



OUTER HOUSE, COURT OF SESSION

[2006] CSOH 190

OPINION OF C J MacAULAY, Q.C.

(Sitting as a Temporary Judge)

in the cause

BERISTON LIMITED

Pursuers:

against

DUMBARTON MOTOR BOAT AND
SAILING CLUB AND OTHERS

Defenders:

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**Pursuers: Robertson, Advocate; Morisons, Solicitors
Defenders: Thomson, Advocate; Drummond Miller, Solicitors**

15 December 2006

Introduction

[1] In this action the pursuers seek two remedies. The first conclusion is a conclusion for decree ordaining the defenders to remove from an area of ground (the "enclosure") forming part of the Old Denny Shipyard in Dumbarton. The second conclusion seeks interdict against the first defenders from entering or attempting to enter on to the whole area of the Old Denny Shipyard ("the Subjects").

[2] The Pursuers aver that they are the heritable proprietors of the Subjects and that their interest in the Subjects was registered in the Land Register of Scotland on 13 September 2004. Since then, on

3 February 2006, the pursuers have granted a Disposition of part of the Subjects to Turnberry Homes Limited. In relation to the part of the Subjects retained by them the pursuers aver that as heritable proprietors they are entitled to peaceable and uninterrupted possession. The defenders admit that the pursuers' interest in the Subjects was registered in the Land Register of Scotland on 13 September 2004.

[3] The first defenders are the Dumbarton Motor Boat and Sailing Club ("the Club") and the known office-bearers of the Club, who are sued as office-bearers and representatives of the Club, and as individuals. The second to fifth named defenders are alleged to be persons in occupation of the enclosure. The sixth defenders are designed as "The Occupiers" and, so far as the pursuers are concerned, are people whose identities are unknown. Only the second named first defender, James Gillespie, has entered the action. He is the Chairman of the Club.

[4] The pursuers go on to aver that the enclosure is now occupied by a number of individuals whom they believe to be members of the Club. They do not specify when such occupation took place. However, the second named first defender avers that the defenders have occupied the enclosure since 1990. The pursuers aver that three large portacabins and a large steel container have been placed on the enclosure occupied by the Club and that about 20 boats ranging from small dinghies to a 40 foot motor cruiser and related equipment have also been placed there. They also aver that the defenders are in occupation of the enclosure *vi aut clam aut precario*.

[5] In response to these averments the second named first defender admits that the enclosure is occupied by a number of individuals and he goes on to explain that this is a fenced enclosure in the northwest section of the Subjects adjoining the River Leven. He admits that some of these individuals are members of the Club. He also admits that within the fenced enclosure there are 4 portacabins, 4 containers and about 40 boats. He avers that the portacabins are used as Club premises. He then goes on to aver what represents his defence to the pursuers' allegation that the defenders are in occupation of the enclosure *vi aut claim aut precario*. He contends that the enclosure which the defenders now occupy formed part of the common good of the Burgh of Dumbarton under a Charter of Confirmation in favour of the Burgh of Dumbarton dated 13 December 1609 and Sasine thereon recorded in the Register of Sasines on 26 August 1842. His averments go on to contend that the enclosure was wrongly alienated by the Burgh without the authority of the Court and that he has title to seek the restoration of the enclosure to the

Burgh, now West Dunbartonshire Council.

[6] The pleadings go on to disclose that the pursuers have asked the Club and those associated with it to vacate and clear the enclosure but that the defenders have remained in possession. That is why the present action has been raised.

[7] The action came before me for debate. On behalf of the second named defender it was argued that the conclusion for removing was incompetent and that accordingly the pursuers' first conclusion should be dismissed. The pursuers argued that the conclusion was competent. Furthermore it was argued that no relevant or specific defence had been made out in the second named defender's pleadings and that certain pleas-in-law ought to be sustained and decree granted in terms of both conclusions.

Defenders' Submissions

[8] At the outset Mr Thomson indicated that only Mr Gillespie as the Chairman of the Club had entered the process and that only he was being represented albeit that his position reflected that of the Club.

Mr Thomson invited me to sustain the first plea-in-law for the second named defender challenging the competency of the pursuers' first conclusion.

[9] The essence of Mr Thomson's argument was that the Court of Session had no jurisdiction in relation to the first conclusion because the first conclusion was a conclusion for removing that was not subsidiary to any other conclusion and accordingly was within the exclusive jurisdiction of the Sheriff Court. He submitted that in certain circumstances it would be possible to include a conclusion for removing in an action in the Court of Session if that conclusion was subsidiary to another conclusion, by which he meant of lesser importance to a main conclusion. However, he argued that in this action removal was the crux of the action, and, that being so, the conclusion for removal could not be said to be subsidiary to any other conclusion.

[10] In developing his argument Mr Thomson made reference to Mackay, *Manual of Practice in the Court of Session* (1893) (at page 120), and McLaren *Court of Session Practice* (at page 153). These texts support the proposition that actions of removing are excluded from the original jurisdiction of the Court of Session and can only be instituted in the Sheriff Court. Dobie, *Law and Practice of the Sheriff Courts in Scotland* (1948) was also relied upon in support of that proposition. Mr Thomson also drew attention

to passages in Maxwell, *The Practice of the Court of Session* (at pages 100 and 354) to support the proposition that removing is only competent in the Sheriff Court.

[11] Mr Thomson also relied on case law to support his position. He referred to *Middleton v Booth* 1986 SLT 450. He submitted that what was said by Lord Cowie in that case supported the proposition that the Sheriff Court had exclusive jurisdiction in actions of removing unless the conclusion for removing was subsidiary to a declaratory conclusion. Mr Thomson also referred to *Michael v Carruthers* 1998 SLT 1179 and in particular a passage at page 1185 in the Opinion of Lord Hamilton. There, in rejecting the defenders' plea to the competency of the conclusion for removing in the Court of Session, Lord Hamilton, following *Middleton v Booth*, expressed the view that such a conclusion was competent where the conclusion for removing was subsidiary to a conclusion which sought a remedy competent to the Court of Session. In that particular case, the conclusion for removing was preceded by a conclusion for production and reduction.

[12] Mr Thomson also referred to the Scottish Law Commission Report on Recovery of Possession of Heritable Property (Scot Law Com No. 118) and, in particular, paragraphs 9.1 and 9.2 where there is some discussion about actions of removing and their exclusion from the original jurisdiction of the Court of Session. He also drew attention to the decision in *Oliver & Son Limited*, Petitioners 1999 SLT 1039. That case concerned a petition presented under Section 46 of the Court of Session Act 1988 for recovery of property belonging to the petitioners and occupied by a group of persons whose identities were unknown to the petitioners. Lord Penrose reported the matter to the Inner House posing the question as to whether a first order could competently be pronounced on a petition under Section 46 of the 1988 Act where the identities of the prospective respondents were unknown and where service in common form could not be effected against them. In the course of his report he also mentioned that a question arose as to whether a simple action of removing was competent in the Court of Session. In delivering the Opinion of the Court the Lord President (Rodger) answered the question posed by Lord Penrose in the affirmative, and, in so doing, because the Court was not asked to deal with the issue, and did not require to do so, declined to deal with the issue of the competency of actions of removing in the Court of Session.

[13] The final case referred to by Mr Thomson was *Drimsynie Estate Limited v James Trainer Letham*

Ramsay [2006] CSOH 46. In that case Lord Brodie was prepared to proceed on the basis that, because there was a conclusion for declarator preceding the conclusion for removing, the action had been competently raised in the Court of Session. He went on to say that, without the conclusion for declarator, there would have been a very real doubt as to whether the action was competent in the Court of Session. [14] In concluding his submissions Mr Thomson submitted that on a proper reading of the pursuer's pleadings the conclusion for removing stood alone and was discreet and could not be regarded as subsidiary to any other conclusion. The crux of the pursuers' action was that they wanted the defenders removed from the part of the Subjects which they occupied. In these circumstances he invited me to sustain the first plea-in-law for the second named defender and dismiss the pursuers' first conclusion. He did not challenge the competency of the interdict conclusion.

Submissions For The Pursuers

Competency

[15] In responding to the attack based on competency Mr Robertson invited me to repel the second named defender's first plea-in-law and to hold that the first conclusion for the Pursuers was competent.

[16] Mr Robertson submitted that there was no rule of law which excluded an action of removing in the Court of Session. He argued that the textbook references relied upon by the second named defender in this case were of some vintage and that matters had moved on procedurally since then. He referred to Chapter 45A of the Rules of Court headed "Action of Removing" in support of his position. He also drew attention to the Scottish Law Commission Report of Recovery of Possession of Heritable Property to support the view that, although the proposition excluding actions of removing from heritable property from the original jurisdiction of the Court of Session was based by McLaren on Sections 34-38 of the Sheriff Courts (Scotland) Act 1907, in fact the statutory provisions mentioned did not make any explicit statement excluding the jurisdiction of the Court of Session.

[17] In any event Mr Robertson argued that this action was not a pure action of removing. There was also a conclusion for interdict. He argued that the conclusion for interdict was an independent one and was not subsidiary to the conclusion for removal. He submitted that the conclusion for removing was subsidiary because the interdict sought went beyond the area of the enclosure occupied by the defenders

and related to the whole of the Subjects. In dealing with the cases of *Middleton v Booth* and *Michael v Carruthers*, Mr Robertson submitted that the appropriate test was to ask whether or not the conclusion for removing was ancillary to any other competent conclusion. In support of that submission he drew attention to the fact that in the Law Commission Report at paragraph 9.2 it is the word "ancillary" that is used and that in the *Court of Session Practice Encyclopaedia* at paragraph 2402, again the suggestion is that the Court of Session has jurisdiction in actions of removing where removing is sought as ancillary to another conclusion.

Relevancy

[18] Mr Robertson went on to develop his attack on the first named defender's pleadings. He invited me to sustain his fourth to seventh pleas-in-law and to grant decree as concluded for. His fourth plea-in-law attacks the relevancy and specification of the second named defender's averments in answer. The fifth, sixth and seventh pleas-in-law seek to focus that proposition, and in particular to challenge the relevancy and specification of the second named defender's proposition that the pursuers are not entitled to possession of the Subjects and the proposition that the second named defender is entitled to enter the Subjects. The seventh plea-in-law in particular challenges the relevancy of the second named defender's averments anent the proposition that he has title to seek the restoration of the enclosure to the Burgh, now West Dunbartonshire Council.

[19] Mr Robertson drew attention to the fact that the second named defender has not challenged the pursuers' title and that it is admitted that the pursuers' interest in the Subjects has been registered in the Land Register of Scotland.

[20] In dealing with the defence advanced on Record to the effect that the enclosure was wrongly alienated by the Burgh without the authority of the Court, Mr Robertson submitted that these averments were grossly lacking in specification and failed to provide a relevant defence to the pursuers' unchallenged title. In developing his submissions Mr Robertson referred to *Cockenzie and Port Seaton Community Council v East Lothian District Council* 1997 SLT 81, *East Lothian District Council v National Coal Board* 1982 SLT 460 and *Kirkcaldy District Council v Burntisland Community Council* 1993 SLT 753. His purpose in so doing was to highlight that, before the issue raised by the second

named defender could be properly explored, a large number of questions had to be addressed. For example, the question might arise in the first place as to the rights of an authority to alienate. The second named defender required to demonstrate that the enclosure was indeed inalienable at the relevant time. Even if it was inalienable at the relevant time, the question would also have to be asked as to why a Court would in fact refuse such an application given that a wide discretion was given to the Court. Mr Robertson argued that the sparse averments put forward by the second named defender fell woefully short of providing the necessary detail that would allow the number of questions that could arise in the circumstances of this case to be addressed.

Response For The Pursuers

[21] Mr Thomson reiterated his position that in dealing with the competency of a conclusion for removing, subsidiarity was the test. The suggestion made by Mr Robertson that the interdict sought was wider, he argued, was a matter of interpretation, and, in any event, at the crux of the pursuers' action was removing.

[22] In dealing with the attack on the relevancy and specification of the second named defender's pleadings Mr Thomson argued that fair notice of the position had been given. He indicated that the second named defender is considering taking steps to challenge the pursuers' title in a separate action seeking rectification of the register. He argued that since the separate action was required it was inappropriate to subject the present pleadings to the same degree of scrutiny that might be applied to such an action. In the circumstances he invited me to repel the pursuers' fourth to seventh pleas-in-law.

Decision

Competency

[23] The first issue to determine is whether the conclusion for removing is competent in the context of this action.

[24] Neither counsel considered it necessary to explore the historical development of actions of removing generally. Before, me much of the argument centred on whether the test for competency lay in deciding whether the conclusion for removing was subsidiary or ancillary to the conclusion for interdict.

[25] The use of the description "subsidiary" appears first to have been used by Lord Cowie in *Middleton v Booth*. In that case the defender in his counterclaim concluded for a declarator and a warrant for ejection. He enrolled a motion to ordain the pursuer to find caution for violent profits. Lord Cowie refused that motion primarily on the basis that the warrant of ejection sought by the defender was clearly dependent upon the conclusion for declarator and that the legislation that provided for caution for violent profits only applied to an action of ejection "pure and simple" (page 451 I-J). In dealing with one of the arguments advanced by the pursuer, Lord Cowie, at page 452 H-J, made the following observations:

"The second of the additional arguments by counsel for the pursuer was to the effect that, if counsel for the defender is right in maintaining that the third conclusion of the counterclaim is a separate action of ejection, then the Court of Session has no jurisdiction to entertain it, and the motion itself must be refused.

In my opinion, there is considerable force in this argument. In *McLaren on Court of Session Practice* at page 153, the learned author points out that, since the Sheriff Courts (Scotland) Act 1907, the Sheriff Courts have exclusive jurisdiction in summary actions of removing. By the same token I am of the opinion that they also have exclusive jurisdiction in summary actions of ejection. Accordingly on the very construction of his pleadings which counsel for the defender seeks to put forward as a ground for the application of the statute of 1594, he, in the same breath, excludes the jurisdiction of this Court. If, on the other hand he had argued that the conclusion for ejection was subsidiary to his declaratory conclusions, this court probably would have had jurisdiction (cf. Rankine *in Leases* page 586, under the heading "3. Decree of Removing"), but the action then not being a pure action of ejection, the statute of 1594 would not have applied. Whichever way the matter is regarded it seems to me that on this ground also the first defender's motion must be refused".

[26] It is worthy of note that when Lord Cowie makes these observations he makes reference to Rankine *on Leases* (3rd Edition) at page 586. Under the heading "Decree of Removing" the learned author explains:

"Where decree of removing is granted in the Court of Session it must be either in a proceeding

under the old Act of 1555 C.39 - an obsolete remedy of which nothing further need be said - or in cases where a conclusion for removing follows, is ancillary to, and carries into practical operation, conclusions for declarator or reduction.

With the charge on such a decree of removing, the function of the Supreme Court comes to an end. It leaves the ejection to be carried out by the Judge Ordinary, as in the other cases now to be noticed.

In the Sheriff Court - which in most cases is the only competent tribunal - decess of removing may be extracted forty eight hours after the interlocutor is signed".

[27] The passages I have just quoted appear in a chapter (chapter 21) where the learned author examines the historical development of actions of removing in Scotland. The Act of 1555 to which he refers was in fact finally repealed by the Statute Law Revision Act (Scotland) 1964. What is clear from these passages is that the competency of a conclusion of removing in the Court of Session is periled on it being consequential upon a preliminary step such as declarator or reduction. The word "ancillary" is also used and clearly is meant to indicate that the conclusion for removing is subordinate to another preliminary conclusion. That perhaps explains Lord Cowie's use of the description "subsidiary" when he expresses the view that he did in *Middleton v Booth*.

[28] In this context it is helpful to consider the case of *Campbell Trustees v O'Neill* 1911 SC 188. In that case an issue arose as to the correct interpretation of the Sheriff Courts (Scotland) Act 1907, and in particular the meaning of the words "summary ejection" in Section 37 of that Act. The First Division held that "summary ejection" in Section 37 was really a summary removing. The importance of that conclusion, as the law then stood, was that the appeal taken by the tenant to the Court of Session was incompetent because a summary removing was reviewable only by a suspension. Lord Johnston produced the leading Opinion in course of which he explored the history of removing in Scots Law. In the course of that opinion he made the following observations (at pages 194-195):

"The only cases in which a separate application for ejection could be made to the Sheriff Court, were, first where proceedings for removing have been taken under the Act of 1555 in the Court of Session, and the pursuer preferred to apply direct to the Sheriff, in place of taking out letters of

ejection; and, second where the conclusion for removing is merely ancillary to a declarator of some right in the Court of Session, in which case the intervention of the Sheriff is called for, and may be obtained just as in the removing under the Act of 1555. This latter is still a possible though infrequent case, and is, and I think has been, for much more than a century, the only case in which a separate application has been made to the Sheriff for ejection of a tenant or one who had a right of possession through expired. Such ejections have not been regarded as falling under the category of summary ejections in the Sheriff Court. The difference between them and summary ejections is that as they are merely accessory and executorial, no proceedings of a judicial character under them was called for, or indeed possible. The Sheriff acts merely as the hand or officer of the Superior Court - very much as an officer executing a diligence Summary ejection, on the other hand, is a substantive proceeding, which is not ancillary to a removing, and is applicable in totally different circumstances. Such ejections, as I have shewn, are truly summary, in this sense, that they proceed without any initial warning. But they are not applications which can be granted *de plano*. They rest on no warrant of a superior Court".

[29] One of the striking aspects of Lord Johnston's description of the law relating to removings and ejection generally is the critical role played by the Sheriff Court of the locality even when the conclusion for removing was granted in an action in the Court of Session. He is at pains to underline the differences between the application made consequential upon a decree for removing in the Court of Session to the Sheriff for a warrant for ejection and the substantive action of summary ejection. Furthermore, it is plain from what he says that it was only in the situation when a conclusion for removing proceeded under the 1555 Act (by then obsolete) or ancillary to a declarator that the Court of Session played a role but an incomplete role in the process of ejection. It is clear, in my view, that his description of the Court of Session's jurisdiction is designed to be exhaustive.

[30] The Lord President (Dunedin) concurs with Lord Johnston's analysis and summarises the position (at page 197) in the following way:

"There could be three positions so far as an ejection was concerned - they have all been detailed by Lord Johnston, and I merely repeat them for clearness. There was the case where removing itself was in the Sheriff Court, and there, if decree were got, ejection followed as a matter of

course always. There was next the case where you had got decree in an action of removing in the Court of Session - possible but utterly obsolete for well over one hundred and fifty years, because of the extreme difficulties of the particular class of notice that you had to give under the old Act of 1555. And there was the third class - no doubt rare but not unknown, because I remember a case in my own practice - where an action of declarator of removing was brought in the Court of Session against a person who was really a squatter, but where, though decree was got, there were no operative conclusions for turning the person out, and you had to go to the Sheriff Court to get the operative decree in the ejection. Well those are the three cases, and they exhaust the whole category of ejections, exclusive of the summary ejection of a squatter".

[31] The passages to which I have made reference in the Opinions of Lord Johnston and the Lord President, in my judgment justify the conclusion arrived at by the learned author of Rankine *on Leases* that, so far as Court of Session is concerned its jurisdiction was a limited one, and essentially dependent upon the existence of another conclusion as a preliminary to the conclusion for removing.

[32] Historically, the Court of Session had exclusive jurisdiction in all declaratory actions and actions of reduction. Until the passing of the Sheriff Courts (Scotland) Act 1907 the Sheriff Court did not have jurisdiction in actions of declarator. Section 5(1) of that Act provided that the jurisdiction of the Sheriff extended to and included certain actions of declarator. However, all actions of reduction are still within the exclusive jurisdiction of the Court of Session. It follows that prior to the enactment of the 1907 Act, in relation to any action seeking removing with a preliminary conclusion for declarator, such actions could not be competently raised in the Sheriff Court. That remains the position if reduction is sought as a preliminary to removing. Against that background, resort to the Court of Session was not simply a matter of choice but mandatory. However, even where an action containing a conclusion for removing had to be raised in the Court of Session, in order to give full effect to the decree of removing pronounced by the Court of Session, it was (and still is) necessary to obtain letters of ejection from the signet directed to the Sheriff who had jurisdiction in the area where the property concerned was located. That was (and is) necessary because a Court of Session decree of removing is not a warrant for diligence.

[33] The discussion in the preceding paragraphs leads me to make the following conclusions. Firstly, where reduction is sought as a preliminary to removing, the action must be raised in the Court of

Session. Secondly, where a declarator is sought as a preliminary to removing, the Court of Session has concurrent jurisdiction with the Sheriff Court, but, as is the case where reduction is sought, the Sheriff Court has to be involved in the process of ejection. As declaratory actions may involve important questions relating to heritable rights, there is clear justification for the availability of Court of Session jurisdiction in respect of such actions. Thirdly, when the action is a pure action of removing, there seems little practical sense in such an action being raised in the Court of Session. If a Pursuer is sufficiently confident to proceed without the need of a declarator, then he is proceeding on the basis that his heritable right to possession is not seriously in issue and to achieve the ultimate conclusion of ejection the Sheriff Court has in any event to be involved. Nowadays a pursuer would proceed by way of summary cause for the recovery of heritable property.

[34] The pursuers do not have a conclusion in this action in respect of which it could be said that the conclusion for removing was seeking to carry the consequences of such a preliminary conclusion into practical operation. It may be the case that a declaratory conclusion could have been included. It may be that the thinking was that, against the background of an allegation that the defenders were in occupation *vi aut clam aut precario*, such a conclusion was unnecessary. However, it was the fact that there was a conclusion for declarator in *Drimsynie Estate Limited v James Trainer Leatham Ramsay* that permitted Lord Brodie to proceed on the basis that the action in that case had been competently raised in the Court of Session. In a similar way, it was the preliminary conclusion for production and reduction that persuaded Lord Hamilton in *Michael v Carruthers* that the conclusion for removing was competent.

[35] Although I consider that Mr Robertson is correct in saying that Sections 34-38 of the Sheriff Courts Act 1907 do not in terms exclude the jurisdiction of the Court of Session in actions of removing, nevertheless, for the reasons set out in the preceding paragraphs, it is clear that, apart from Act of 1555, it has been long established practice that the Court of Session did not have jurisdiction in such actions in the absence of a preliminary conclusion for declarator or reduction. The references in the standard textbooks such as Mackay and McLaren support the existence of such a rule. Furthermore, the passage in Rankine to which I have already made reference and the observations made in *Campbell Trustees v O'Neill* support the existence of such a rule. That such a rule exists has been at least implicitly acknowledged in the decisions in *Middleton v Booth* and *Michael v Carruthers*. Had this been a pure

action of removing then it seems to me such an action would not be competent in the Court of Session. Furthermore as I have already discussed (paragraph [33]) there is practical sense in the Sheriff Court possessing exclusive jurisdiction in such actions.

[36] In my opinion therefore the critical question, when considering the jurisdiction of the Court of Session, is whether there is a preliminary conclusion that can invoke its jurisdiction. In this case, although there is a conclusion for interdict, that conclusion is not pled as a preliminary step towards removing. In the context of the pursuer's pleadings the interdict conclusion is designed to reinforce the conclusion for removing. Mr Robertson sought solace in the use of the word "ancillary" in the Law Commission Report and in the Court of Session Practice Encyclopaedia, but for the reasons set out at paragraph [27], properly understood, an ancillary conclusion in this context is one that is subordinate to a conclusion that is a preliminary step for a decree of removing.

[37] Although the conclusion for interdict may relate to a larger area of ground than that from which the removal of the defenders is sought, I do not agree with Mr Robertson that that means the conclusion for removing is the subsidiary conclusion. As I have already discussed, I am of the view that the real question is whether there is a conclusion being employed as a preliminary step towards removing and it was not suggested that the conclusion for interdict played such a role in this case.

[38] I propose now to consider what effect, if any, Chapter 45A of the Rules of Court has on this issue. As the Lord President (Rodger) explained in *Oliver & Son*, Petitioners, Chapter 45A was designed to implement certain recommendations made by the Scottish Law Commission in its report on Recovery of Possession of Heritable Property, particularly in relation to the removal of unidentified and unlawful occupants such as trespassers or squatters. RC45A.1. is in the following terms:

"(1) Subject to paragraph (2), this Chapter applies only to a conclusion for removing in an action of removing against a person or persons in possession of heritable property without right or title to possess the property.

(2) This Chapter shall not apply with respect to a person who has or had a title or other right to occupy the heritable property and who has been in continuous occupation since that title or right is alleged to have come to an end."

[39] RC45A.1.(2) suggests that Chapter 45A is aimed at squatters and trespassers. If that is correct, then

the references in RC45A.1.(1) to a "conclusion for removing" and "action of removing" are difficult to understand. Squatters and trespassers would normally be ousted by an action of ejection - the substantive remedy alluded to by Lord Johnston in *Campbell's Trustees v O'Neill* (see paragraph [28]). The Sheriff has exclusive jurisdiction in such actions and nowadays a pursuer would proceed by way of summary cause for the recovery of heritable property. Be that as it may, and although RC45A.1. makes reference to an "action of removing" it does not, in my opinion, follow that that reference is designed to render competent in the Court of Session a pure action of removing or an action with a conclusion for removing that is not premised upon another preliminary conclusion such as declarator or reduction. RC45A.1. also refers to "a conclusion for removing in an action of removing" and that may tend to suggest that the conclusion for removing does not stand alone. Furthermore, as it is my view that the Court of Session did not have jurisdiction in pure actions of removing or actions that did not contain a conclusion as a preliminary step towards removing, at least since the disappearance of the act of 1555, an Act of Sederunt such as the Act of Sederunt (S.I. 1996 No. 2168) that introduced Chapter 45A could not change the substantive law.

[40] In his submissions Mr Robertson also drew attention to the notes accompanying RC45A.1. Whilst these notes suggest that the "conventional wisdom is that an action of removing without any other substantive conclusion is not competent in the Court of Session" they also suggest that "It is accepted that an action with a conclusion for removing is competent if associated with another conclusion such as interdict". A similar observation is made in the Law Commission Report at paragraph 9.2. It may be possible to have a situation where a conclusion for interdict might be seen as a preliminary step to a conclusion for removing. However, in this present action interdict is not being sought as a preliminary to removing but rather in order to reinforce the removing. I would disagree with a broad proposition that, to invoke the jurisdiction of the Court of Session, it would be sufficient that a conclusion of removing is "associated with" a conclusion for interdict if the conclusion for interdict is not a preliminary to the conclusion for removing.

Relevancy

[41] I have no hesitation in concluding that the second named defender's averments seeking to challenge

the pursuers' heritable right to possess the enclosure occupied by the defenders are wholly lacking in specification and are irrelevant. I agree with Mr Robertson that there is a total lack of fair notice in relation to the second named defender's contention that the enclosure occupied by the defenders was wrongly alienated and that he has title to seek the restoration of the enclosure to the Burgh, now Western Dunbartonshire Council. Under reference to the cases referred to by Mr Robertson, when dealing with land that may have been common good land, a number of questions do require to be addressed. One critical question is whether the subjects concerned were inalienable and in addressing that question the question has to be asked whether the subjects fell within the category of subjects regarded as inalienable.

[42] Even if the answer to that question is in the affirmative, it is still necessary to determine whether the inalienable quality was attached to the subjects at the relevant time of disposal.

[43] Even if these hurdles are overcome, as Mr Robertson correctly submitted, it would still be necessary for the second named defender in this case to offer to prove that the Court in the exercise of its discretion would refuse to permit the disposal of common good land. None of these issues have been properly addressed by the second named defender in his averments.

[44] I think Mr Thomson realised the difficulties he faced and what his argument amounted to was that the necessary specification would be offered in due course in a separate action to be raised by the second named defender. This present action was signetted on 25 February 2005, and I fail to see, if the second named defender is intending to raise a separate action, why that has not been done and at the very least the pleadings incorporated *brevitatis causa* into this action.

Conclusion

[45] My view is that the conclusion for removing is incompetent and I propose to sustain the first plea-in-law for the second named defender. Mr Robertson, in seeking to have his fourth to seventh pleas-in-law sustained, invited me to grant decree of removing and interdict, but for the reasons I have elaborated upon in the course of this Opinion the conclusion for removing cannot be sustained. However, I am also of the view that no relevant defence has been pled to challenge the pursuers' right to possess the enclosure. In presenting his submissions Mr Robertson did not elaborate upon what the outcome should be if the first conclusion was incompetent but that there was no relevant defence to the conclusion

seeking interdict. Nor did Mr Thomson address me on this matter. In the circumstances I propose to put this case out By Order so that I can be addressed by parties as to the appropriate disposal of this action in light of the conclusions that I have arrived at. In the meantime I shall reserve the question of expenses.