stitute—that in the judgment of the Sheriff these trustees still had a title to the property, and a duty with regard to it. He held, and no doubt correctly, that the fee was vested in them in trust, with the duty of keeping the trust property in repair, because a conveyance of the property to the minister during his incumbency could not divest the trustees absolutely, or relieve them of their duty to protect the trust-estate. The Sheriff also held that the facts of the case justified the trustees' appearance, because the property was being neglected, and it was necessary that some operations should be performed. The only point against the trustees was that they were wrong in supposing that their duty to the trust property required or entitled them to enter upon it without the consent of the beneficiary. The Sheriff goes on to say that while the trustees were wrong, they were in his opinion acting in good faith, and for the benefit of the property. Their error therefore was one in law only.

It appears from these circumstances that there was a question between the pursuer and the trustees, which was a fair question for discussion, and they were therefore entitled, and indeed called on, to make some answer to the pursuer's demand for interdict, and for a large sum in name of damages, which it might have fallen upon the trust to pay. The trustees, as representing the trust, were justified in entering appearance, and although they were wrong in their views, I think the expense incurred is a good charge against the trust estate, in whose interest it was incurred.

On the second point, I agree that the casualty payable once in nineteen years is not annual income, and cannot be handed over to the incumbent for the time being, but belongs to the trust-estate in which he and future incumbents have an interest.

LORD ADAM was absent.

The Court recalled the interlocutor reclaimed against, assoilzied the defenders from the whole conclusions of the action, and found them entitled to expenses.

Counsel for the Pursuer—Jameson—F. T. Cooper. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defenders—Vary Campbell—Salvesen. Agents—Adair & Fenwick, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Sheriff Court of the Lothians and Peebles.

ROBB *v.* BREARTON.

Process — Summary Ejection — Appeal — Competency—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 44.

Held that an appeal against a decree of summary ejection by a sheriff was competent.

Process—Summary Ejection—Sub-Tenant in Lawful Possession.

A proprietor of urban premises gave notice to quit to a tenant who held them on a yearly tenancy. Part of the premises were occupied by a sub-tenant under a lease from the principal tenant. Without giving any notice to the sub-tenant the proprietor petitioned the Sheriff to grant warrant for his summary ejection from the premises.

Held that the petition was incompetent, in respect that the sub-tenant was in lawful possession of the subjects, and could not be removed without warning.

In November 1894 James Robb purchased from James Jeffrey certain heritable subjects on the south side of Springfield Street, Leith.

The firm of H. & A. Brown, van builders, Leith, were tenants of the subjects from Jeffrey under a lease from year to year.

In March 1893 Messrs Brown had granted a sub-lease of a portion of the subjects for a period of six years to Patrick Brearton, sawdust merchant, Leith.

On 2nd February 1895 Robb, by registered letter, gave warning to Messrs H. & A. Brown to flit and remove from the premises occupied by them.

No notice was sent to Brearton.

In May 1895 Robb presented a petition against Brearton in the Sheriff Court of the Lothians and Peebles, craving the Court "to grant warrant to officers of Court summarily to eject the defender and his gear, goods, and effects" . . . from the subjects in question, "and to make the same void and redd, and to interdict the defender in all time coming from entering into" the subjects.

A record was made up, and the pursuer pleaded—"(1) The defender having no title to possess the ground libelled on, or any part thereof, and notwithstanding occupying the same or a part thereof, the pursuer, as being the proprietor of said ground, is entitled to have the defender ejected therefrom. (2) The defence is irrelevant."

The defender averred that he was in lawful possession of the subjects under a sub-lease from the tenant for a period of six years; that even if he was regarded only as a yearly tenant, he was not liable to summary ejection, and that he had received no previous warning or notice of removal.

He pleaded—"(2) The defender being in possession under a missive of lease flowing from a party entitled to grant the same, is not liable to summary ejection without previous warning or notice to quit."

On 19th June 1895 the Sheriff-Substitute (HAMILTON) sustained the second plea for the pursuer, and granted warrant of summary ejection.

"*Note.*—The Sheriff-Substitute holds the defence to be irrelevant upon the authority of the following cases—*Robb* v. *Menzies*, January 20, 1859, 21 D. 277, and *Wilson* v. *Campbell*, December 12, 1839, 2 D. 232.

The defender appealed to the Sheriff, who, on 27th June 1895, dismissed the

appeal and adhered to the interlocutor of the Sheriff-Substitute.

The defender appealed to the First Division of the Court of Session, and argued—(1) The appeal was competent—*Barbour* v. *Chalmers & Company*, March 3, 1891, 18 R. 610; *Clarke* v. *Clarkes*, June 28, 1890, 17 R. 1064. (2) A petition for summary ejection only applied to persons whose possession was vitious; it was not competent here where the defender was lawfully in possession of the subjects. In the case of *Halley* v. *Lang*, June 26, 1867, 5 Macph. 951, a petition for summary ejection was held incompetent because there were no allegations of vitious or precarious possession—*Scottish Building Society* v. *Horne*, May 31, 1881, 8 R. 737. The authorities quoted by the Sheriff-Substitute did not warrant the procedure. In *Robb* v. *Menzies*, January 20, 1859, 21 D. 277, the tenant was in point of fact duly warned, while here the defender had received no warning. In *Wilson* v. *Campbell*, December 12, 1839, 2 D. 232, the tenant had two years' warning; moreover, that was a case of agricultural subjects which were in a different position to urban. The Act of Sederunt of 14th December 1756, quoted by the pursuer to show that a warning given to a principal tenant was enough, and that no separate notice to the sub-tenant was required, applied only to agricultural subjects—Hunter, vol. ii., p. 82. The case of *Udney* v. *Brown*, 1802, Hume 566, showed that warning was necessary. In *Marchmont* v. *Fleming*, February 22, 1743, M. 13,829, the contrary was held, because the lease excluded assignees, and therefore the sub-lessor was not in *bona fide* possession.

Argued for the pursuer—(1) The appeal was incompetent. The case fell under sec. 44 of the Judicature Act of 1825 (6 Geo. IV. 120), and the only competent way of reviewing the Sheriff's decision was by suspension, and not by appeal—*Fletcher* v. *Davidson*, November 3, 1874, 2 R. 71. (2) The Act of Sederunt of 1756, which was declaratory of the common law, showed that it was enough for the notice to quit to be given to the principal tenant, as had been done here. There was no authority to show that it did not apply to urban tenants as well as agricultural. In *Robb* v. *Menzies* allegations such as there were here, to the effect that the sub-tenant had received no notice, were held to be irrelevant. The defender here was really in possession without any right at all, his lease as a sub-tenant having come to an end when that of his author did.

At advising—

Lord Adam—Two questions have been raised. The first is whether the appeal is competent, the ground of objection taken being that an ordinary appeal is not competent against a decree of ejection—that the only mode of review is by a suspension of the judgment. That argument is founded on the Act authorising appeals, and substituting them in place of advocations. It is said that prior to the passing of that Act ejections could only be reviewed by way of suspension, and not by bill of advocation. It is quite true that, as settled in the cases of *Barbour* and *Clark*, in the case of a proper action of removing the judgment can be only reviewed by suspension, but in these two cases it was distinctly admitted that in ejections that was not so, and that review by appeal is competent.

The second question arises on the merits. The facts are these. The pursuer is the heritable proprietor of certain subjects which were let to the firm of H. & A. Brown, who were the tenants from year to year under the person from whom the pursuer acquired the property. These tenants had been in peaceable possession for a considerable number of years. They had sublet the property to Mr Brearton, and he had occupied it as sub-tenant for several years, and was so possessing it from Whitsunday 1894 to Whitsunday 1895. Prior to Whitsunday 1895 it is said—and we must take it to be the fact—the pursuer gave due notice to remove to Messrs H. & A. Brown, the principal tenants, but he gave no warning at all to the sub-tenant, the defender. The warning given to the principal tenants was by registered letter, which was a perfectly good form of notice, but he did not adopt the other, and, in the case of urban subjects, the more customary mode, which might have been available against the sub-tenants also, viz., of chalking the door. In this way the defender had no notice at all until the warrant for summary ejection was served upon him, by which he was required to remove in forty-eight hours from premises of which he had been in possession on a perfectly good title for several years.

I think ejections are applicable only in cases when the person in possession is in possession without any title at all—either forcibly, or secretly, or precariously as a squatter would be. But where a person is in possession of property not in any of those ways, but up to the term day on a perfectly good title, he must be treated just like an ordinary tenant. In this case Mr Brearton had been in possession on a good title up to Whitsunday 1895, for he had a sub-lease from the principal tenants, and it cannot be disputed that in the case of leases of urban subjects the principal has not only an implied power but an actual legal power to sublet. Was he then to be ejected summarily, just as if he had no title at all? Even if the subject had been agricultural, if the tenant had had an express power of subletting, as I understand the law, a warning under the Act of Sederunt given to the principal tenant only would not have been sufficient. Applying the principle of that rule to the case of an urban tenement the result is the same. There is no express power to sublet, but then the law gives the power, and the sub-tenant of the urban subjects is in possession on a title just as good as an agricultural sub-tenant under a tenant who has express power to sublet. Accordingly, if warning is necessary in the one case, it is equally necessary in the other. The mistake the Sheriffs made was in not having regard to the proper point of time. They should have asked themselves, Was

the sub-tenant up to Whitsunday 1895 in possession on a good title? for if that question is answered in the affirmative, then it appears plain that the landlord was bound to give warning. He did not do so. Therefore it appears to me that this warrant for summary ejection proceeds on a wrong basis altogether, and, in my opinion, the Sheriff's interlocutor must be recalled and the defender assoilzied.

I beg to say that my judgment proceeds solely on the fact that no sufficient warning was given to this sub-tenant. I give no opinion as to whether there was tacit relocation, and whether the appellant is entitled to continue in possession for a whole year or not.

LORD M'LAREN—A process of ejection, that is to say, a petition for summary warrant, is not a proper method of trying a question of right to the possession of subjects, or of determining a lawful state of possession. We know that the practice in England is different, because there, till recently, the regular mode of settling questions of heritable right was a fictitious action of ejectment between "John Doe" and "Richard Roe," in which the true owner was permitted to appear and to assert his right. But with us, where a person is in lawful possession, and it is desired to displace him or to terminate the period of possession, it must be done by an action of removing directed against the possessor, with a conclusion that he should be ordered to flit. He is entitled to this ordinary legal process, so that, if he fails, he may have an opportunity of going out peaceably, and may not have to undergo the indignity of being turned out by the sheriff's officer. Now, under this petition there is no such conclusion asked for against the appellant, but the Sheriff is craved "to grant warrant to officers of court summarily to eject the defender," and that, in my view, is not a proper mode of proceeding against a man in lawful possession of heritable subjects. According to the facts set out in the record, the appellant was a subtenant under Messrs H. & A. Brown, tenants of the petitioner. If he had been included in the warning which was directed against the principal tenants, probably he would now be liable to ejection, if he had not complied with the demand for removing. But the warning to remove was directed only against the principal tenant, and there is no decree ordering the appellant to remove, or warning to him, such as would have put him in default had he continued to occupy the subjects.

Whether he can now be displaced by an action of removing we are not called upon to consider. It may be that in a question as to tacit relocation his position is not so favourable as it would be if he were the principal tenant, and held under rights granted to him by the landlord. But that is not the question before us. I agree with your Lordship that the petition for summary ejection was not a competent proceeding.

LORD KINNEAR—I concur. I think it clear enough that the appeal is competent, and that the section of the Judicature Act founded on, by which judgments pronounced in actions of removing cannot be brought under review by bill of advocation, is not applicable to the present case, because the judgment before us is not a decree of removal against a tenant, and does not bear to be a judgment pronounced in an action of removing. Nor is it a mere diligence for carrying a previous judgment into effect. It is a decree in a proceeding of a very anomalous character indeed. It appears to be neither an action of removing nor a precept of ejection. It asks the Court to grant warrant summarily to eject the defender from a certain piece of ground, and to interdict him in all time coming from entering into the said piece of ground without the pursuer's express permission. Upon this petition the Sheriff makes up a record, and accordingly turns it into an action, and gives judgment on the question of law raised by the pleas of parties stated on the record so made up, with the result of ultimately giving a decree for the summary ejection of the appellant. That appears to me to be a perfectly incompetent proceeding, and therefore the judgment may be brought under review by appeal on the authority of the cases cited by Lord Adam, and on principle. If the appeal is competent, then I agree with your Lordships on the merits of the question, on the ground that the appellant was in possession on a good title. He had a sub-lease from the principal tenant, and there can be no question that the principal tenant had power to grant the sublease. It is said that the appellant's right has determined, but the question is not, whether his right had come to an end, but whether he could be summarily turned out of the subjects without any warning. Now, it is settled law that no one who is in possession of a good title can be ejected summarily and without warning. I agree that we can decide nothing more than that he was entitled to have warning. I wish to express no opinion as to whether this right has come to an end, or whether it has commenced to run a new course on the principle of tacit relocation. That is not before us.

The LORD PRESIDENT concurred.

The Court sustained the appeal, recalled the interlocutors of the Sheriffs, and assoilzied the defender.

Counsel for the Pursuer—Craigie. Agents—Miller & Murray, S.S.C.

Counsel for the Defender—W. Campbell—Chree. Agents—M. Macgregor & Co., W.S.