure, privative to the Sheriff, as an alternative for that of the Act of 1555. The service of an action of removing forty days before Whitsunday was made the equivalent of the warning provided by the Act 1555, and the Sheriff was directed thereupon to proceed and determine in the removing in terms of that Act. The form of an application under this Act of Sederunt simply craves the Sheriff—for as I have said, procedure under the Act of Sederunt was confined to the Sheriff Court—to ordain the defender to flit and remove, etc., "and that under the pain of ejection"—Lees, Sheriff Court Styles, 342. And the extract decree, even in the abridged form of the Act of Sederunt 27th January 1830, Schedule C, shows what these words involved. After the decerniture to remove, and the direction to officers to charge under pain of ejection, the extract proceeds:—"Wherein, if the defender fail, that the said officers eject, remove, and put forth the said . . . defender, his family, and others aforesaid-furth and from the foresaid . . . and pertinents possessed by him, and keep, hold, and detain them furth thereof, and enter and possess the pursuer, or others in his name, therein, and maintain, uphold, and defend them in the peaceable possession thereof, and to cause inventory the hail goods and gear so to be ejected; and, if needful, to make gates and doors, and other lockfast places, open and patent, and use His Majesty's keys for that effect, and that in terms of the Act of Sederunt libelled, and laws and daily practice of Scotland used and observed in the like cases in all points." Now since the Sheriff Courts Extracts Act of 1892 (55 and 56 Vict. cap. 17), the extract which is made, section 14, the equivalent of the older form — itself as I have said, an abridgement — is simplified thus—"And the Sheriff grants warrant for all lawful execution herein by ejection at the terms or period (or the respective terms) of removal, if a charge of forty-eight hours be given prior thereto, or forty-eight hours after a charge thereafter." There is thus no separate warrant for ejection, and therefore no separate application for it required, or in use, and so far as I can ascertain there never has been in removings as these have been conducted in the Sheriff Court, and therefore none to which the term "common form" could be applied.

The only cases in which a separate application for ejection could be made to the Sheriff Court were, first, where proceedings for removing have been taken under the Act 1555 in the Court of Session, and the pursuer preferred to apply direct to the Sheriff, in place of taking out letters of ejection; and, second, where the conclusion for removing is merely ancillary to a declarator of some right in the Court of Session, in which case the intervention of the Sheriff is called for and may be obtained just as in the removing under the Act of 1555. This latter is still a possible though unfrequent case, and is, and I think has been, for much more than a century, the only case in which a separate application has been made to the Sheriff for ejection of a tenant, or one who had a right of possession though expired. Such ejections have not been regarded as falling under the category of summary ejections in the Sheriff Court. The difference between them and summary ejections is that as they are merely accessory and executorial, no proceedings of a judicial character under them are called for or indeed possible. The Sheriff acts merely as the hand or officer of the Superior Court, very much as an officer executing a diligence. His only concern is the authenticity of his warrant. The fact of an application in writing to move the Sheriff being in use to be lodged in the rare cases in which this form of ejection is necessary is a mere matter of convenience. There is no reason why the Sheriff, on presentation to him of an extract of the Court of Session judgment, should not sign a warrant to eject endorsed on the extract or otherwise referring to it. Summary ejection, on the other hand, is a substantive proceeding, which is not ancillary to a removing, and is applicable in totally different circumstances. Such ejections, as I have shown, are truly summary in this sense, that they proceed without any initial warning. But they are not applications which can be granted *de plano*. They rest on no warrant of a Superior Court. However summary the procedure may be, the party defender cannot be disposed of without the opportunity of opposing and stating his defence, if any, and having it dealt with. The proceeding is not executorial merely, but of the nature of an action, be

it a summary one. For such cases, which are not uncommon, there is "common form," and the form of extract decree will be found in the schedule to the same Act of Sederunt and statute to which I have already referred.

Turning back now to the 37th section of the Sheriff Courts Act 1907, the meaning of the provision that the notice in writing shall not warrant summary ejection is, I think, plain. If the notice is to take the place of the action of removing, *qua* its conclusions for removing, it would, according to practice, be in itself a warrant to eject. It was impossible that this private action of the landlord should be such, and accordingly what section 37 of the Act really effects is to provide a summary mode of commencing an action of removing, which with confusing inaccuracy it terms an application for a warrant for summary ejection. Let the initial procedure be shortened and simplified as much as may be, this is still a removing in fact. The pursuer will not get a warrant as merely executorial of his notice. Nor will he get his warrant as in a proceeding for summary ejection. He must establish his right to remove, and meet defences against removing as in a removing, not in a summary ejection. His action will get the summary expedition which all actions of removing get, at least in theory. But the defender is *ex hypothesi* not one without a title to possess, and he must be allowed the same opportunities to state his defence against removing as he would have had under the former procedure. It is a pity that the Act should have used the misleading term "summary ejection" for what is really a summary removing. But if the process be one truly of removing of a person with a title to possess and not an ejection of a squatter, whatever terms the statute may use, I think that we must look to the essence and not to the form, and must hold that the restriction of the Judicature Act 1825, section 44, limiting review to suspension, holds, and that the appeal is incompetent.

As regards the procedure which the Sheriff-Substitute adopted, I cannot say that I find anything unreasonable in it. He does not get much help either from the statute or its relative rules. But with one exception I see nothing to object to in the course which he has taken. I would, however, say that I think at 30th July 1910 the Sheriff-Substitute erred in allowing the defender instantly to verify his defence, and for that purpose assigning him a diet of proof. A defence is not instantly verified which requires proof. If proof is required, that should only have been allowed on caution for violent profits. Then the possible injustice of a hurried proof for the purpose of instantly verifying a defence would have been avoided. This is, I think, material in the matter of procedure. But it does not involve any illegality which would make an appeal a competent remedy.

But there is another point which was argued, and which from one point of view requires consideration, notwithstanding the reasons which I have advanced for holding the 44th section of the Judicature Act 1825 to be applicable to the new statutory process of removing. It was maintained that the removing or ejection was without warrant, because the notice of 31st March which preceded the action was ineffectual. It simply requires the defender to remove at the term of Whitsunday 1910, and does not specify whether the removal term in the case in question is 15th May or 28th May. It is true that the Removal Terms (Scotland) Act 1886 (section 4) provides that a Whitsunday ish shall import obligation to remove at noon on 28th May. But that is only "in the absence of express stipulation to the contrary." Hence the schedule form J appended to the statutory rules of procedure, if followed, requires the insertion after the word "Whitsunday" of the words "being the 15th day of May" or "the 28th day of May," as the case may be. Without these explanatory words the notice is, in my opinion, indefinite and therefore bad. And I cannot explain away their absence as the Sheriffs do by assuming that the words in rule 112, "as nearly as may be in the form J," sanction the laxity.

If, then, the notice was bad, there is ground for review, but I do not think that this class of objection warrants an appeal in place of a suspension. The case is distinguishable from *Clark* (17 R. 1064), and *Barbour* (18 R. 610).

On the merits of the question, to which the proof was directed, were it necessary for the disposal of the case, I should agree with what I understand to be your Lordships' opinion that the defender has failed to establish his defence. But I think that the proper course is to dismiss the appeal as incompetent.

LORD PRESIDENT — I agree with the opinion just delivered with the exception of one part of it at the end as to the notice, upon which I hold a contrary opinion.

I think it is impossible to read the 37th section of the Act in such a way as to make the words really fit the state of the law as it existed at the time of the Act in respect of removings, and I concur entirely in the very careful inquiry that has just been made by my brother Lord Johnston dealing with the various kinds of removings and ejections that were possible under the older law. But while I am unable to think that the draughtsman of section 37 had really before him the precise state of the law as it has been explained by my brother, I think at the same time, as is often the case, it is not very difficult to get at the general idea which was underlying the draughtsmanship of section 37, and I think in these cases it is our duty, however inaccurate in terms we may find the Act, to give effect to what we consider the spirit, so long of course as the words used do not absolutely preclude us from so doing.

Now, put in general and untechnical language, what I think the idea of section 37 was, was this—Hitherto where you were

dealing with the turning out of a tenant you had first an action of removing, and in that action of removing after you got decree—that is to say, after either he had not opposed your getting the decree of removing, or, if, after having tabled such defences as he had against your getting it, those defences were repelled—after you got your decree of removing you then proceeded to the subsequent stage of ejection. Now the meaning of section 37, I think, was clear enough, and it was this, to sweep away all the chapter one of that proceeding, and to leave only chapter two—to sweep away chapter one, provided only that proper notice was given, namely, forty days before the term.

Well of course under the old law you could join issue upon what I may call the merits in the action of removing. If those merits were once determined it was impossible to raise them again in the process of ejection, which was a mere sequel to what had already been done. And that was equally the case whether chapter one, as I call it, had happened in the Court of Session or in the Sheriff Court. There could be three positions so far as an ejection was concerned. They have all been detailed by Lord Johnston, and I merely repeat them again for clearness. There was the case where the removing itself was in the Sheriff Court, and there, if decree were got, ejection followed as a matter of course always. There was next the case where you had got decree in an action of removing in the Court of Session, possible but utterly obsolete for well over one hundred and fifty years, because of the extreme difficulties of the particular class of notice that you had to give under the old Act of 1555. And there was the third class, no doubt rare but not unknown, because I remember a case in my own practice where an action of declarator of removing was brought in the Court of Session against a person who was really a squatter, but where though decree was got there were no operative conclusions for turning the person out, and you had to go to the Sheriff Court to get the operative decree in the ejection. Well, those are the three cases, and they exhaust the whole category of ejections exclusive of the summary ejection of a squatter.

Now in each and all of those cases the merits were discussed, if there were any merits, in the action of removing or declarator. By the change that is here made—for of course there must be an opportunity of discussing the merits—it is absolutely necessary that their discussion should be allowed in what is here called the petition for ejection in common form. That is a change from the old law, where what was done was merely something ancillary to something that went before, and where no discussion on the merits could therefore be allowed. That is the whole meaning of section 37—simply to cut out the action of removing, substitute the mere notice, and then allow the objections to be stated in the ejection instead of in the removing. I agree with Lord Johnston that the result of that is to leave the Judicature Act where it was, and accordingly to prevent an appeal from the Sheriff Court to this Court upon the questions there raised, leaving the person who is aggrieved by the decision in the Sheriff Court, if he chooses, to raise the matter by suspension, which of course differs from a pure appeal in this important respect, namely, that in a suspension you have to find caution, and that I think is quite right.

Accordingly I think here that the appeal is incompetent, and ought to be dismissed. But one or two matters were argued upon which I think it is necessary to say something.

Now the bottom of the whole matter is, of course, the notice. As to that I differ from my brother Lord Johnston. I think here the notice was a good notice, and I think that the Sheriff-Principal has put the matter upon the proper grounds. The Act says that notice to remove may be in this Form J, but there is no absolute sanction of that particular form, though if any real prejudice was done to a person who got a notice in a different form, then I think we should hold it was a bad notice. But I cannot hold that this is a bad notice here, because it being undoubtedly given forty days before the earlier term, I mean the 15th May, the recipient is not in any way hurt when it is not explained to him that Whitsunday means on this occasion the 28th May rather than the 15th, because the Act of Parliament says it for him, and he cannot be turned out before the 28th. It would be a different thing if, by special paction between him and the proprietor, he had agreed, notwithstanding the Act of Parliament, to turn out upon the 15th. Then I think it might very well be that a notice at Whitsunday generally would be a bad notice, because then the proposal would be to turn out on the earlier date. But inasmuch as here it is not proposed to turn the tenant out until the later date, I do not see that he has suffered any prejudice, and therefore I think it is a good notice.

Well, now, the next point that was raised was this. It was said here that the Sheriff had taken the wrong procedure, in respect that he had not gone on with an ejection in common form, but had really followed the forms of procedure which are laid down in connection with the summary removing under section 38, which are really summary removings for houses or heritable subjects let for under a year. Now there is no doubt that if one looks at the interlocutors in this case one is driven to the conclusion that as a matter of fact the Sheriff has copied the forms which are given in the Act in connection with the summary removings dealt with under section 38. I cannot escape that conclusion. But there again it does not seem to me to vitiate the matter, because, as has already been pointed out by my learned brother Lord Johnston, summary ejection in common form is not a *nomen juris* at all. You are not helped by that; and therefore it practically comes to be this, that you are told

to have a petition of summary ejection in common form, and then the Act does not tell you anything about what this common form is.

Now I think that really left the Sheriff master of the situation, whether he should treat this as an ordinary petition, or whether he should treat it—as he has done—as a summary application. I do not think it would have been wrong if he had proceeded to make up a record in the ordinary way. The initial writ as it stands would, of course, square with either method of procedure afterwards, and if the Sheriff had proceeded in the ordinary way—that is to say, the ordinary way which is followed upon an initial writ in an ordinary action in the Sheriff Court—I should not have held that he was wrong. But on the other hand I as little hold it wrong that he did what he did.

I say this because it was very strenuously argued by the counsel for the appellant here that he had been badly prejudiced by not having his case made up in the ordinary way. Well, I cannot see that he suffered any prejudice at all. If I had thought that, in looking at the proof and in looking at the way the defence was brought out, any prejudice was put upon him in stating his defence, I should have come to an opposite conclusion. But I think here there was no prejudice, and although I am inclined to think the more correct method would have been to have proceeded in the other way, I do not think for a moment that that can vitiate the whole proceeding. I think here the defender had an opportunity of stating every defence which he had, and that it made no difference whatsoever that that defence was not stated by way of condescendence and answers, but was stated in the summary form in which it was. I will go further and say—although, of course, it is not necessary for the determination of the case—that I am absolutely satisfied that this defence is made merely to gain time, and that there is no substance in it whatsoever.

The judgment of the Court, I think, however ought to be that this appeal is incompetent, and that the matter ought to have been raised by suspension.

LORD KINNEAR—I agree with both of your Lordships who have spoken that this appeal is incompetent for the reasons which have been so fully explained by Lord Johnston, and that the only method in which the appellant's complaint can be considered is by suspension. On the point on which your Lordships are not agreed I agree with the Lord President, and as it is of some general importance I only add one observation to what has been already said. I think the principle upon which this question must be determined is very clearly expounded in the case of *Johnston* v. *Pettigrew*, 3 Macph. 954, to which the learned Sheriff refers. The Sheriff says—and I think quite rightly—that that case is to be distinguished from this, but that is only because the principle there explained must operate differently upon totally different facts, and the real difference between the two cases is of that kind.

In that case the question was whether the method prescribed for completing a real right in an easier and cheaper form than had been formerly necessary had been properly followed. An Act of Parliament allowed registration of a disposition in the register of sasines upon a warrant for registration if presented in a certain form. The Court held that a warrant for registration that did not comply with the directions of the statute prescribing the form was ineffectual. But then they explained—I think very clearly—that the question before them was whether there was any substantial departure from the form prescribed by the statute, or whether, the form being substantially correct, there had been merely a trivial and literal deviation from it.

The ground of judgment is, I think, very clearly explained by the Lord Justice-Clerk (the late Lord President Inglis), and he says that if the statute dispenses with formalities which are found to be cumbrous and expensive, and allows the lieges to attain the same object by a cheaper and a simpler method, provided they follow a certain prescribed procedure, they must follow that procedure in all essential matters or lose the benefit of the statute. But then he said if the departure from the prescribed method is merely trivial, that may be of no consequence; and therefore you must consider whether the method actually followed serves the purpose for which method is prescribed at all.

Now in that statute the purpose of prescribing the method was that people dealing with property on the faith of the records should be able to see who the person was who was infeft in such property. And the Lord Justice-Clerk points out that if you register upon a warrant in favour of somebody who is not designed you give no information as to who the person infeft really is. The warrant in that case was in favour of A B without designation, and therefore the warrant was not good.

Applying the same principle to the present case, I think the learned Sheriff was quite right in considering whether any possible prejudice could accrue to the defender from the failure of a notice to inform him that the term of Whitsunday, upon which he was to be removed, was the 28th May. I think that the Sheriff was perfectly right in saying that he could suffer no prejudice, because he knew perfectly well (and he had an Act of Parliament to decide it for him) that the term of Whitsunday to which the notice referred was the 28th of May and not the 15th. Neither party had given or accepted notice of removal for the 15th, and therefore the omission of the words "28th May" was unimportant. It may very well be, as the Lord President has pointed out, that a similiar omission in other circumstances might lead to a totally different result. But in this par-

ticular case I agree with the Sheriff and the Lord President that the notice is good.

LORD MACKENZIE gave no opinion not having heard the case.

The Lords sustained the objection and dismissed the appeal as incompetent.

Counsel for Pursuers (Respondents)—Wilson, K.C. — Macgregor. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Defender (Appellant)—Morison, K.C.—Paton. Agents—Gill & Pringle, W.S.

REGISTRATION APPEAL COURT.

Monday, November 28.

(Before Lord Ardwall, Lord Mackenzie, and Lord Skerrington.)

NIVEN *v.* ABERCROMBIE.

Election Law — Lodger Franchise — Joint Occupation of Lodgings — Registration Amendment (Scotland) Act 1885 (48 *and* 49 *Vict. cap.* 16), *sec.* 13.

In a claim to be enrolled on the register of voters as a joint tenant in respect of lodgings described as "joint use of bedroom," the declaration of claim stated that the lodgings in question were of a clear yearly value if let unfurnished of £20 or upwards. There was no statement of the number of lodgers with whom joint use was enjoyed.

Held that in case of ambiguity the construction which favoured the validity of the claim ought to be adopted, and that in the absence of proof to the contrary it was to be assumed that there were not more than two joint lodgers in lodgings of the annual value of £20 in respect of which a claim was made by one as joint tenant.

The Registration Amendment (Scotland) Act 1885 (48 and 49 Vict., cap. 16) enacts—Section 13—"Where lodgings are jointly occupied by more than one lodger, and the clear yearly value of the lodgings if let unfurnished is of an amount which when divided by the number of lodgers gives a sum of not less than ten pounds for each lodger, then each lodger . . . shall be entitled to be registered." Section 14—"In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall for the purposes of revision be *prima facie* evidence of his qualification."

At the Registration Court for the Burgh of Paisley, held at Paisley on 3rd October 1910, John Balfour Symington Abercrombie, architect, Paisley, claimed to be enrolled on the register of voters as a joint tenant in respect of lodgings described as "joint use of bedroom in Craigmuir, Meikleriggs, Paisley." His declaration of claim stated that such lodgings were of a clear yearly value if let unfurnished of £20 or upwards.

No separate form of claim for joint lodgers is provided by The Registration Amendment (Scotland) Act 1885 or by any other statute.

The declaration annexed to the present claim was in the following terms—"I, the above-named John Balfour Symington Abercrombie, hereby declare that I have been, during the twelve months immediately preceding the last day of July in this year, the occupier as joint tenant of the above-mentioned lodgings, and that I have resided therein during the twelve months immediately preceding the said last day of July, and that such lodgings are of a clear yearly value if let unfurnished of twenty pounds or upwards."

Mr MacRobert, solicitor, appeared for the claimant. Mr Lochhead, solicitor, for William Niven, joiner, 12 Lady Lane, Paisley, a registered voter, objected to the said claim (1) that it was not made in proper form; (2) that *ex facie* of the said claim the joint bedroom did not appear to be of the clear yearly value of £10 for each lodger. He argued that it was essential, under section 13 of the Act of 1885, above cited, that the clear yearly value of the lodgings jointly occupied should, when divided by the number of lodgers, yield a sum of not less than £10 for each lodger; that the claim did not state what the number of joint lodgers was, or that the number was not more than two; and that there was nothing before the Court to show that the clear yearly value of the lodgings when divided by the number of lodgers was sufficient to give a sum of not less than £10 for each lodger. He contended that the claim was therefore bad, or at least that the omission of this essential statement displaced the statutory presumption enacted by section 14 of the said Act, and that the claimant therefore required to prove his claim. He moved that the claim be rejected.

It was not alleged that more than two persons did occupy these lodgings. No evidence was led or tendered by either party.

The Sheriff held (1) that it was quite competent to adapt to the case of a joint lodger the form prescribed by Schedule I of the Representation of the People (Scotland) Act 1868, and that though it would have been more accurate to have added after the words "£10" the words "for each lodger," yet considering that the joint lodgings consisted of only one room, and that in case of ambiguity the construction which favoured the validity of the claim ought to be adopted, he repelled both objections and admitted the claim. Thereupon the agent for the objector required him to state a Special Case for the Registration Court of Appeal

The *questions of law* were—"(1) Is the said claim *ex facie* invalid in point of form; (2) if not invalid, does the omission to state that the number of lodgers is not more than two, or that the clear yearly value is sufficient to give not less than £10 for each lodger, displace the statutory presumption