

letters-patent dated 28th December 1892, numbered 2216091, for improvements relating to paints and lacquers; (2) that the invention for which said letters-patent were granted is described in the complete specifications by the pursuers as a paint in which collodion or dissolved liquid (pyroxoly) pyroxylin is used as the essential element, this being combined or mixed with bronze or other metallic or alloyed substances in a powdered state to form a paint or a lacquer for gilding purposes; (3) that the defender Cutler in the year 1888, and from that date down to the 28th December 1891, made, sold, and publicly used, both as a paint and a lacquer for gilding purposes, a paint composed of dissolved liquid pyroxylin combined or mixed with bronze powder or other metallic substances, and that he has since said 28th December 1891 continued to make, sell, and publicly use the same; and (4) that the paint so made, sold, and publicly used by said defender was the same as that for which said letters-patent were granted: Find in law that the pursuers' letters-patent foresaid are invalid and void on the ground of prior public use: Th. refore assoilzie the defender Cutler from the whole conclusions of the action, and decern."

Counsel for the Pursuers—Solicitor-General, Graham Murray, Q.C.—Salvesen—Younger. Agent—Alex Morison, S.S.C.  
Counsel for the Defender—Ure—Hunter. Agents—Dagleish, Gray, & Dobbie, W.S.

Tuesday, December 17.

FIRST DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

WHYTE v. WHYTE.

Process — Appeal — Competency — Interlocutor of Sheriff bearing to be Pronounced of Consent—Power of Court to Order Inquiry.

When a final judgment of an inferior court bearing to be pronounced of consent is appealed against, and the appellant alleges that in fact no such consent was given by him, the Court has full power to order inquiry into the fact whether such consent was given.

A Sheriff-Substitute decerned in favour of a petitioner upon the preamble that the agent for the respondent had stated at the bar "that he now withdraws his opposition" to the application. The respondent appealed to the Court of Session, and asked the Court to review the judgment on the merits, alleging that the Sheriff-Substitute was in error as to the fact of opposition having been withdrawn. Held that the appellant having neither proposed nor agreed to accept a remit to

the Sheriff-Substitute to report on the question of fact, the appeal must be dismissed.

George Whyte presented a petition in the Sheriff Court of Stirling, Dumbarton, and Clackmannan, craving the Sheriff to decern him executor-dative *quod* one of the next-of-kin to his deceased sister Mary Logan Whyte. The petition was opposed by Miss Fanny Whyte, a sister of the deceased, who maintained that she had been appointed executrix-nominate under a mutual settlement executed between her and the deceased. On 24th May 1895 the Sheriff-Substitute (GEBBIE) pronounced an interlocutor, finding that the mutual settlement had been revoked by a subsequent writing of the deceased, and continuing the cause. Miss Fanny Whyte appealed against this interlocutor to the Court of Session, which, on 4th July 1895 dismissed the appeal as incompetent.

On 30th September 1895 the petitioner lodged a minute in the Sheriff Court craving that he should be appointed executor-dative in terms of his petition, in respect that the Court of Session had dismissed Miss Fanny Whyte's appeal. On 8th October the Sheriff-Substitute sisted further procedure to enable the respondent to lodge a competing petition. On 15th October 1895 the Sheriff-Substitute pronounced the following interlocutor:—"The agent of the respondent having stated at the bar that he now withdraws his opposition to the minute for the petitioner, the Sheriff-Substitute decerns the petitioner executor-dative in terms of his petition."

The respondent Miss Fanny Whyte appealed to the Court of Session.

The appellant stated at the bar that the Sheriff-Substitute was mistaken in supposing that she had withdrawn all opposition to the petition. All that her agent had stated was that his client did not propose to lodge a competing petition. The appellant accordingly argued that the Sheriff-Substitute's judgment was open to review by the Court.

The respondent in the appeal denied at the bar the appellant's allegation as to what occurred in the Sheriff Court, and alleged that the Sheriff-Substitute on being applied to by the appellant's agent had declined to alter the interlocutor in any material respect. The respondent accordingly argued that, the Sheriff-Substitute's judgment bearing to be of consent, the appeal must be dismissed.

At advising—

LORD ADAM—The interlocutor of the Sheriff-Substitute appealed against is as follows:—"The agent of the respondent having stated at the bar that he now withdraws his opposition to the minute for the petitioner, the Sheriff-Substitute decerns the petitioner executor-dative in terms of his petition." The minute referred to, after alluding to the appellant's previous unsuccessful appeal, goes on:—"The petitioner respectfully craves the Court to appoint him executor-dative in terms of his petition." It is clear, therefore, upon the face

of this interlocutor, that the opposition to the minute having been withdrawn, the Sheriff appointed the respondent in this appeal in terms of his prayer. It will be observed that this interlocutor does not proceed upon any minute signed by the party withdrawing opposition, but it proceeds upon a statement of what is alleged to have taken place at the bar, namely, that the agent for the respondent in the original petition withdrew his opposition to the minute for the petitioner. Now, we were informed by the counsel for the appellant that that was not true in point of fact, that in reality the agent for the respondent in the Court below had not withdrawn the opposition to the appointment of Mr Whyte as executor-dative. On the other hand, it was distinctly denied by the respondent in this appeal that that was so, and he told us that the interlocutor truly represented what had taken place in the Court below, and that, in point of fact, the agent for Miss Fanny Whyte had intimated the withdrawal of opposition to the petition. I should not regard the statement of fact as to what is alleged to have passed at the bar, even though embodied in an interlocutor, as conclusive of the fact. We all know that misapprehensions and mistakes sometimes take place in such matters, and I think it would not be right that a party should be barred from all redress simply because such a statement was set forth in an interlocutor. But it appears to me that if the question should be settled what in point of fact took place before the Sheriff, the first thing to do would be to remit the case to the Sheriff to report to us whether or not the interlocutor truly set forth what took place before him, and whether there might not have been the possibility of a mistake. On receiving a report from the Sheriff we should have an opportunity of considering its terms, and having so considered it, we should be in a position to say what other steps should be taken in the matter.

Now, I should have been quite ready in this case to follow that course and to remit to the Sheriff to report, but we were very distinctly informed at the bar that the appellant did not desire any such course, and that being so, it appears to me that we are left in this position, that the appellant not wishing that inquiry be made, we must assume that what took place before the Sheriff is properly recorded in this interlocutor, and that being so, that it is impossible for us to review this judgment on the merits because it proceeds on consent. Consequently, I think we should dismiss the appeal.

LORD M'LAREN.—I agree with all that Lord Adam has said, and I am anxious that it should be understood that in my opinion, where a judgment or interlocutor bears to proceed upon a consent or concession of the other party, and it is represented to us that the concession was not in fact given, the Court has full power to deal with the representation upon equitable principles, not being tied down to any par-

ticular mode of procedure. When a judgment is to be passed upon a consent, the proper mode of recording that consent would be by a minute signed by the procurator of the party granting it, but when the matter at stake is of no great value or importance, and especially when it only relates to procedure, we know that it is common both in the inferior courts and in this Court to state in the interlocutor that it is granted on consent. I should not think it consistent with sound principle to hold that the statement of the Sheriff or inferior judge, to the effect that the defender had consented to a decree, was conclusive, or that we were in any way limited in our mode of correcting what is made to appear to us a mistake. In the present case no pecuniary interests are involved, but only a question of the right to administer a small estate, and the history of the case makes it not at all unlikely that the consent which the Sheriff says was given would be given. There has been no proposal to refer the matter to the Sheriff, and I agree that the appeal should be dismissed.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court dismissed the appeal with expenses.

Counsel for the Appellant—Cooper. Agents—Welsh & Forbes, S.S.C.

Counsel for the Respondent—Watt—A. S. D. Thomson. Agents—Cumming & Duff, S.S.C.

*Tuesday, December 17.*

#### FIRST DIVISION.

FORBES (SURVEYOR OF TAXES) *v.*  
SCOTTISH PROVIDENT INSTITUTION.

FORBES (SURVEYOR OF TAXES) *v.*  
SCOTTISH WIDOWS' FUND SOCIETY.

*Revenue—Income Tax—Customs and Inland Revenue Act 1893 (56 Vict. cap. 7), sec. 5—Property and Income Tax Act 1853 (16 and 17 Vict. cap. 34), sec. 2—Property and Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 102—Interest on Colonial Securities.*

In an appeal by the Surveyor of Taxes against a decision of the Income Tax Commissioners, to the effect that interests on the colonial investments of a Scottish insurance company not received in the United Kingdom were not liable to be assessed for income tax for the year 1893-4—*held* (1) that under the Customs and Inland Revenue Act 1893, section 5, no species of property was subjected to income tax except what is enumerated in Schedules A, B, C, D, and E of the Property and Income Tax