The Court unanimously recalled the interlocutor of the Lord Ordinary, and held George Robertson entitled to half of the fund *in medio*, and the trustee on Peter Robertson's estate entitled to the other half, and found no expenses due by or to any of the parties. The terms of the deposit-receipt were peculiar. The nature and effect of such a deposit-receipt had been settled by the Court in the recent case of *Watt's Trustees*, and it was quite settled that the effect of depositing money in bank on such a receipt did not in any way effect the transfer of the money. If, indeed, the deposit-receipt had been delivered by Peter Robertson to George for the purpose of transferring to him the money, a different state of matters might arise; but they could not hold that that had been proved in this case, seeing that George Robertson had not thought fit to call as a witness his mother, Mrs Robertson, to whom he alleged that the receipt had been given for him. Taking the deposit-receipt as it stood, the effect of it was —taking into consideration its terms, and along with that the undoubted fact that the money in the receipt arose from profits of the vessel "Tay," which belonged half to George and half to Peter Robertson—to give the presumption in law that the money belonged half to George and half to Peter. There was no proof either one way or the other to overcome this presumption, to which therefore the Court would give effect. As to the question whether George was merely a creditor on Peter's estate, that was disposed of by the consideration already alluded to, that the money in question was proved to be wholly the profits of the vessel. It was put into a separate account formed exclusively of the proceeds of the joint adventure. In regard to Mrs Robertson's claim, she had no right in competition with the trustee on her husband's estate. No claim had been lodged by her in the process until after the sequestration of Peter Robertson's estate had been awarded. She was merely a creditor of Peter Robertson, and must claim in the sequestration along with Peter Robertson's other creditors.

Agent for George Robertson—James Webster, S.S.C.

Agent for Trustee on Peter Robertson's estate—W. Officer, S.S.C.

Agents for Mrs Peter Robertson—Ferguson & Junner, W.S.

Friday, January 14.

FIRST DIVISION.

FRASER *v.* HIBBERT.

Jurisdiction—Lease— Citation — Co-defender — Conjugal Rights Act—Divorce—Heritage—Shootings. Under a conclusion against an Englishman for expenses as co-defender in a divorce suit, *held* (1) that his holding a lease of heritage in Scotland subjected him to the jurisdiction of the Scotch Courts; but (2) that § 7 of the Conjugal Rights Act has not this effect, but only gives a power of citation.

Question, whether a lease of shootings without any heritable adjuncts would suffice to give jurisdiction?

In an action of divorce for adultery by Mr Fraser, formerly of Skipness in Argyllshire, against his wife, Colonel Hibbert of 3 Carlisle Place, Victoria Street, Westminister, was cited as co-defender in the action edictally, and also by leaving a copy for him at a shooting lodge of which he was lessee, and in which he was confined to bed by illness; the conclusion against him being of course for expenses. He maintained that he was not subject to the jurisdiction of the Court, in respect that he was not domiciled in Scotland, had no heritable property in Scotland, and had not been personally cited. His lease gave him right for five years from 15th May 1869 to Ardlussa shootings, the shooting lodge, pertinents and garden, and also the grazing ground and grass parks. The lease was to Colonel Hibbert "and his heirs, but expressly excluding all assignees, legal or conventional, and sub-tenants."

The Lord Ordinary (ORMIDALE) gave effect to the plea of no jurisdiction.

The pursuer reclaimed.

MONCRIEFF and GLOAG, for him, argued—The defender is amenable to the jurisdiction of the Court, in respect (1) of the Conjugal Rights Act, (2) of his tenancy of lands and shootings in Scotland; and (3) of the *locus delicti* and *locus* of citation being both in Scotland. By the Scotch Conjugal Rights Act citation of the co-defender is permissive; by the English it is imperative. If the defender is resident in Scotland, no statute need have been passed to make citation of him competent. The statute can only have been passed to allow citation of a person not amenable in respect of domicile or arrestment to the Court's jurisdiction. A lease of heritable subjects must subject the lessee to the Court's jurisdiction. Long leases can be registered. A lease is not necessarily of a more temporary character than ordinary land rights. It would be strange to say a person may be tenant of a large farm for a long period, a lessee of extensive and valuable mines, and not be subject to the Court's jurisdiction. The Court would surely have jurisdiction if one tenant used defamatory language towards another. The decree could be given effect to by poinding the sheep, or guns, or dogs. An agricultural lease is a lease for a limited object. Authorities—24 and 25 Vic. c. 86, § 7 and 10; 20 and 21 Vic. c. 85, § 28; Erskine 1, 2, 18 and 19; Bell's Com. 1, 66; *Carrier* v. *Carrier*, 34 Law Jour. P. and M. 47; *Tomkins* v. *Tomkins*, 27 Law Jour. P. and M. 54; *Ferrier* v. *Woodward*, June 30, 1831; *Macarthur* v. *Macarthur*, Jan. 12, 1842; *Hunter* v. *Gray*, Dec. 22, 1844; *Kirkpatrick* v. *Irvine*, June 23, 1838, H. L.; *Douglas* v. *Jones*, June 30, 1831; *Shaw* v. *Dow*, Feb. 2, 1869; *Charles* v. *Charles' Trustees*, March 29, 1868.

SOLICITOR-GENERAL & LANCASTER, for Colonel Hibbert, replied—The purpose of § 7 of the Conjugal Rights Act is to allow of the co-defender being made a party to the action, which formerly he could not be. An English statute cannot confer jurisdiction against a Scotchman. A lease is not a heritable right. In its nature it is a mere personal contract. It has been decided that the tenant under an agricultural lease may not fish for trout, such a right being incident to a heritable right; and a lease is not such a right. It is a lease of a limited character; and so is a lease of shootings. The shootings were the principal right; and the occupancy of the house incident to it. The right created by the lease in connection with the land is of a temporary nature. Decree against Colonel Hibbert might prove abortive, as the lease excludes assignees and sub-tenants. Authorities—

Erskine, 1, 2, 16; Erskine, 2, 6, 23; *Gaynor* v. *Gaynor*, 31, Law Jour., P. and M., 116; *Birkbeck* v. *Ross*, Dec. 22, 1865; *Maxwell* v. *Copland*, Nov. 30, 1868.

At advising—

Lord President—By the interlocutor under review the Lord Ordinary has sustained the first plea in law for the co-defender, to the effect that Colonel Hibbert is not subject to the jurisdiction of the Court. He is co-defender in an action of divorce for adultery, and of course the only conclusion against him is for expenses. This is therefore not a question of jurisdiction for purposes of divorce, but simply as if it were a question of personal debt.

The first of the two reasons on account of which it is alleged there is jurisdiction against Colonel Hibbert is the 7th clause of the Conjugal Rights Act. I think it does not subject Colonel Hibbert to our jurisdiction. It only gives the pursuer a right to cite him in the case, if otherwise under our jurisdiction.

The second ground put forward for subjecting Colonel Hibbert to our jurisdiction is, that he is lessee of shootings in Scotland. This involves a new and interesting point. That a man should be subject to our jurisdiction in so far as regards any heritable estate he may have in Scotland is an obvious legal proposition. But this principle has been carried by a long course of decisions to make a proprietor subject in other questions than those in regard to his estate. This has been so long settled that we need not go back on it. And I think it has been also settled by a long train of decisions that the proprietor's title need not have been feudalized. He may only possess on apparency, or as having a beneficiary right; and either is sufficient. But the defender says that, even though it be so, he is not subject to the jurisdiction of the Scotch Courts unless he possess in the character of owner. Having given this subject my most attentive consideration, I have come to the conclusion that where a person is in the beneficial enjoyment of land under a good civil or actual title he is subject to our jurisdiction. And I come to this conclusion a good deal on a consideration of the extraordinary circumstances that might arise if he were not. Take the case of a person who possesses a long lease of minerals. Or what is a very common case, a lease almost amounting to perpetuity. I do not mean such leases as the Ormiston leases in East Lothian. But there is the example of a building lease. The lessee is practically proprietor of the ground, on which he may have erected very valuable buildings, for a hundred, or perhaps a thousand years. And surely it would be absurd to say that such a person is not subject to our jurisdiction.

But it is a maxim of law that a Court should not arrogate a jurisdiction under which it cannot enforce its decrees. Now, tested by that principle, I think this conclusion, to which I have come not without difficulty, but eventually without doubt, satisfies the test. It may be said that the tenant might sell or assign his right, and that so there would be nothing left against which the pursuer could enforce our decree. But the same result might happen in the case of a proprietor, and it could not be disputed that he is subject to our jurisdiction. The remedy could be the same in each case—to use an inhibition on the dependence of the action. Such a course would fix the right to the subjects on the lessee. I therefore think, on the whole question, that we should recal the Lord Ordinary's interlocutor, and find that in the action before us Colonel Hibbert is subject to the jurisdiction of the Court.

Lord Deas was absent.

Lord Ardmillan—I think this is a question of delicacy, but I am quite of opinion with your Lordship. I notice first, as a matter of form, the argument that the Conjugal Rights Act gives us jurisdiction over the co-defender Colonel Hibbert. I cannot assent to that argument. I think the Conjugal Rights Act only gives a power of citation, but does not *ipso facto* subject the co-defender to the jurisdiction of the Court.

On the second point, whether the lessee of heritable property is subject to our jurisdiction, I entirely agree with your Lordship. The fundamental principle by which an owner of property in Scotland is subject to the jurisdicton of the Courts of Scotland is, that every owner of ground in Scotland ought to have some Court to which he may be entitled to look for protection. I agree with your Lordship that ownership is not necessary to subject the possessor of heritage to our jurisdiction. It would never do to hold that a person holding heritable property under a lease of 999 years is not subject to jurisdiction here. And there is no difference between a tenant for 19 years and a tenant for 999 years. Neither of them is an owner in the proper sense of the word; but I think the possession of the kind that Colonel Hibbert's is, is sufficient. Nor would there be more difficulty in his case than in that of a proprietor in giving our decree effect. Just as the tenant might sell or assign so might a proprietor. And the use of inhibition would be as effectual in the one case as in the other. And the fact that the proprietor's title has not been completed does not free him from our jurisdiction. I entirely reserve my opinion on the question whether the lessee of what in common parlance is termed a mere shooting would be subject to our jurisdiction. But that is not the case of Colonel Hibbert. He is not lessee of the shootings merely, but also of the house, gardens and other heritable subjects. And I think the lease of these subjects brings him under the jurisdiction of the courts of this country.

Lord Kinloch—The question before us is, whether the Court has jurisdiction over Colonel Hibbert, who has been sought to be made a co-defender in the present action of divorce.

This question must, I think, be determined on the footing of the action involving against Colonel Hibbert simply a money claim. He is sought to be made defender only to the effect of being subjected in expenses in a certain event.

I am of opinion that, if not otherwise founded, jurisdiction is not created against Colonel Hibbert by the 7th section of the Conjugal Rights Act. That section authorises the pursuer to make the alleged co-adulterer a party defender; which would otherwise have not been competent. But I think it does no more. It allows citation; but only as in the usual case, and that which is always to be presumed, to wit, where there is jurisdiction. It assumes jurisdiction, it does not create it. To confer such jurisdiction, where it was not antecedently possessed, would require a very express and unambiguous enactment; and none such, I think, occurs. No such thing, I think, was intended as to give the Court power to call, *de plano*, an alleged

co-adulterer from the farthest corner of the globe; whether he was subject to the jurisdiction of the Court or not.

But I consider jurisdiction created over Colonel Hibbert, to the effect to which he is called to the process, by the fact of his being tenant of Ardlussa in Argyleshire, under a lease of 5 years from Whitsunday 1869. His lease, which is produced, shows him to be tenant of a dwelling-house, with a certain extent of land occupied both for grazing and crop, as well as shootings. It is not a mere lease of shootings; supposing that any difference would be thereby produced, as to which I give no opinion. Colonel Hibbert is the tenant of a house and farm grounds; and is as much imbued with the legal character of a Scottish tenant as if the house was the largest mansionhouse, and the grounds the largest estate in the county.

It is undoubted that, if Colonel Hibbert were the proprietor of the subjects of which he is tenant, jurisdiction would lie against him. It is settled that the proprietorship of landed property within Scotland creates jurisdiction to the Scottish Courts—not merely as to all actions concerning that property, but as to all actions for money claims. This was expressly laid down in the unanimous judgment of the Court in *Ferrie* v. *Woodward*, 30th June 1831, 9 S. 854: and the principle was stated in these very general terms, bearing reference to all property whatever held in this country by alleged debtors; "Where a claim is made against them, which either directly affects such property, or can be made to affect it, they are bound to answer the demand made against them in this Court; or if they do not choose to appear, decree will go against them, to the effect of attaching the property in this country and subject to its laws." In the after case of *Macarthur* v. *Macarthur*, 12th January 1842, 4 D. 354, in which jurisdiction was held created by the possession on mere apparency of a landed property, the principle was anew stated in the leading judgment of Lord Fullerton to be "not the absolute and direct application of the conclusions of the action to the subject situated within the territory, but the mere fact of there being within the territory property which the judgment in the action may be the instrument for reaching." By these judgments there was precisely the same power to found jurisdiction given to the possession of heritage within the country, and to the arrestment *jurisdictionis fundandæ causa*. The only difference is that the arrestment is necessary to fix the moveables in the country; the heritage is in itself immoveable.

I consider it to follow, accordantly with these principles, that the right to a lease of heritage within Scotland confers jurisdiction to the Scottish Courts, even in a strictly personal action, alike with the right of proprietorship. It has been said theoretically that a lease is in its nature simply a personal contract. In its origin it may have been so; but it has become a real right by the adoption of the law, in every essential particular. Clearly it is an immoveable right; which is a character sufficient for the present purpose. It is a right to property fixed in the soil—or it may be more accurately said a right to the soil itself, *qualificate*. It is a subject capable of being attached in execution of any decree to be pronounced. None can doubt that any decree pronounced for a sum of money would form the groundwork of diligence against the lease; and this the very diligence proper to heritable subjects, viz., inhibition and adjudication. Any exclusion of assignees in the lease could only be pleaded by the landlord, not by the tenant himself. The property is such, to use the words in the case of *Ferrie*, "as the claim can be made to affect;" or, to use the words in the case of *Macarthur*, "as the judgment in the action may be the instrument of reaching." On the very same principle on which possession as proprietor of the lands is held to give jurisdiction, I think possession as tenant of the same lands must be held to operate the same result.

It is said that a lease is only a temporary right, and therefore cannot become a valid foundation of jurisdiction. The time for which it lasts may be tolerably long, for it may be a lease for 999 years. We have had to deal in our Courts with a well-known set of leases, which are renewable for ever on a payment at the end of each term. In the present case the lease has still more than four years to run; and if our existing means of dispensing justice do not fail us, it is reasonably to be believed that the suit will terminate long before the lapse of this period. But reverting to principle, it is no good ground for finding jurisdiction not to lie that the heritable right is not a perpetual one. The apparent heir may die without making up a title. The liferenter may not live a month. The heir of entail may vanish from the scene, and the estate pass to some one who does not represent him. There may be a *pactum de retrovendendo*, terminating the existing occupancy; or a simple sale, where inhibition has not been used, may destroy it. In these and various other ways the possession of the heritage may be temporary and uncertain, and yet none would say that it would not suffice to found jurisdiction. Nor is the value of the subject to be critically measured, as might be done in regard to a lease running first to a conclusion. It is trite law that the value of the thing laid hold of in order to found jurisdiction need not be commensurate with the amount of the claim; and that the smallest value, not being merely elusory, will be sufficient. It is not necessary to struggle for the box of toothpicks, which is the old illustration. The lease of Ardlussa, having nearly four years to run, is quite enough.

On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and jurisdiction sustained against Colonel Hibbert.

Agents for Pursuer—Wilson, Burn & Gloag, W.S.
Agents for Defender—H. & A. Inglis, W.S.

Friday, January 14.

CRAIG *v.* LOCKHART.

Trustee—Bond—Creditor—Debt—Extinction—Payment. Circumstances in which the trustee in a sequestration *preferred* to the creditor in a bond granted by the bankrupt, on the ground that the debt for which the bond was granted had been paid and extinguished before the bond came into the holder's possession.

In 1852 John Ednie, flax-spinner in Leven, having borrowed from Mr Alexander Craig the sum of £400, bound himself to repay the same; and in further security disponed to him certain heritable property in Leven, with power of sale and other usual clauses. Having failed to make payment when required by Mr Craig, the subjects were sold on 6th August 1860 by public roup; and the balance