it was proposed to do, and accordingly I think that, in a case which should never have been before the Court at all, justice between parties will be done by allowing no expenses whatever.

Lords Ormidale and Gifford concurred.

The Court pronounced this interlocutor:—

"Find that the appellant is one of the inhabitants and feuars of the village of Charleston, of which the respondent is superior: Find that the appellant and the other feuars are entitled by their feu-rights to a servitude or privilege of use of the water of the burn or stream libelled, including the feeders thereof, for domestic and primary uses: Find that the respondent proposes to draw off from one of the feeders of the said burn, at above its junction therewith, a certain supply for the domestic purposes of Glamis House: Find that the respondent is entitled to perform the proposed alterations in terms of, and for the purposes set out in, the minute No. 83 of process: Therefore, on the merits, dismiss the appeal; affirm the judgment appealed against; but direct the respondent to lodge with the Sheriff a certificate by the engineer employed by him that the work has been executed in terms of said minute, when the same shall be completed: Find no expenses due to either party in either Court, and to that effect recal the judgment appealed against, and decern."

Counsel for Petitioner—Mair—Rhind. Agent—W. G. Roy, S.S.C.

Counsel for Respondent — Balfour — Keir. Agents—Dundas & Wilson, C.S.

Wednesday, June 27.

FIRST DIVISION.

GARDNER *v.* BERESFORD'S TRUSTEES.

(*Ante*, p. 570.)

Appeals to the House of Lords—Case where Leave granted conditionally.

Following upon a verdict of a jury reducing a lease upon the ground of fraud, decree of removing was pronounced. The defender, the lessee, had averred possession upon two titles, but his plea to that effect was repelled by the interlocutor in which the Court applied the verdict. This was a unanimous interlocutory judgment, there being still a conclusion for accounting undisposed of. On the defender applying for leave to appeal to the House of Lords, it was granted on condition that he should find caution for violent profits, and present the appeal within a limited time.

This was an application in terms of section 15 of the Act 48 Geo. III. cap. 151, for leave to appeal a unanimous interlocutory judgment of the Court to the House of Lords.

The action, which was at the instance of Beresford's Trustees, concluded (1) for reduction of a lease; (2) for decree of removing following upon reduction; and (3) for an accounting of intromissions with the subject. The defender, the present petitioner, had, *inter alia*, stated this plea—"The pursuers are not entitled to decree of removing as concluded for, in respect that, in the event of the lease under reduction being set aside, the defender will be entitled to obtain a lease from the pursuers in terms of the agreement of 7th June 1873, or otherwise in terms of the agreement set forth in the condescendence."

It had been found by verdict of a jury that the pursuers had been induced to execute the lease by fraudulent representations, to which the defender was a consenting party. The Court afterwards applied the verdict, and reduced, decerned, and declared in terms of the reductive conclusions of the summons. They further repelled the defender's plea [*quoted supra*], and decerned in terms of the conclusions for removing, and reported to the Lord Ordinary to proceed with the conclusions for accounting, &c.

At advising—

Lord President—An application of this kind is addressed to the discretion of the Court, and it is sometimes very difficult to say whether it is more expedient to grant or to refuse leave to appeal. I am very much inclined in most cases where the cause is not exhausted to lean to the side of refusing to grant the leave unless the interference of the Court is clearly expedient. It is apt to cause an interruption to the final disposal of the action. But here there is a great peculiarity, because, as Mr Kinnear very pointedly observed, if the leave now asked is not granted, there never can be an appeal, and all that a judgment of the House of Lords could give would be a restitution of the lessee's possession, not under the lease by which he at present possesses, but under another and a different lease. I do not think that the pursuers have any great interest to resist the application, provided they are secured against any loss consequent on continuance of possession. If caution is found for violent profits they will be amply secured, because violent profits embrace not only all profits which the pursuer could make if they were in possession, but also all damages which the subject may receive at the hands of the defenders. One cannot conceive any other loss which can arise to the pursuers if the application is granted.

Besides, the interruption in the progress of the case is not of so much consequence here as in many cases. The accounting may perhaps occupy some time, and is not a thing requiring any great hurry in the settlement. The defender, so far as we know, is quite solvent, and therefore the delay which will occur cannot create any prejudice to the pursuers. I therefore think we may grant leave to appeal if the defender will lodge in process a bond of caution for violent profits; and also under the distinct understanding that he will present his appeal to the House of Lords within a certain short time. Probably eight days should be the limit, as Parliament is now sitting.

Lord Deas—The specialty on which Mr Balfour founds against leave being granted to appeal at this stage, is the fact that the lease which has been reduced was induced by fraud, and that that was the ground of our judgment. But the ques-

tion to be raised in the appeal is, whether our judgment was right? The defender says the title has been reduced on the ground of fraud, but that he had two titles, and possessed on both of them, and ought not to be turned out until it has been finally decided that he is not entitled to remain in possession upon that footing. We were unanimous in our judgment, but that is the reason why leave is required to appeal. There have been unanimous judgments where we have been held to be wrong. There are considerations of expediency both for and against the granting the application. But if the conditions which your Lordship has named are complied with, the specialties urged by the pursuers as objections will be removed, and I think we may grant leave to appeal.

Lords Mure and Shand concurred.

The following interlocutor was pronounced:—

"The Lords having heard the counsel for the parties, in respect of caution for violent profits having now been found, in terms of bond, No. 27 of process, Grant leave to the petitioner James Gardner to appeal to the House of Lords against the interlocutor of this Court of 13th June 1877, as prayed for, on condition of the petition of appeal being presented and an order of service obtained thereon within eight days from this date."

Counsel for Petitioner (Defender)—Kinnear—Lorimer. Agents—Adamson & Gulland, W.S.

Counsel for Respondents (Pursuers)—Balfour—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, June 27.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KEITH *v.* OUTRAM & CO.

Process—Amendment of Record—Court of Session Act (31 and 32 Vict. cap. 100) sec. 29.

The defenders in an action of damages for newspaper libel appealed it from the Sheriff Court for jury trial. An issue was adjusted and notice of trial given, and the defenders thereafter craved to be allowed to amend the record and issues to the effect of pleading *veritas convicii*, thereby raising a new ground of defence. Leave *granted*, but expenses found due to the pursuer since the date when defences were lodged.

In an action of damages in the Sheriff Court against newspaper proprietors for slander and libel contained in an article published in their newspaper, the defenders pleaded, *inter alia*, (1) that they were justified in publishing the article complained of, as it was merely a report of charges made in a criminal court, which were matters of notoriety; (2) that there was no malice on their part.

The record was closed, and a proof had been allowed by the Sheriff, when the defenders appealed to the Court of Session for jury trial under the Act 6 Geo. IV. c. 120.

Issues were then adjusted, and notice of trial given for the ensuing sittings. The defenders thereafter put in a print stating that they proposed to amend their statement of facts and pleas in law, and craved the Court to open up the record that they might aver that the statements in the article were true, and that they might put in a counter issue of *veritas*.

They quoted the cases of *Gelot* v. *Stewart*, Mar. 4, 1870, 8 Macph. 649, and *Arnott and Others* v. *Burt*, Nov. 14, 1872, 11 Macph. 62.

At advising—

Lord President—We are all of opinion that this amendment is competent, but it is necessary that an issue should be put in. That should be done when the amendment is lodged.

But there are some important conditions on which alone we can allow the amendment. Like all other defences, it ought to have been stated when the defenders came into Court. That is the rule both in this Court and in the Inferior Courts. I can conceive that amendments may be added to the record by a defender at a late stage which do not involve any great hardship to the pursuer, and where no great award of expenses would be necessary as a condition to their being allowed. But this defence belongs to a class of a different kind. It should have been stated when appearance was entered for the defenders in the Inferior Court. It would then have been for the pursuer to consider whether he would go on with the case, and that will now be a matter for his consideration. It is the duty of the Court, when an amendment is allowed, to place a pursuer in the same position as if the defence had been stated at the proper time. The only expense then incurred was the expense of bringing the action into Court, and he might have abandoned the action then on paying the defenders' expenses. All that he has since done may be thrown away if he is now induced to abandon the action.

This rule is not confined to this defence, but to all defences which put it upon the pursuer to consider whether or not he will go on with his action. When we allow such an amendment the payment of all expenses incurred since the defence ought to have been stated must be imposed upon the defender. At the same time, the particular circumstances of any case will always fall to be taken into consideration.

Lord Deas, Lord Mure, and Lord Shand concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel for the parties on the competency of the proposed amendment of defences (No. 18 of process) on condition of the defenders paying to the pursuer the whole expenses incurred by him in both Courts since 17th January last, Allow the defences No. 6 of process to be amended in terms of the said proposed amendment, and the counter issue, also now proposed by the defenders, to be added to the issue for the pursuer, adjusted and settled on the 3d March last, No. 13 of process: Appoint the said issue for the pursuer, and counter issue for the defenders, to be