Saturday, November 9.

MURRAY *v.* CAMPBELL (J. P. FISCAL OF STIRLINGSHIRE).

Justiciary Cases—Statute 27 and 28 Vict. cap. 53 (Summary Procedure Act 1864)—Form of Charge under.

Objection to charge under the Summary Procedure Act 1864, that in addition to the form prescribed in Schedule A it concluded for a penalty of a fine and expenses or imprisonment with caution, *repelled*, in respect that it contained what was necessary, though it contained a great deal more.

Hugh Murray was charged in the Sheriff Court of Stirling and Dumbarton under the Summary Procedure Act 1864 with theft or reset and previous conviction of reset. The complaint after setting forth the charges, prayed the Sheriff "to grant warrant to apprehend the said Hugh Murray, and bring him before you to answer to this complaint, and thereafter to convict him of the said crimes, and to adjudge him to suffer the pains of law following, viz., a fine not exceeding £10 together with expenses, or imprisonment for a period not exceeding sixty days, accompanied when necessary with caution for good behaviour, or to keep the peace for a period not exceeding six months, and under a penalty not exceeding £20."

At the trial it was objected on his behalf that the form of the complaint was not that of Schedule A of the Summary Procedure Act of 1864, and that the form of the prayer was incompetent in concluding for a fine and expenses or imprisonment with caution.

The Sheriff (BUNTINE) repelled the objection, and found Murray guilty of reset of theft, and sentenced him to sixty days' imprisonment.

Murray appealed to the High Court of Justiciary, and the following question was stated for the opinion of that Court:—"Whether the complaint was competently and relevantly brought under the Summary Procedure Act of 1864, having regard to the objections stated thereto."

Argued for appellant—There was here an unreasonable departure from ordinary procedure. If a charge was brought under the Summary Procedure Act, its provisions must be attended to.

Argued for respondent—There was here a relevant charge, conviction, and sentence. The Act did not require that the charge should be in the form of its schedule; it only said it might be; besides, the appellant suffered no prejudice.

At advising—

LORD YOUNG—I am of opinion that this appeal is unfounded. The question is whether the form of the complaint was too comprehensive. But it contained all that was necessary under the statute, and all that followed was mere superfluity. Besides, it is admitted that it did no harm, and that the appellant suffered no prejudice from the form used. I think therefore that there are no objections made to render it possible for us to interfere with the conviction.

The LORD JUSTICE-CLERK and LORD ADAM concurred.

Appeal refused.

Counsel for Appellant—Brand. Agent—John Galletly, S.S.C.

Counsel for Respondent—Burnet. Agent—The Crown Agent.

Saturday, November 9.

CALDER *v.* ROBERTSON.

Justiciary Cases—Statute 2 and 3 Will. IV. c. 68 (Day Trespass Act), and 40 and 41 Vict. c. 28 (Game Laws Amendment Act 1877)—Killing Rabbits—Where Farmer's Servant Acting under his Master's Instructions.

Held that a farmer's servant who had killed rabbits by his master's instructions in order to preserve the master's crops was not liable to a conviction under the Day Trespass Act, although there was a clause in the master's lease expressly reserving the rabbits to the proprietor,—Lord Young *observing* that a farm-servant cannot be expected to ask his master to show him his lease before he obeys an order to shoot rabbits.

Observed per Sheriff-Substitute (BARCLAY), and approved *per curiam*—"The statute founded on (*i.e.*, Day Trespass Act) is a penal statute. Though rabbits be within its terms in any question with stranger trespassers, it has been authoritatively settled that with the tenant-farmer he cannot be proceeded against under the statute. Rabbits are in his case held to be vermin which he is entitled to keep down for the preservation of his crops. If so, he is entitled to authorise a third party, especially his own servant resident on the farm, to act for him."

Counsel for Complainer (Appellant)—Brand. Agent—John Galletly, S.S.C.

No appearance for Respondent.

COURT OF SESSION.

Friday, November 8.

FIRST DIVISION.

[Sheriff of Aberdeen.

MASON BROTHERS & COMPANY *v.* RENNIE.

Consuetude—The Court will not give effect to any Dishonest Custom of Trade.

In an action brought for the price of a quantity of glass rejected by the purchaser as not conform to contract, it was sought to be established that by a trade custom where "best glazing quality" was contracted for, ordinary glazing quality was always supplied. The Court *held* on the evidence that no such custom had been proved, and the Lord President observed that if the pursuer's contention had been sustained "it would have been nothing else

than the establishment of a dishonest practice of foisting off goods of an inferior quality to that which the parties understood they were to get, and that that was a practice to which no Court could possibly give effect however fully it might be established."

Counsel for Pursuer—R. V. Campbell. Agents—T. & W. H. M'Laren, W.S.

Counsel for Defender—Jameson. Agents—Renton & Gray, S.S.C.

Friday, November 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

STEWART *v.* STEUART.

Property—Running Water—Recompense—Exaction of Rates for Water.

A raised an action against B, an adjoining proprietor, for a certain sum as the value of water supplied from A's lands to certain feuars and tenants of B, the supply having been introduced at a time when the lands of A and B were in the hands of one proprietor. *Held* that (1) A could not exact water-rates without a contract or an Act of Parliament; and (2) that he had no claim in the nature of recompense, his remedy being to cut off the supply.

Recompense.

Observed per Lord President Inglis that to found a claim for recompense there must be a loss to one party resulting in a gain to the other.

In 1857 Sir William Drummond Stewart made an application to the Court for power to feu part of his entailed estate of Murthly called Inchewan. He obtained that power subject to the condition that the feu-charter to be granted should be drawn according to the form fixed by the Court. In the feu-charters granted in compliance therewith it was conditioned that Sir William should supply from another part of the entailed estate water to the feus at Inchewan, and that the feuars should pay a yearly sum for that supply of water. In 1864 he excambed that part of the entailed estate called Inchewan for certain other lands held by him in fee-simple, and from that date Inchewan ceased to be part of the entailed estate. He still went on granting feus of Inchewan with the same feu-charter as he had previously used. In 1869 he had conveyed Inchewan to Franc Nichols Steuart, the defender, and it had been held by him as his property from that date down to May 1877, when it was sold. In a previous case between these parties, July 5, 1877, *ante* vol. xiv., 608, 4 R. 981, it had been found that in so far as regarded the feus granted before the excambion the water-rate was payable to the heir in possession of the entailed estate, and in regard to other feus granted after the excambion that as fee-simple proprietor of Inchewan Sir William had no right at all to give his feuars a water supply from the entailed estate.

Sir Archibald Douglas Stewart, the heir of entail in possession, Sir William having died in April 1871, raised the present action to obtain payment from the defender of a sum of £62, 16s. 6d., which he described as the amount due to him for water supplied to the feus from 15th May 1871 to 15th May 1877, with interest thereon, if the rates so due were calculated on the same principles as the water-rates in the feu-charter previously granted under authority of the Court; or alternatively, he claimed such sum as should be fixed to represent the fair and true value of the water supply.

The circumstances will be found more fully narrated in the previous report, and below in the Lord Ordinary's note and the opinion of the Lord President.

The defender pleaded, *inter alia*—"The defender having only used the water which he found upon his own lands, was entitled so to do, and the pursuer having had it in his power to stop the supply if so advised, is not entitled to maintain the present claim."

The Lord Ordinary (Rutherfurd Clark) assoilzied the defender, adding this note:—

"*Note.*—The late Sir William Steuart in order to feu Inchewan brought water to it from other parts of the entailed estate. Some feus were given off, and thereafter Inchewan was disentailed. After the disentail additional feus were granted, and to all the feu-rights, whether before or subquent to the disentail, Sir William attached the privilege of using the water which he had introduced, on payment of a certain rate.

"By his last settlement Sir William conveyed Inchewan to the defender, so that he was vested with the *dominium directum* as regards those parts which were feued, and the *dominium utile* as regards those parts which had not been feued.

"Sir William died in 1871. The defender ceased to be proprietor of Inchewan at Whitsunday 1877.

"In July 1877 it was decided that Sir William had no power to confer on the feuars subsequent to the disentail any right to the water introduced from the entailed estate. The consequence of that decision was that the pursuer as heir of entail was entitled to cut off the water from the proprietor and feuars of Inchewan other than those whose feu-right was anterior to the disentail.

"The pursuer alleges that during the period between Whitsunday 1871 and Whitsunday 1877 the defender by himself and his tenants—almost exclusively by the latter—used the water which had been introduced by Sir William Steuart, and he claims that he shall be recompensed for this use either by a rate at 5 per cent. on the annual value of the subjects which were supplied by the water, or on some other reasonable principle. He does not allege that he gave any notice of the claim until the decision of the Court was pronounced. He explains that the reason was that the defender had claimed a right to the water, and a right to levy the water-rates stipulated in the feu-contracts, whether before or after the disentail. On the other hand, the defender maintains that he continued to possess Inchewan just as his predecessor had left it, and that the only right of the pursuer was to cut off the water if he so desired.

"The Lord Ordinary is of opinion that the defence is sufficient. It is not alleged on the record that any change was made by the defender, nor