survivors of them, or its equivalent under the recent statutes, but that affects only the mode of completing his feudal title, and does not touch the substantial right to the subject which is in him as representing the children. Neither of the services expede by the pursuer to the original disponee and to Janet Douglas, could, in the views I take of the case, carry anything; and the action has consequently, in my opinion, been rightly disposed of by the Lord Ordinary.

LORD BENHOLME—I cannot hesitate to concur. It is very fortunate that we had such an able pleading by Mr Watson, because that pleading showed how far in logical sequence the argument could be pushed in defence of his client. And after all we have heard there seems to be no solid ground for his contention. When the mother after her marriage took the title in favour of herself in liferent and her children in fee, there were two children alive. Others came into life afterwards, and four survived her. It is not of much importance whether, at the date of the deed, children were alive or not, but as some were then born the case is stronger than that supposed by the Lord Ordinary, there being at the date of the deed fiars in life.

Well then, what was the right of those fiars? If simply heirs they never served, and might be passed over; but that was not their position. They were disponees—singular successors—having a right vested in their mother's failure, which, whether they during life made up their title or not, was transmitted to their representatives. It is a somewhat delicate question, what was necessary to transmit the right of the children *inter se*,—whether a general service was required, or whether it acted by accretion without service. But we need not inquire into that, because all the children who survived their mother died without having made up a title; and the present defender might make up a title to the whole property. It has been argued that the children might have served to their mother, and that if so they must be heirs, and that the fee is gone because they did not serve.

If a party entitled to a beneficial interest is an heir and does not serve, he dies without a vested interest, but if his interest is that of a disponee, he does not require any title to give him a transmissible right, although to give him a feudal right a form must be gone through either by special service or declaratory adjudication. In either case it is only a form—a shadow—which is taken up, although that must be taken up before the feudal title is complete.

Now it is only through Mr Douglas that the pursuer can claim any connection with this fee; but how anything was left in Mr Douglas after the title was taken to his daughter in liferent allenarly and her children in fee, and infeftment thereon, it is impossible for me to see. There seems an impression that a fiduciary fee in favour of non-existing persons is no fee at all, but I cannot agree to that.

I quite agree that the finding in the Lord Ordinary's interlocutor, which implies that the defender could not have succeeded if the property had not been conquest, must be altered. I do not think the question is in the least degree affected by inquiring whether the property was heritage or conquest in the children, as the defender is heir both of heritage and conquest.

The LORD JUSTICE-CLERK concurred.

Agent for Pursuer—James Somerville, S.S.C.
Agent for Defender—James Webster, S.S.C.

Tuesday, January 11.

FIRST DIVISION.

GATHERER *v.* CUMMING'S EXECUTORS.

Landlord and Tenant — Lease — Barn — Custom—Thrashing-Mill. Held that an outgoing tenant under a nineteen years' lease expiring at a Whitsunday term was not by law entitled to retain his thrashing-mill in one of the barns in order to thrash the crop of the year, and that he had failed to prove the existence of such right by the general custom of the district. But *observed* that he might be allowed to stack his crops on the ground for a reasonable period till a favourable opportunity of selling them.

In 1846 the pursuer became tenant under a nineteen years' lease of the farms of Easter and Wester Muirton, of which the late Sir William Gordon Cumming was proprietor; and as there was no thrashing-mill on either of the farms he erected a large thrashing-mill in connection with one of the barns. At Whitsunday 1866, being the term of expiry of the lease, the pursuer maintained that by the custom of the county, or at least of the county of Moray, he was not bound to remove his thrashing-mill, but was entitled to continue his occupancy of the barns and thrashing-mill-house attached for the purpose of harvesting and thrashing the growing corn crop of the year. The agents for the incoming tenant and the proprietor's factor requested the pursuer to remove his thrashing-mill and various other articles, but he refused to do so; and ultimately, on 10th August 1866, the proprietor's agents wrote to the pursuer, stating that if he did not remove the mill by Tuesday the 14th of that month, the proprietor would, in virtue of his powers under the tenant's letter of removal, and the custom of the district, cause it to be removed, and placed in a convenient portion of the steading, in order that the new tenant might put in a mill for himself. The pursuer's letter of removal was as follows:—"*Elgin, 2d April* 1866. Sir, I am to remove from the farm and lands of Muirton and Paddockdale at Whitsunday next 1866 as to the houses, grass, and pasture lands, and land intended for fallow and green crop, and at the separation of the crop of the year 1866 from the ground as to the land in grain crop. I am, your obedient servant, (signed) GEO. GATHERER." As the pursuer still persisted in his refusal to remove the mill, and it was necessary for the purposes of the incoming tenant that he should have the mill-house as well as the barns, with a view to storing and thrashing the grain which he would require in the autumn and winter, Sir Alexander employed a sheriff-officer, assisted by skilled mill-wrights, to remove the mill. This they did on 23d August 1866, with all due care, and placed it in a shed on the farm, where it remained, and from which the pursuer had all along opportunity of removing it. The pursuer asserted that the value of his mill was £41, 12s. 6d.; and this sum be now claimed, and £30 as being the expenses he had incurred in consequence of having to remove his crop to another place and thrash it there. The defenders denied it was the custom of the country, or

of Morayshire, to let the outgoing tenant have the use of the barn for harvesting and thrashing the way-going crop. A proof was led; and on 9th July 1869 the Lord Ordinary (BARCAPLE) pronounced an interlocutor in which he found (1) that the pursuer had failed to prove the existence of the usage he alleged; (2) that the landlord was entitled to remove the mill as he had done; and (3) that the pursuer had not proved that he had applied to the landlord for the use of the farm-yard to stack his way-going crop, or for the use of the barn for thrashing thatch for his stocks and proofing his corn, or that the landlord had refused these accommodations.

The pursuer reclaimed.

DEAN OF FACULTY and KEIR for him.

SOLICITOR-GENERAL and BALFOUR in answer.

At advising—

LORD PRESIDENT—The term of the pursuer's removal was Whitsunday 1866; and on 2d April preceding this he granted a letter of removal in the following terms—(*reads*). This letter made no change in the term of ish—it remained, as in the lease, a Whitsunday ish. The outgoing tenant is entitled to a limited possession for a limited purpose, not for any definite time, but till he is able to separate the growing crops from the soil; and the moment that the crop is reaped and carried away this last remnant of a right disappears. The tenant, therefore, has no right to any use of the buildings. This, I think, is settled law in spite of the respectable authority of Mr Hunter in his Law of Landlord and Tenant to the contrary. It has been settled decisively in the case of *M'Ewen* v. *Paterson*, and in other cases here and in the House of Lords.

But still the outgoing tenant, though he has no right by law to the possession of any of the buildings, may yet have by established and recognised custom a right of this kind. This right would, to judge from the correspondence of the parties, justify a demand (1) to have the thrashing-mill retained on the farm till the outgoing tenant has got all his corn thrashed, and (2) to have the use of the barn and stackyard till he had got all his corn thrashed by his own thrashing-machine. Now a custom, to amount to the force of law, must be a general and recognised custom. It must occur in most cases. But so far is this from being the case that, even particularly in Morayshire, the growing crop is purchased along with the thrashing-machine by the incoming tenant. The general case that occurs is, where there is no hostility between outgoing and incoming tenant, and irrespective of their legal rights, they accommodate one another. But what the pursuer asserts is, that he is entitled by general custom to retain the use of the barn for his thrashing-machine and thrashing purposes till it may be the June or May of the following year. This on the face of it seems absurd; and I do not think it is in the least borne out by evidence.

Then there is another demand made by the pursuer, viz., that he was entitled to stack his corps on the ground till he had a favourable opportunity of sale. I think if an outgoing tenant made such a demand for a limited period on reasonable grounds he would be entitled to what he asked. But the claim made here is not of that kind; it seems to have been only a correspondence with the defender's agents, in which, as is not uncommon, the parties seem only to have succeeded in misunderstanding one another. I think the Lord Ordinary is right on both grounds; and I am therefore for adhering to his interlocutor.

LORD DEAS was absent.

LORD ARDMILLAN—The tenant is entitled to the use of the farm for a limited period, viz., to reap his growing crop; and I further think he is entitled to the use of the machines necessary therefor, as subordinate to this right. But what the pursuer avers is, that by almost universally established custom in Morayshire he is entitled to a use of the barn to keep his thrashing-machine in. I can only say that I think he has not only not established this alleged general custom, but that the evidence seems to me to bear out precisely the reverse. The result of the evidence seems to me to be that he is entitled to the use of the stackyard, or of ground to stack his crop on. It has been said in the course of the argument that the incoming tenant might appoint to the outgoing tenant a site in a distant and out of the way field to stack his crop in. But we have no reason to suppose that he would. There is nothing in the evidence to justify such a hypothesis. And even if it did take place, the utmost that the outgoing tenant would suffer, would be the time and trouble of carriage of the crop to that place. But what the pursuer asserts here is that he was entitled not to this, which I think he is entitled to, but to a right to deprive the incoming tenant of the use of his barn in order that he might keep his thrashing-mill in it and thrash his corn there. And he seeks damages for the denial of this right, not from the succeeding tenant, but from the landlord. Now this is not a reasonable mode of arguing at all. And I do not think that, either in law or in custom, is there anything to justify the pursuer in his demand. I therefore agree with your Lordship in thinking we should adhere to the Lord Ordinary's interlocutor.

LORD KINLOCH—The Lord Ordinary has decided the case on the footing of its involving two separate points; and I think he has done so rightly, because, even if the tenant were right in everything else, he might not be entitled to retain the thrashing-mill on the farm merely that he might have the opportunity of thrashing his corn with his own thrashing machine. I think the Lord Ordinary is right in holding that he was not entitled to this alleged privilege. The thrashing mill was simply one of the moveable implements of the farm. It is because it was so that the tenant had right to remove it at all; and I think he was bound to remove it at the same time with the other implements. There has been no usage proved to support the retention claimed.

On the other point disposed of, I think the Lord Ordinary is also right. The right claimed by the outgoing tenant to occupy the stackyard and barns is alleged by him to have rested on usage. But if so, the customary right did not require to be inserted in the incoming tenant's lease; and the landlord cannot be claimed against because he did not so insert it. The outgoing tenant was as much entitled to vindicate the right, if it existed, against the incoming tenant, as if it was expressly mentioned in the latter's lease. The pursuer, accordingly, went against the incoming tenant; and when the latter, as is averred, refused the accommodation asked, the pursuer did not call

on the landlord to vindicate his alleged right. Nor in truth did the pursuer do so himself. On the contrary, he made a quiet, and I think a very wise, arrangement with a neighbouring farmer, by which he obtained permission to stack and thrash his corn on the adjoining farm. I am of opinion, with the Lord Ordinary, that the pursuer cannot now insist in any claim of damages against the landlord for want of the accommodation said to have been due to him at the time. Most certainly he was not entitled to claim the whole of what he demanded; and of which I do not see that he ever abated a jot, or would take less than the whole; and whatever reasonable facilities he might have fairly asked for stacking and disposing of his crop, I think the want of these cannot be visited on the landlord, from whom such facilities were not asked, and by whom they were not refused.

I am of opinion, with your Lordships, that the Lord Ordinary's interlocutor should be affirmed.

Agents for Pursuer—Stuart & Cheyne, W.S.

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

Tuesday, January 11.

SHOTTS IRON COMPANY *v.* TURNBULL, SALVESEN & CO.

Amendment of Record—Issue—Summons—Interest—Reclaiming Note. Where a party sought to have a conclusion for additional interest inserted in the summons, with a view to have the additional interest claimed in the issue, *held* that the proper procedure was by Reclaiming note, but that the note must be refused, as the amendment sought would enlarge the sum under the jurisdiction of the Court.

Observed (*per* Lord President) an Act of Sederunt is not to be read so strictly as an Act of Parliament.

In the original conclusions of the summons, interest on the principal sum from the date of the action was not asked. The Lord Ordinary (BARCAPLE) refused to allow the amendment in order to its being introduced into the issue. The pursuers reclaimed; but it was objected to their reclaiming note—(1) that by sec. 29 of the Court of Session Act the Court have no power to amend the summons so as to subject to their jurisdiction a larger sum than was concluded for in the summons or other original pleading; and (2) that if the pursuers only proposed to vary their issue, by sec. 6 of the Act of Sederunt following on the Court of Session Act, such was not competent by reclaiming note but only by motion. By sec. 28 of the Court of Session Act it is provided that any interlocutor of the Lord Ordinary as to probation under sec. 27 shall be final unless it is reclaimed against within six days; "Provided always that it shall be lawful to either party within the said period, without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired." And by sec. 29 it is provided:—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made: Provided always that it shall not be competent, by amendment of the record or issues under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment." Section 6 of the relative Act of Sederunt provides:—"When an interlocutor has been pronounced by a Lord Ordinary approving of an issue or issues, under section 27, sub-section 3, of the said recited Act, it shall not be necessary nor competent to reclaim against the said interlocutor if the party aggrieved thereby desires only to obtain a variation of the terms of the issue or issues, and does not desire to have such issue or issues, or one or more of such issues, disallowed *in toto;* but, in every such case, the party shall apply by motion to the Inner House, in terms of the 28th section of the said recited Act, specifying precisely in his notice of motion the particular variation or variations which he desires should be made on the said issue or issues, and at same time box copies of the record."

MILLAR Q.C. and SCOTT for the reclaimers.

SOLICITOR-GENERAL and MONCRIEFF in answer.

At advising—

LORD PRESIDENT—The interlocutor under review is pronounced under sec. 27 of the Act of 1868. There were two courses open to the pursuers here. The Act of Sederunt contemplates only two courses: the one where the party coming to the Court seeks only to vary the terms of one of the issues, the other where he seeks to have it set aside *in toto.* But there is a third case, not contemplated by the Act, and that, I think, is the one here. No doubt the ultimate object is to vary the terms of the issue, but it is to be done by recalling the Lord Ordinary's interlocutor. An Act of Sederunt is not to be read so strictly as an Act of Parliament. The only thing that throws light on an Act of Parliament is itself. But an Act of Sederunt is only a canon or rule of Court. And I am, therefore, not moved by the argument of incompetency urged here.

But the insertion of the words "with interest from the date of citation," vary the sum by enlarging it; and that is increasing the sum under the jurisdiction of the Court. This may, perhaps, be done in an action of count and reckoning; but that is the only case where it is allowable. This therefore is a case where a reclaiming note was the only way competent.

But then, when we come to consider the note on the merits, there are objections made. It is said we cannot alter the summons or record. I think it would be competent to vary the terms of a summons or record so as to have the matter at litigation put an end to. But then it is objected, that this alteration is struck at by the proviso in the end of the section. The proviso renders such amendment incompetent where the sum under our jurisdiction would be enlarged. The two sums under jurisdiction are the principal sum of £2920, 17s. and the sum of £621, 0s. 10d. of interest up till the date of the action, and the proposed amendment would subject to our jurisdiction, not only these sums, but the interest from the date of citation till paid in addition. Can it be doubted