fectly possible that one might come to a different result if the lands were acquired under the clauses applicable to the taking of lands by agreement, because then it would be extremely difficult to apply the provision which depends upon a date fixed by a Special Act, while if it were a case of compulsory purchase the same difficulty would not arise. But another difficulty, to which I need not further allude, would arise upon the construction of the somewhat carefully worded definition of a Special Act contained in the Act of 1878. But on the question which we are considering, my opinion is, that the conditions of the case are entirely different from those upon which the Sheriff-Substitute has based his argument, and that the appeal ought to be sustained.

LORD KINNEAR—I am of the same opinion. Counsel for the respondent concedes that part of the 31st section of the Act of 1872, which effected a partial incorporation of the Lands Clauses Act, has been repealed, and that in place of the partial incorporation there is substituted a total incorporation by the provision of the 31st section of the Act of 1878. Now, that section incorporates generally the Lands Clauses Consolidation Act, and the Acts amending it, with the Education Act. But then the incorporation is subject to this condition—that before any of the powers of the Act of 1845 are to come into operation a certain procedure is to take place, and therefore the statute is not effectively incorporated until that procedure has been followed out, the result of it being that after a Provisional Order has been obtained from the Privy Council there may be obtained a confirming Act. When that has been done, the Act of 1872, the Act of 1878, and the confirming Act, all taken together, are to become the Special Act with which under the 31st section the Lands Clauses Act is to be incorporated. Now, no part of that procedure has been followed; and it appears to me to follow that the Lands Clauses Act, notwithstanding the general incorporation of the 31st section, has not been brought into effective operation for the purposes of this School Board. Now, if that has not been brought into effective operation at all, it follows that the clauses from 6 to 16, which had been incorporated by the previous repealed enactment of 1872, are not applicable to any transaction which the School Board may carry out. Under the Act of 1872 the School Board had the benefit of these provisions, notwithstanding that they were not in a position to satisfy the conditions under which, by the Lands Clauses Act itself, those provisions were brought into effect, because by the 6th section of the Lands Clauses Act they are only to be applicable in cases where the promoters have by a Special Act obtained authority to take lands by compulsion. Under the 1872 Act the school boards have the benefit of those clauses although they had no such power. But according to the concession of the respondents' counsel, there is substituted for that power a new incorporation of the Lands Clauses Act itself under the conditions of that Act. Therefore it seems to me to follow of necessity from the concession, that until the School Board has obtained authority to take land, it has not been brought within the scope of the Lands Clauses Act of 1845 at all. Now, that being so, I agree with your Lordships that none of the conditions under which section 127 would be brought into operation have been satisfied. The promoters or the School Board have become possessed of land, but not by virtue of the Lands Clauses Act, because that has not yet been brought into operation, nor by virtue of any Special Act or Act incorporated therewith, because the Special Act has not yet come into existence. They might obtain a Special Act by following certain procedure, but they have not, and therefore I agree with your Lordships in thinking that they are possessed of the land by virtue of the powers conferred upon them by the 37th section of the Education Act of 1872, and not otherwise. For these reasons I agree that the interlocutor of the Sheriff-Substitute should be recalled, and that the appeal should be sustained.

LORD ADAM concurred.

The Court sustained the appeal and recalled the interlocutor of the Sheriff-Substitute.

Counsel for the Appellants—Dickson—Sym. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Dean of Faculty, Q.C.—Deas. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

GIBSON *v.* CLARK.

Landlord and Tenant—Lease—Sheriff—Jurisdiction—Desertion of Farm—Judicial Manager.

An application for the appointment of an interim judicial manager upon a farm was granted by the Sheriff on the application of the landlord, who alleged that the farm had been deserted by the tenant. No appearance was made to oppose this appointment on behalf of the tenant. The manager entered upon his duties, and by subsequent interlocutors the Sheriff approved of his intromissions and granted him a discharge.

In an action of reduction of the appointment and the proceedings following thereon at the tenant's instance, it was proved that the pursuer had left this country on 24th August, and returned on 22nd September; that before leaving he had sold off the greater part of his stock, and that his family, who had been left at the farm, had informed the landlord, in answer to inquiries by his agent, that they were not aware

where the pursuer had gone. In doing so they acted upon the pursuer's instructions. The pursuer explained in his evidence that he had merely left for a month's holiday, and that his object in selling off the stock was to convert his farm from a dairy farm into a sheep farm.

Held (*aff.* the Lord Ordinary, and *diss.* Lord M'Laren) that the application and subsequent proceedings were competent, and that the pursuer was not entitled to have them reduced.

Opinion by Lord Adam that the defender had reasonable grounds for making the application, and was therefore not responsible for any damage caused thereby to the pursuer. *Contra* by Lord M'Laren, who held that such an application was made *periculo petentis*.

Observed by Lord Kinnear that it was in the discretion of the Sheriff to order inquiry upon an *ex parte* application for such an appointment, and that an inquiry would, in the circumstances, have been expedient.

Process—Citation—Edictal Citation—Sheriff Court Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 9.

The Sheriff Court Act 1876, sec. 9, enacts that "the sheriff-clerk shall, in all warrants to cite or charge persons furth of Scotland, insert a warrant to cite or charge edictally."

A petition in the Sheriff Court for the appointment of a manager on a farm alleged to have been deserted by the tenant, was presented by the landlord, and served on the tenant by leaving it at the farmhouse. There was no warrant to cite edictally. The petition was granted. The tenant returned in a month, and sought for reduction of the order for management on the ground, *inter alia*, of want of edictal citation. The Court *repelled* the plea.

Process—Citation—Disconformity between the Execution and the Service Copy as to Date of Service—Inducicæ.

On 31st August a Sheriff granted warrant to cite a defender upon forty-eight hours' *inducicæ*. The execution of citation was dated 31st August, but the service-copy was dated 1st September. Decree in absence was granted on 3rd September, and reduction thereof was subsequently brought on the ground, *inter alia*, that forty-eight hours had not elapsed from the serving of the petition.

The Court *repelled* the plea on the ground that service must be held to have been made on the date set forth in the execution of citation.

In August 1894 John Gilchrist Clark, Esq., of Speddoch, Dumfriesshire, presented a petition in the Sheriff Court at Kirkcudbright against Alexander Gibson, his tenant, under a fifteen years' lease, of which three years had still to run, in the farm of Birkbush, in the parish of Irongray and stewartry of Kirkcudbright. In the petition he stated that "The defender is in insolvent circumstances, and diligence has recently been used against him at the instance of certain creditors. He has recently removed the most of his stock from the farm to the extent of almost entirely displenishing the same, and he has left the farm without instructing any proper person to take charge thereof. It is believed that he has gone to America without any intention of returning. The corn crop and the meadow hay crop of the current year are ripe for cutting, and require to be immediately cut and stacked, and unless immediately attended to are in danger of being lost, to the prejudice of the pursuer as proprietor and his legal rights, unless an immediate remedy be obtained in the premises as herein prayed for."

The pursuer prayed the Court "to appoint a fit and proper person to take charge of the lands and farm of Birkbush, in the parish of Irongray and stewartry of Kirkcudbright, and stock and effects thereon, presently tenanted by the said Alexander Gibson, and to labour and cultivate the whole lands requiring to be laboured and cultivated for the year ending at Whitsunday, and separation of crop 1895, and to reap the crops presently growing on the said farm in order that the pursuer's rights may not be prejudiced; also to purchase all seeds and manures that may be required for the proper cultivation of the land, and generally to do everything necessary in order that the present crop may be suitably reaped, and the crop of 1895 suitably and seasonably sown, and to deal with the crops, stock, and effects thereon, including the selling and disposing thereof, in such way as he may consider best, and to report to your Lordship an account of his outlays and intromissions and management foresaid; and to decern against the defender for whatever balance may become due thereon, with expenses of management and process, reserving to the pursuer all claims competent to him for rent, interest, and expenses, and for damages or otherwise." The name of Mr Alexander Smith, gardener at Speddoch, was suggested as manager.

Upon 31st August 1894 the Honorary Sheriff-Substitute (WILLIAMSON) granted warrant to cite the defender upon forty-eight hours' *inducicæ*.

The execution of citation bore date 31st August, but the service copy of the petition was dated 1st September.

Upon 3rd September the Honorary Sheriff-Substitute, in respect that the defender had not entered appearance, appointed Mr Alexander Smith, before designed, to take charge of the lands and farm of Birkbush, referred to in the petition, with all the powers craved.

The manager thereafter entered upon his duties, and sold the whole corn, hay, and potatoes, and a portion of the turnip crop on the ground by public roup.

Upon 9th October 1894 the Sheriff-Substitute (LYELL) remitted the account of the pursuer's expenses, then lodged, to the Auditor of Court to tax and report, and upon 10th October, having resumed consideration of the process, with the Auditor's

report upon the pursuer's account of expenses, approved thereof; also approved of the report of management produced: Found that there was no balance in the hands of the manager to be consigned in the hands of the Clerk of Court; and discharged the said manager of his intromissions.

Upon 16th October 1894 Alexander Gibson brought an action of reduction against Clark for the purpose of having the following warrants, decrees, or interlocutors reduced, viz., "(*First*) A pretended warrant of citation, dated 31st August 1894, granted by the Sheriff-Substitute of Dumfries and Galloway, at Kirkcudbright, in a petition presented in the Sheriff Court of the said sheriffdom of Kirkcudbright on said date, at the instance of the defender, the said John Gilchrist Clark, against the pursuer; (*Second*) a pretended service of said petition, dated 1st September 1894, following upon said pretended warrant of citation; (*Third*) a pretended decree or interlocutor, dated 3rd September 1894, pronounced by the said Sheriff-Substitute of Dumfries and Galloway at Kirkcudbright, in said petition; (*Fourth*) a pretended decree or interlocutor, dated 9th October 1894, pronounced by said Sheriff-Substitute in the foresaid petition; and (*Fifth*) a pretended decree or interlocutor, dated 10th October 1894, pronounced by the said Sheriff-Substitute in the foresaid petition."

The pursuer in this action of reduction pleaded—"1. The said pretended decrees or interlocutors having been pronounced irregularly, and incompetently, ought to be reduced in terms of the conclusions of the summons. 2. The said pretended decrees or interlocutors are reducible, in respect they were pronounced (1) in a petition which was incompetent in the Sheriff Court; (2) in a petition at the instance of a person who had no title or interest to insist in the same; and in respect (3) that the warrant for service was irregular and incompetent; (4) that the service following thereon was irregular and incompetent; (5) that the procedure in said petition was incompetent and contrary to the provisions of the Sheriff Courts (Scotland) Act 1876; and (6) that the granting of the prayer of the petition without inquiry into the facts was incompetent and *ultra vires;* and (7) that the interlocutor making the said appointment was void from uncertainty and ambiguity. 3. In the circumstances condescended on, the pretended decrees or interlocutors ought to be reduced, and the defender John Gilchrist Clark found liable in expenses, and also the defender Alexander Smith in the event of his entering appearance to defend this action." He reserved his claim of damages in respect of the proceedings complained of.

The defender maintained that the proceedings were regular and competent.

Upon 21st February 1895 the Lord Ordinary (KINCAIRNEY) repelled the pursuer's plea that the warrant for service was irregular and incompetent: *Quoad ultra* before answer allowed a proof.

Note.—"The pursuer objects to the warrant of citation. This objection is founded on section 9 of the Sheriff Court Act (39 and 40 Vict. cap. 70), which enacts that 'the sheriff-clerk shall, in all warrants to cite or charge persons furth of Scotland, insert a warrant to cite or charge edictally.' There is no warrant to cite edictally in the warrant in this case, and it is said that there should have been such a warrant, because the petitioner, in the Sheriff-Court petition, states his belief that the present pursuer had gone to America without intention to return. But the pursuer cannot maintain the plea, because he denies that he had left the country without intention to return. I think that the clause does not require edictal citation whenever a defender happens to be temporarily abroad, but means only that when the circumstances are such as to necessitate edictal citation, according to ordinary practice in the Court of Session, a special warrant for it shall be issued by the sheriff-clerk. I think that I am in a position to repel the plea that the warrant for service was incompetent."

A proof was taken, the general result of which appears in the opinions of the Judges. As regards the circumstances under which the pursuer left the farm in August, and the provisions he made for its management in his absence, the material parts of the evidence were as follows:—

The pursuer deponed:—"When I left for America I left £35 with my daughter. . . . It is not true to say that I left without making any arrangements for the charge of the farm. I arranged with Thomas Kirk, the bower, that he was to look after my harvest, and that in return for that he should get £6, 10s. and his own food. Kirk had a servant-girl, about 17 or 18 years of age, who used to do the milking, and I arranged that she should get £4, 10s. for helping with the harvest. There was also a man called Peter Thomson, who had taken the cutting of my hay, and I arranged with him that he should help with the reaper, and I would pay him when I returned."

The pursuer's daughter Margaret Gibson deponed—"I remember of my father going away to America on 24th August last year. He told me that he was going about a week before he left. He said that he was going to look at some land, and that he might be away for three weeks or a month, but he did not know exactly. He told me that he was going with a Mr Green. My father is a dealer and moves about a good deal, and I was not surprised at his going away. Before he left I got £35 from him to use in the house and to pay workers at the harvest if there were any. He told me that he had engaged for the harvest two workers from Dunscore, and also Peter Thomson, Thomas Kirk, and Kirk's girl. My immediately younger brother is in the habit of working on the farm and looking after the horses, and he had driven the reaping machine the year before last. . . . *Cross.*— . . . He told me that he did not wish people to know much about his going away because they were always saying plenty about things. My father

did not give me any reason for not wanting people to know that he was going, and he merely said that he did not wish me to speak about it. I did not know that my father was in money difficulty at the time. . . . Mr Symons and Mr Smith asked me repeatedly where my father was, but I don't think they asked me where he had gone. When they asked me where my father was, I said I did not know because I had not heard from him. It did not occur to me to tell them that my father had gone to America, because I did not think it was any of their business. That was partly because my father had asked me not to tell people where he was going to. I know Mr Smith who had the management of the farm. I remember the first time he came up to the farm and asked about my father. He saw me at that time, and I remember of his asking where my father was, my answer to him being that I did not know."

Thomas Kirk deponed—"The pursuer gave me instructions as to looking after the harvest in his absence. It was agreed between us that I was to get a wage of £6 or £6, 10s. for reaping the harvest. At that time I had a girl-servant for the milking of the cows, and pursuer said that he would give her £3, 10s. for helping with the harvest. Pursuer also informed me that he had spoken to two women, belonging to Dunscore, as to helping with the harvest. There was also a man, called Peter Thomson, who had been hired for the harvest at another place, but he was to assist us till he went away there. With that staff I think we might have managed to reap the whole harvest, as there was not very much to do. . . . *Cross.*— . . . The pursuer never mentioned anything to me about taking full charge of the farm. . . . The pursuer left no money with me to pay for the work that I had to do, and he did not tell me that he had left any money with his daughter to pay for the expenses of the harvest. The pursuer did not tell me exactly where he was going to. He was in our house the night he went away, and he then told me that I was to go on with the cutting of the corn, that he had written with instructions to have the mill put in order, that I was to thresh what I could, and that he had arranged with Derby & Sons, Dumfries, to take the oats, and his daughter would lift the money. I then asked the pursuer, in my kitchen, where he was going, and all he said about that was 'I might be in America before I am back.'"

The defender led no evidence.

Upon 27th June 1895 the Lord Ordinary having considered the proof, productions, and whole cause, repelled the reasons of reduction stated for the pursuer and assoilzied the defender.

Note.—"In this case evidence has been led by the pursuer under the proof allowed by the interlocutor of 21st February, and the defender having stated that he had no evidence to lead, the case falls to be decided on the evidence so led by the pursuer. I think it presents very considerable difficulty, which is much enhanced by the want of evidence by the defender, in consequence of which various points are left insufficiently and unsatisfactorily explained.

"I certainly cannot commend the proceedings adopted by the defender, which seem to have been hasty and ill advised. But the question is whether the pursuer is entitled to the remedy which he demands on the grounds which he has pleaded.

"The pursuer and defender are tenant and landlord, and the proceedings from which the pursuer, the tenant, seeks redress were commenced by a petition by the defender, as landlord, presented on 31st August 1894, to the Sheriff at Kirkcudbright, which prayed for the appointment of a person to take charge of the pursuer's farm and stock, to cultivate the farm and reap the crop, and to 'deal with the stock and crop and effects thereon, including the selling and disposing thereof in such a way as he may consider meet,' and to report.

"The prayer was founded on the averments that the tenant was insolvent, that diligence had been used against him, that he had almost displenished his farm, and had left it without instructing any proper party to take charge of it, and had, it was believed, gone to America without intending to return, and that the corn crop and meadow hay were ripe and in danger of being lost.

"The Sheriff-Substitute on 30th August ordered citation of the defender on forty-eight hours' warning. On 3rd September he, in respect the respondent, the tenant, had not entered appearance, appointed one Mr Smith (the landlord's gardener) to manage the farm with the powers craved. On 9th October he remitted the landlord's account of expenses to the Auditor, and on 10th October he approved of the Auditor's report and of the manager's report, and found that there was no balance in the hands of the manager.

"The conclusions of the action are for reduction of the warrant of citation, the service of the petition, and of these interlocutors. There is no conclusion for damages, and there is no averment that the proceedings complained of have occasioned any pecuniary loss to the pursuer. All that is said about damages is that the pursuer reserves his claim of damages in respect of said illegal and oppressive proceedings.

"The defender has not pleaded that the action is incompetent. The pursuer's objection to the warrant of citation was repelled by the interlocutor of 21st February, and therefore the first conclusion for reduction must be rejected. The action otherwise remains now to be disposed of.

"The document sought to be reduced secondly is said to be the service of the petition, stated to be 'dated 1st September 1894.' The only document which has that date is the service copy of the petition; and defender contends that the document so described must needs be the service copy, and that there is no conclusion for reduction of the sheriff-officer's execution, which bears date 31st August 1894. If this contention be sound, this conclusion for reduc-

tion must also be rejected, because it would be an absurd, meaningless, and wholly ineffectual proceeding to reduce a mere service copy, leaving the execution unimpeached. But if this conclusion be directed against the sheriff-officer's execution, which bears date 31st August, as I suppose was intended, then I am of opinion that no sufficient ground has been shown for reducing it. I now understand that the defender stands by it, and maintains that unless it is reduced it must bear faith, and establish the service of the petition on the 31st August. It is a suspicious looking document certainly, and I should not have been surprised had evidence been led that its date was erroneous. But there is, properly speaking, no such evidence. The pursuer did not examine the sheriff-officer, and the pursuer's daughter was unable to say on what day of the week the service was made. The improbation of the sheriff-officer's execution is left to depend on the service copy alone. The pursuer referred to the case of *Dunlop* v. *Nicholson*, 10th July 1827, 5 S. 915, in which in special circumstances it was held competent to refer to a service copy in contradiction to an execution; but the report bears that the case was to be regarded as of a special nature, and not to affect the general rule that a formal execution could not be contradicted by the service copy. And there is no doubt that that is the settled general rule—Stair, iv. 42, 12; Erskine, iv. 2, 5; *M'Donald* v. *M'Leod*, January 11, 1726, M. 3765; A. S., July 10, 1839, section 91. In this case there is no reason whatever for preferring the service copy to the execution. They bear different dates, and one of them must bear a wrong date. But there is no reason for saying that it is the execution which is misdated. Therefore I think that on the evidence which has been led, the execution cannot be reduced The point raised, it will be observed, is entirely technical. It is not suggested that the pursuer suffered any prejudice from any defect in the citation.

"Now, when the petition was brought before the Sheriff on the 3rd September, the sheriff-officer's execution appended to the petition proved to him, and must now be held to prove, that the time for entering appearance had expired, and that the petition might be competently proceeded with as in absence. I say competently proceeded with, for I do not mean to say that some preliminary inquiry might not have been desirable and prudent in the circumstances. The pursuer founded on the case of *Mackenzie* v. *Monro*, November 19, 1894, 32 S.L.R. 43. But that case was different, because the decree reduced was not a decree in absence, but a decree by default for failure to lodge defences; and it was held that there had been no default, because the defender had right to lodge defences during the whole of that day. Here the Sheriff proceeded in absence, and not on default.

"There remain for consideration the conclusions for reduction of the three interlocutors. Now, the reasons of reduction of these three interlocutors are specifically set forth in the pursuer's second plea. Seven reasons of reduction are there stated; and I am not prepared to sustain any of these specific reasons.

"They are as follows:—(1) That the petition was incompetent in the Sheriff Court. No authority was quoted in support of this reason, and I think it is sufficiently met by the case of *Brock* v. *Buchanan*, June 7, 1851, 13 D. 1069. (2) That the landlord had no title or interest. This was maintained on the ground that the Whitsunday rent had been paid. But I have no doubt that the landlord had a title and interest to see that his land was properly cultivated, and the rent fully due at Martinmas properly secured. (3) That the warrant was irregular and incompetent. That reason has already been repelled for reasons which have been stated. (4) That the service was irregular and incompetent. I think the regularity of the service is proved by the undisproved execution of the sheriff-officer. (5) That the procedure was incompetent and contrary to the Sheriff Courts Act 1876. If this reason refers to the contention that the Sheriff's interlocutor was pronounced before the term of citation was expired, I think that reason fails on the grounds explained; and if that be not what is referred to, I do not know what the reference is. (6) That it was incompetent and *ultra vires* to grant the prayer of the petition without inquiry. I think it was not so, the petition being competently before the Sheriff, and no one appearing to oppose it, although it might have been not unreasonable to have made some preliminary inquiry. (7) That the interlocutor making the appointment was void from uncertainty and ambiguity. I think this reason was not maintained, and I see no ground for it.

"I think therefore that the first and second pleas for the pursuer fall to be repelled, and I understand the defenders to maintain that, because no other grounds of reduction are specified, it follows immediately that they are entitled to absolvitor.

"There remains, however, the third plea, which, although quite general, might be sufficient if it appeared from the proof that the Court had been imposed on by the averments in the petition, or that substantial injustice had been done.

"Struck with the apparent haste of the defender's proceedings, and with the wide character of the prayer of his petition, I thought it possible that the proof might disclose some such case, in which case I am not prepared to say, that these interlocutors might not have been open to reduction. But considering that it is not said that any loss has been caused to the pursuer by the proceedings complained of, and that the circumstances warranted the statements in the petition, I do not think that a case of this sort is made out; although I have the impression that the defender and his agent ought to have acted with more consideration and caution, and made more inquiry before adopting such very summary and trenchant proceedings, an impression which might possibly have been removed had the defender or his agent or the manager given evidence.

"The main facts proved may be stated very shortly:—

"The pursuer has been working his farm as a dairy farm, and had a number of cows on it which he had let out to the witness Kirk under a bowing contract. Pending that contract, he, on or about 22nd August, sold all his sheep, and all his cows but three. He drove the cattle to Lockerbie at night. He left the farm on 24th August. Although he seems to have told his family and one or two friends where he was going, he made a secret of his destination, and told his daughter that he did not wish people to know it, and he left then uncertain as to the period of his return. He does not appear to have had any money then until he sold his cattle and sheep, and there were apparently several creditors who were becoming urgent, although the proof on that point is not wholly satisfactory. Even without the evidence of the defender or Mr Symons, his agent, or the manager, one can conclude that the farm must have appeared displenished. It was just on the eve of harvest, almost all his stock had been sold, and he himself had disappeared. No circumstances could have tended more to excite suspicion, and it appears from the pursuer's proof that the defender's agent inquired several times before taking action about the pursuer's absence, and it is clear that the only answer which he got from the members of the pursuer's family was that they did not know where he had gone or when he would return. In the meantime the rumour arose that the pursuer had absconded, and it appears from the proof—in particular from the evidence of Kirk—that this rumour existed before the defender had taken any action. Now, unfortunately the evidence of Symons is withheld, but it seems proved that he was not told of any arrangements made by the pursuer for the cultivation of his farm, or of any money left by him for payment of labour. Now, these were the circumstances under which the defender, in the fear, I suppose, that the crops would go to waste, and that his November rent might be endangered, and that the farm would get into disorder, presented the petition. I think it cannot be said in the circumstances that the averments in it were unwarrantable or overstated the case. The pursuer no doubt puts a different colour on the facts. I do not feel certain that his disclosures have been complete, but he is entitled to say that his actual return on 22nd September refutes the idea that he had absconded. He accounts for the sale of his stock by stating that he had found his farm unsuitable as a dairy farm, and intended to recur to the use of it as a sheep farm, and that for that reason he sold his cows with the consent of Kirk, the bower, and he says that his visit to America was merely to see whether land was to be got there on favourable terms with the view to going there at the close of his lease. All this may be true, and may remove some of the suspicion which his conduct was so much calculated to excite, although I hesitate to say that the pursuer's explanations are wholly satisfactory. But whether it was so or no, I think the combination of circumstances was extremely questionable, and that there is no wonder that they aroused the suspicion that he had absconded—a suspicion which the members of his family apparently came also to entertain.

"After the petition was served, no objection of any kind was stated to it, and if the pursuer left his farm under the conditions mentioned without leaving anyone who was in a position to meet such averments as are made in the petition, it seems his own fault if proceedings thereafter passed in absence.

"It seems to be true that the interference of the defender was regrettable, for it certainly did no good. Neither, however, is it said to have done any material harm; at least the interlocutors are not challenged on any ground of that kind. It is not averred or proved that the pursuer's property was sold at a sacrifice, or that the expenses of process were excessive. I do not express' any opinion whether relief might not have been given had either of these things been averred and proved, but as they are not in the case, and as, in my opinion, the technical objections are untenable, I have come—not without difficulty—to the conclusion that the pursuer's action fails, and that the defender is entitled to absolvitor."

The pursuer reclaimed, and argued—(1) This action of reduction was competent—*M'Lachlan* v. *Rutherford*, June 10, 1854, 16 D. 937. It was a preliminary and necessary step to an action of damages. (2) The interlocutor of 3rd September should be reduced, because pronounced before the induciæ had expired. The question was not whether the service copy of the petition or the execution was to bear faith. The fact remained that the only writ left for him, viz., the service copy of the petition, was dated 1st September. He had forty-eight hours to enter appearance, and accordingly no interlocutor pronounced on 3rd September could stand. A defender was entitled to found on the date of the service copy—*Dunlop* v. *Nicolson*, July 10, 1827, 5 S. 915; *Mackenzie* v. *Munro*, November 10, 1894, 22 R. 45. (3) The defender had sought a remedy to which he was not entitled. His proceedings were equivalent to sequestration in security of rent, which would have been incompetent. His highest right was to have the *status quo* maintained—*Drysdale* v. *Lawson*, March 11, 1842, 5 D. 1061. In the circumstances he had no right whatever to interfere. His tenant was not due any rent, and had a good cautioner. If he disapproved of the displenishing he should have applied for a plenishing order, but the tenant was entitled in the circumstances to displenish if he chose. He had made arrangements for harvesting, and was surely free to go abroad for a month without incurring the risk of having all his goods sold off. (4) It was *ultra vires* of the Sheriff to grant the prayer of the petition without inquiry. The petition asked for far larger powers than in *Brock's* case, and there the powers were only given after inquiry. The powers here conferred

were more like those of a factor *loco absentis*, who could not be appointed by the Sheriff—*Brock* v. *Buchanan*, June 7, 1851, 13 D. 1069.

Argued for the respondent—(1) The action was irrelevant, because the pursuer could gain nothing by it. He had deliberately elected to wait till he could get nothing—he did not claim damages, although he says he will subsequently raise an action of damages—and he now asks the Court for what was impossible, to recal an appointment and management which was at an end. (2) The citation was good. No reduction of the execution was sought, and a defect in the service copy, if there were a defect, did not invalidate the citation. *Dunlop's* case had been recognised as special, and was not followed in the subsequent case of *Macqueen* v. *Clyne's Trustees*, May 20, 1834, 12 S. 610. (3) He was entitled to the remedy he had asked if the circumstances warranted the application—*Brock's* case (*supra*) and *Affleck* v. *Affleck*, January 14, 1862, 24 D. 291. All the circumstances pointed to the farm having been deserted, and if it was not so in fact, the pursuer had himself to blame for that impression in the mind of his landlord from the way he had acted, having failed to give any account of his whereabouts, and not having left a proper person in charge who could have attended to answering the petition.

LORD ADAM—The pursuer in this case is tenant of the farm of Birkbush in the parish of Irongray and stewartry of Kirkcudbright, and the defender Mr Clark is proprietor of that farm. On 31st August 1894 the landlord applied for the appointment of a person to take charge of that farm, and the first question is whether that application was competent. The grounds upon which the application was made are set forth in the second article of the condescendence, and the averments are that he (*i.e.*, the tenant) "has recently removed the most of his stock from the farm to the extent of almost entirely displenishing the same, and he has left the farm without instructing any proper person to take charge thereof. It is believed that he has gone to America without any intention of returning. The corn crop and the meadow hay crop of the current year are ripe for cutting, and require to be immediately cut and stacked," and so on. There are other preliminary statements, but these are the principal.

Now, that just means that the application was made upon the ground that the pursuer was proceeding to displenish the farm, and that he had deserted it, and the question is—assuming these facts to be true for the purposes of this question, is the application competent? In my opinion it is quite a competent application. The farm belonged to the landlord, the defender, who was entitled to have it properly managed and looked after, and if he was right in assuming that it had been deserted by his tenant, who had left no one to look after it, then I think he had a right and title to have somebody appointed to look after it. I do not think it is necessary to go further into that matter, because I agree with the Lord Ordinary that the case of *Brock* v. *Buchanan* is conclusive upon this point. It is also said that the prayer of the petition is too wide, but I think it is just an enumeration of the acts which anyone in charge of the farm would be bound to carry out, and in my opinion there is no incompetency on that ground. Well, then, if the application was competent, the next question which arises is with regard to the procedure which took place upon it. The first document which is sought to be reduced is a warrant of citation pronounced upon the 31st August 1894, by which the Court had granted warrant to cite the defender upon forty-eight hours' warning, and ordained him, if he intended to show cause why the prayer of the petition should not be granted, to lodge a notice of appearance within the *inducice* of citation. The ground of reduction of that warrant is that it did not contain a warrant to cite edictally. I cannot see how that warrant can be objected to on that ground. If, in point of fact, the tenant was resident furth of Scotland, the warrant could not possibly do him any harm. If the tenant was, as he says he was, not resident furth of Scotland, but was only temporarily absent, then it was a perfectly good warrant. Therefore I can see no ground whatever why the warrant should be set aside.

The next document that is sought to be reduced is described as a service of the petition, dated 1st September 1894, following upon the warrant of citation. The Lord Ordinary has pointed out that the only document which bears that date is not the execution of service but the service copy of the petition, and he says, and says truly, that cannot be the document meant to be set aside, because to set it aside would be just to leave the execution of service unchallenged in every respect. Therefore the Lord Ordinary treats it as if the document meant to be reduced and set aside was the execution of service which is dated the 31st of August 1894. Now, the question which arises upon that is this. It will be observed that the warrant for service was dated 31st August 1894, that it granted warrant to cite the defender on forty-eight hours' notice, and that the Sheriff-Substitute appointed a manager on the 3rd September 1894. If the true date of the service was that set forth in the service copy of the execution, then the forty-eight hours had not expired when this appointment was made upon 3rd September. If, on the other hand, the true date of service was the 31st August 1894, as set out in the execution of service itself, then the forty-eight hours had expired on the 3rd September, when the appointment was made. The date of service is a question of fact. There is no evidence whatever in this case as to what was the true date of the service of this warrant—whether it was the 31st August as set forth in the execution of service, or whether it was the 1st September as set forth in the service copy. In that state of matters the

only proof on record of any sort to challenge the 31st August, the date set forth in the execution of service, is production of the service copy; and I hold with the Lord Ordinary that that is not sufficient to set aside the execution of service. That being so, until the execution of service is set aside, that date must be held by the Court to be the true date of service. Therefore I think there is nothing whatever in this second challenge.

Then, if that be so, the question arises as to the next document sought to be reduced, namely, the appointment of the manager upon 3rd September to take charge of the farm. If, as I think, this petition was duly served, and if it was duly and properly brought before the Sheriff on the 3rd September, the position of matters was this. Here was a petition duly served, and no appearance made to answer the statements contained in it; and the question is, what was the Sheriff to do with it? What he did do is set forth in the interlocutor of 3rd September:—"In respect the defender has not entered appearance, appoints Mr Alexander Smith, before designed, to take charge of the lands and farm," &c. It is said that the Sheriff was bound to make inquiry. I do not say that it might or might not have been judicious for the Sheriff to have made some further inquiry into the matter; but I am bound to say that the Sheriff was entitled to act as he did here, for there was no appearance made by the respondent to dispute the statements in the petition, or to dispute the appointment, or any other matter. I think he was entitled to treat this as an undefended cause, which it was, and to appoint a manager in these circumstances. Therefore I think there is no ground for setting aside the interlocutor or judgment of the 3rd September 1894.

The other documents challenged are the subsequent interlocutors of the 9th and 10th October. With reference to these, I have only to say that their competency depends upon the prior proceedings. If the petition was competent, there is nothing whatever said against the proceedings of the manager in the way he carried out his commission. Therefore I see no ground whatever why these two judgments should be set aside unless the petition was bad.

Now, if that be so, the question remains on the merits, that is to say, whether the facts and circumstances of the case entitled the landlord to make the application which he did. Now, I think that question depends upon this, whether, on the facts and circumstances existing at the time, the landlord had reasonable ground, induced by the acts of the respondent, the farmer himself, to think that he had abandoned the farm, and that it was necessary that some person should be put in charge of it. If the landlord had reasonable ground for believing that this farm was abandoned, then I cannot say that there was anything wrong in applying for this appointment. That depends upon facts as proved in the evidence, and I again agree with the Lord Ordinary on these facts. I shall not read what he says, but the facts are just these—that this tenant on the 22nd August sold the cattle on his farm with the exception of three. The farm had been occupied as a bowing farm, but notwithstanding that, he, on the 22nd August, drove all the cattle away, breaking his contract with the bower, under which he had let the grazing. So to that extent he displenished the farm of all the cattle which had been left on it but three, two of which did not belong to the tenant, and were shortly afterwards removed after his going away. Those two were taken away by their owner, so that the farm was left with only one cow. Very shortly before he sold off the cattle he drove away and sold all the sheep on the farm. The result was that the landlord had reason to believe that the farm was displenished with the exception of one cow and two old horses. Now, the tenant not only so displenished the farm, but when he went away he left instructions with his daughter that she should not say where he had gone. He says himself that he did not wish anyone to know where he was, and that he left instructions to that effect with his daughter. Accordingly, when the landlord's representative, with a view to ascertain his whereabouts, made inquiry as to where the tenant was, he was told by the daughter that they did not know. I think that was a most suspicious circumstance, very well entitling the landlord to think that the farm was abandoned. Before he went away the tenant made no arrangement for the working of the farm. He did not leave any money in the hands of anybody to pay the harvesting wages or any other outlay. Now, I say again that the landlord had very reasonable grounds for believing that this almost displenished farm had been deserted by the tenant, who left instructions that nobody was to be told where he had gone. It is in these circumstances that the application was made. I do not see any reasonable ground on the part of the tenant for objecting to the competency of the application. I therefore concur with the Lord Ordinary that this defender ought to be assoilzied.

LORD KINNEAR—I agree with Lord Adam. The action is rested upon the objections to the regularity and competency of the proceedings alone. It is not averred that the pursuer suffered any loss or injury from these proceedings. His action is based upon objections to competency, and nothing more. Now, in so far as regards the technical objections to the warrant for service and the execution of service, I agree entirely with Lord Adam and the Lord Ordinary that these objections are untenable upon the grounds which his Lordship has stated. I do not think it necessary to add a single word upon these minor questions at all. But the substantial complaint of incompetency was not based upon the executory proceedings, but upon a plea that the petition was in substance incompetent. I agree with Lord Adam that that plea is not well founded. I think that the landlord

had reasonable grounds for believing that the pursuer had deserted his farm without making any proper provision for its management. I do not repeat the grounds in fact upon which I come to that conclusion, because they have been fully stated by Lord Adam; but I add that it appears to me to be a very material fact, in considering the reasonableness of the pursuer's conduct, that the pursuer's family not only withheld from the landlord all the information that might have satisfied him that his tenant had not deserted the farm, or that he had left it in competent hands, but that the persons who are now said to have been entrusted with the management—the daughter and the witness Kirk—abstained, when the petition was presented to the Sheriff, from making any opposition whatever to its being granted. There was nothing to suggest to the landlord, and certainly there was nothing before the Sheriff to suggest, that the tenant in leaving his farm had left the management in competent hands. These considerations, however, are hardly relevant to the real question which we have to consider, because the question, as I look upon it, is not whether the application was reasonable, but only whether it was competent, assuming that the pursuer had sufficient grounds for presenting it. Now, as to the competency, I think there can be no doubt. The case to which the Lord Ordinary refers is an authority; and in Mr Hunter's book, and in a subsequent case, the practice seems to be taken for granted that where a tenant has not provided for the management, an application for judicial management may be made to the Judge Ordinary. That does not in any sense involve any forfeiture of the farm. In the case of *Affleck* v. *Affleck*, Lord Colonsay pointed out that it had no resemblance to a sequestration of land. The only effect of it is to provide for the interim management for the benefit of all concerned, including the tenant; and that it is exceedingly reasonable and convenient that such interim management should be provided I think there can be hardly any question. If it be the case, as the defender alleges to have been the case here, that the tenant had left the country, leaving his crops going to waste and exposing the farm to fall into disorder, then it is to the interest of everybody—and not only of the landlord to whom the farm belongs, subject to his tenant's right—that some interim management should be provided. Therefore it appears to me there can be no question that this proceeding was perfectly competent.

I am disposed to agree with the Lord Ordinary that it might have been well had the Sheriff made some further inquiry into the circumstances before giving effect to the prayer of the petition, but I agree with Lord Adam that he was not bound to do so if he thought it unnecessary. The circumstances which should induce the Judge Ordinary to make further inquiry in such cases may vary; but that he is entitled to proceed upon the assumption that, if there were any answer to the complaint which is made to him it would have been brought before him by the tenant, or on his behalf, I do not think can be open to doubt. Whether proceedings of this kind might found an action of damages at the instance of the tenant if he had suffered wrong, is another question. It was argued that, if it turned out that the application upon which the landlord had obtained the appointment of an interim manager was altogether unfounded in fact, then the tenant would have a right to damages for the wrongful use of a summary proceeding upon the same principle upon which it has been held that an applicant who obtains interim interdict upon a wrong ground must be answerable for the consequences. Whether that is so or not I express no opinion. There is no authority—at least we were referred to none—for holding that the analogy of actions for wrongous interdict is applicable to such a proceeding as this. It may be so, but I prefer to reserve my opinion until the case arises in which that question is really argued. It is enough in the present instance to say that this is not an action of damages. The pursuer does not allege that he has suffered any prejudice whatever. It is said that he reserves his claim for damages, and it was indicated in the course of the discussion that the proceeding now before us was a preliminary action, which, if it were successful, was to be followed up by a second action of damages. Now, if that was the object of the pursuer in putting the action in its present shape, it appears to me to involve an unnecessary and oppressive multiplication of actions. I do not think it reasonable that the defender should be subjected to the expense of a long proof, first in an action of reduction, and then separately in an action of damages. In the second action the proof very probably would be much the same, and therefore the same facts would have to be proved twice over. That appears to me to be a kind of procedure which ought not to be encouraged. But at all events the pursuer cannot complain if the action which he has brought is disposed of solely upon the grounds which alone he has brought forward in support of it, and not upon other and different grounds which he tells us he holds in reserve to support another and different action. I therefore do not take into account any suggestion which may have been made at the bar as to possible injury which the pursuer in this case has sustained, because he has alleged none, and makes no claim for damages. That appears to me to be the single ground for assoilzieing the defender in so far as the action concludes for reduction of all the proceedings and interlocutors, except perhaps the interlocutors of the 9th and 10th October 1894. These stand in a different position, so far as the form and also in so far as the practical operation of them is concerned, from the interlocutor making the appointment, because there stands a judgment the practical result of which is that the interim manager's accounts of intromissions have been formally approved of, so that the pursuer might have

no claim of accounting against him. It appears to me that these interlocutors might, upon different grounds from any which I have hitherto considered, be held as decrees in absence which the pursuer was entitled to reduce on the ground that they were pronounced in his absence, so that the questions which they have decided might be retried upon their merits by a judgment resulting in a decree *in foro*. But then, in the first place, it is to be observed that the right to reduce decrees in absence is not absolute, but is subject to qualification, and I think it is a material ground of objection to a reduction of those two interlocutors on that ground that at the time when they were pronounced the pursuer had returned to this country. He knew all about the proceedings, but abstained from taking the step which was quite competent, and would have been the proper step for bringing the interim management to an end, and having the manager's accounts duly audited, by appearing in the process and asking that the appointment should be recalled. It was quite open to him to appear at this stage, and if he had done so all the questions which could have been raised as between him and the manager would have been raised at the right time, and might have been disposed of by a judgment *in foro*. That is merely one consideration that occurs to my mind, but there is a more conclusive ground, and it is this, that a decree in absence cannot be set aside upon that ground merely unless the pursuer in the reduction is prepared to show that it is wrong, and to point out the decree which ought to be substituted for it. If this action had been an action to set aside these two interlocutors as in absence, and thereafter to proceed to determine as between the pursuer and the interim manager the true state of accounts between them, I do not say that there might not have been ground for sustaining that objection. But then the pursuer does not say that there was anything wrong in substance in the interlocutors in question. The result is that a report of the interim manager's management and the pursuer's account of expenses have been approved of, with the result of leaving nothing for the tenant from the sale of his crops. But the tenant does not say that more could have been made of the sale; he does not say that he has suffered from the sale of his crops, and he does not enable us to say that the findings in question are in any respect wrong, or that if they were reduced as in absence they ought not to be repeated *in foro*.

Upon the whole matter, I think that this is an action rested upon an allegation of incompetency of procedure alone, and I think this allegation is unfounded, and therefore I agree with Lord Adam and the Lord Ordinary as to the result.

LORD M'LAREN—I regret that in this case my opinion can be of no benefit to the pursuer, but it is proper that I should state the grounds of my difference with your Lordships' opinion. The pursuer is tenant under a lease for fifteen years, whereof at the time when he was dispossessed there were three years unexpired. He was not in arrear of rent, and it has not been shown to my satisfaction that he had committed any breach of obligation towards his landlord. In the month of August 1894, having made all necessary arrangements for carrying on his farm during his absence, the pursuer went with a friend on a voyage to North America, in order, as he says, to see whether he would be likely to better himself by settling there at some future time. He returned to Scotland within a month, as he had intended, to find that his farm had been put under judicial management, his crop sold uncut, and the entire proceeds absorbed in expenses. The petition to the Sheriff for the appointment of a judicial manager set forth that the tenant (the present pursuer) was in insolvent circumstances, that he had recently removed the greater part of his stock from the farm to the extent of almost entirely displenishing the same; that he had left the farm without instructing any proper person to take charge thereof; and that it was believed he had gone to America without any intention of returning. As I read the evidence in this case, those statements are completely disproved. The pursuer was not insolvent; he had sold a part of his stock of cattle, but only with the intention of stocking the farm with sheep, as he was entitled to do; there was not a shadow of foundation for the statement that he had abandoned his farm, and so far from his having left it without care, he had left the house and farm in charge of his daughter, who was sufficiently supplied with money, and he had engaged the services of labourers for harvesting the crop.

To this it may be added that the landlord had as cautioner for his rent a lady who is the owner of a small landed property, and the sufficiency of whose security is not impugned. The petition was presented within a few days after the pursuer had left his farm—as I think, without any adequate inquiry into the facts—and in the pursuer's absence an appointment of a judicial manager was obtained from a gentleman holding the position of Honorary Sheriff-Substitute. As the appointment of the judicial manager has fallen, reduction is perhaps not a very appropriate remedy for the original wrong. But the Sheriff-Substitute thereafter approved of the manager's actings and discharged him, and I think that as regards this interlocutor, at all events, there is no objection to the competency of the reduction.

If I rightly follow the Lord Ordinary's judgment in favour of the defender, it proceeds on the view that the circumstances attending the pursuer's voyage to America were suspicious, and that the application to the Sheriff was made in good faith. But neither the defender nor the agent who presented the petition tendered themselves for examination before the Lord Ordinary—in fact, the defender offered no evidence, and if the case depends on his good faith, this circumstance alone is, in my opinion, sufficient to put him out of Court. But I demur altogether to this ground of judgment. I conceive it to be a perfectly

settled general rule of law that where an inhibitory order is obtained from a judge on an *ex parte* statement of the facts, the applicant is responsible for the truth of the statements on which he obtains the order. He cannot defend himself by alleging that he acted in good faith, or that the circumstances made his story reasonable or probable. I think that the cases relating to wrongous interdict establish this doctrine; and if this be the criterion of responsibility where a party is merely interdicted from making a particular use of his property, it must in principle apply to proceedings for taking the possession out of his hands altogether. To say that a tenant is liable to be deprived of his farm because he takes a month's holiday in the autumn, is a proposition that carries absurdity on the face of it; and I do not think the proposition is much improved by the averment that the landlord or his agent thought that the tenant was going to abscond. The tenant's right of possession cannot, as I think, be determined or interfered with upon a mere opinion of the landlord, and, as a matter of fact, the pursuer had done nothing of which the defender was entitled to complain.

I cannot help thinking that the pursuer has been unfortunate in his choice of a remedy for the wrong which was done to him, for if he had gone to a jury on an issue of damages, he might have avoided the legal difficulties which have caused the failure of his case.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer — Salvesen — W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender — Dickson — Clyde. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, December 6.

SECOND DIVISION.

[Sheriff of Dumfriesshire.

DINWOODIE'S EXECUTRIX *v.* CARRUTHERS' EXECUTOR.

Succession—Deposit-Receipt—Effect of Destination to Survivor—Donation.

A brother and sister placed £400 in an English bank on deposit-receipt, which was issued in their joint names, repayable "to them or survivor of them," on 15th July 1895, and bearing interest at 5 per cent. per annum. Of the £400, £350 was contributed by the sister and £50 by the brother. The sister, who kept the deposit-receipt in her possession till her death, died before the date of repayment, survived by her brother.

Held that the deposit-receipt did not operate as a testamentary conveyance or as a donation by the sister in favour of the brother, and that accordingly £350 of the sum contained in the deposit-receipt formed part of the sister's executry estate.

Conflict of Laws—Deposit-Receipt—Deposit-Receipt Issued by English Bank to Scottish Depositors.

Where two persons resident and domiciled in Scotland invest a sum on deposit-receipt, to which they have contributed jointly, in an English bank, all questions between the depositors or their representatives as to their rights under the deposit-receipt fall to be determined by the law of Scotland, and not by the law of England.

On 15th July 1892 David Dinwoodie, merchant, Townhead, Lochmaben, acting on behalf of himself and his sister Mrs Mary Dinwoodie or Carruthers, residing in Princes Street, Lochmaben, invested £400 on deposit-receipt with the National Bank of New Zealand, Limited, London, in his own name, to be repaid to him with interest at the rate of 5 per cent. per annum on 15th July 1895. Of the £400, £50 was contributed by Mr Dinwoodie and £350 by Mrs Carruthers.

On 20th September 1892 Mrs Carruthers having objected to the deposit-receipt being in the name of Mr Dinwoodie alone, this deposit-receipt was cancelled, and in lieu thereof a new deposit-receipt was issued in the following terms:—

"*The National Bank of New Zealand, Lmtd. London, 20th September* 1892.

"£400. *Deposit-Receipt.*

"Received of Mr David Dinwoodie, grocer, Lochmaben, and Mrs Mary Carruthers, Lochmaben, N.B., the sum of Four hundred pounds stg. as a deposit with the National Bank of New Zealand, Limited, to be repaid on the 15th July 1895 to them or survivor of them, and bearing interest at the rate of five per cent. per annum from the 15th July 1892.'

The deposit-receipt was handed over to Mrs Carruthers, and remained in her possession till her death.

Mrs Carruthers died on 17th January 1895, and Mr Dinwoodie died on the 21st of the same month.

Mrs Carruthers left a trust-disposition and settlement dated 26th February 1894, in which she appointed James Wright, flesher, Lochmaben, her trustee and executor, and, *inter alia*, stated that she was in possession of the deposit-receipt, that the sum of £350 contained in it was her exclusive property, and that it never was her intention that the deposit-receipt should be made repayable to her brother and herself or survivor of them. He had obtained the receipt in these terms without her knowledge.

Mr Dinwoodie also left a trust-disposition and settlement dated 11th January 1895, in which he appointed his wife his sole trustee and executrix.

After the death of Mrs Carruthers the deposit-receipt was found among her papers, and was taken possession of by Mr Wright.

Mrs Dinwoodie, as her late husband's executrix, maintained that as he had survived his sister the whole £400 contained