

an outfall for part of the drainage of that estate, and was used by them as such outfall, and that he did not object thereto, but that this knowledge and acquiescence on his part did not affect Lord Dalhousie or the appellant as a singular successor in the estate of Little Inchock; (8) That the appellant purchased the estate of Little Inchock in 1886, and that he has since been in possession of it as proprietor; (9) that when the appellant purchased the estate of Little Inchock he had no knowledge and no notice of the existence of the said drain, or of its being used as an outfall for drainage from Abbethune, as also that he did not acquire such knowledge until 1893, and that he objected to the drain shortly after; (10) that the appellant has done nothing to bar himself from challenging the respondents' claim of right to maintain the said drain in his land, and that he is entitled to remove it: Therefore refuse the prayer of the petition for interdict, and decern: Find the respondent liable to the appellant in the expenses of process in the Sheriff Court and in this Court," &c.

Counsel for Pursuers—W. Campbell, Q.C.  
—Macphail. Agents—Webster, Will, &  
Co., S.S.C.

Counsel for Defenders—Solicitor-General  
(Dickson, Q.C.)—Clyde. Agents—Lindsay,  
Howe, & Co., W.S.

Thursday December 21.

### FIRST DIVISION.

(Without the Lord President.)

#### STEEL v. FINDLAY AND OTHERS.

*Process—Appeal from Sheriff—Competency—Whole Subject-matter of the Cause—Court of Session Act 1868 (31 and 32 cap. 100), sec. 53—Sheriff Court Act 1853 (16 and 17 Vict. cap. 80), sec. 24.*

*Held* that the interlocutor of a sheriff in an action of sequestration for rent, which repelled all the pleas-in-law for the defender, granted warrant of sale, found the pursuer entitled to expenses, and *quoad ultra* continued the cause, was an interlocutor which disposed of the whole subject-matter of the cause within the meaning of section 53 of the Court of Session Act 1868, and section 24 of the Sheriff Court Act 1853, and was therefore appealable.

*Observed* (per Lord M'Laren and Lord Kinneir) that section 24 of the Sheriff Court Act 1853 is not directly or impliedly repealed by the Court of Session Act 1868.

The trustees of the late John Turner, proprietor of the subjects 61 High Street, Edinburgh, brought an action in the Sheriff Court, Edinburgh, against Mary Scott Steel, their tenant, concluding for sequestration

of her effects under their hypothec, and for payment to them of £23, 15s., being the rent due and payable at 28th February 1898 for the quarter preceding, and "(2) the sum of £23, 15s. sterling, being the quarter year's rent due and payable by the defenders to the pursuers, as trustees foresaid, for said premises upon 15th May 1899 for the quarter year preceding that date, with interest on each of said sums at the rate of 5 per centum per annum from the said respective terms of payment, and with expenses, and also in security to the pursuers, as trustees foresaid, for payment of (1) the sum of £23, 15s. sterling, being the quarter year's rent of the said premises to become due at 28th August 1899 for the quarter year preceding that date, with the interest as aforesaid from that date, and with expenses; (2) the sum of £23, 15s. sterling, being the quarter's rent of the said premises to become due at 28th November 1899 for the quarter year preceding that date, with interest as aforesaid from that date, and with expenses; (3) the sum of £23, 15s. sterling, being the quarter's rent of the said premises to become due at 28th February 1900 for the quarter year preceding that date, with interest as aforesaid from that date and with expenses; and (4) the sum of £23, 15s. sterling, being the quarter's rent of the said premises to become due at 15th May 1900 for the quarter year preceding that date."

The defender pleaded — "(1) *Lis alibi pendens* as regards the two first items mentioned in the prayer of the petition. (2) By raising the action in the Debts Recovery Court the pursuers abandoned any right of hypothec they had for said two first items. (3) No relevant or sufficient statement to support the application for sequestration for the current year's rent. (4) In respect of the foregoing pleas, the deliverance granted in absence of defender, sequestrating and granting warrant to inventory and secure, ought to be recalled, and the action dismissed, with expenses. (5) The defender having been deprived of the occupancy of the attic part of the house through the roof being in a state of disrepair, and having suffered damage through the fault of the pursuers, is entitled to have an abatement of the rent equivalent to said loss."

On 1st August 1899 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor — "Repels the defences and grants warrant to licensed auctioneers, at the sight of the Clerk of Court or one of his assistants, to sell by public roup, after due advertisement, so much of the sequestrated effects as will pay to the pursuers, as trustees mentioned in the petition, (1) the sum of £23, 15s., being the quarter's rent of the premises in question due at 28th February 1899, and (2) the like sum of £23, 15s., being the quarter's rent of said premises due at 15th May 1899, with interest on said sums, and expenses of sale and of process as these shall be ascertained; appoints the free proceeds of said sale to be consigned with the Clerk of Court; grants warrant to open doors if necessary;

and *quoad ultra* continues the cause; Finds the pursuers entitled to expenses," &c.

On appeal the Sheriff (RUTHERFURD) "Repels the defender's first four pleas-in-law, the same not being insisted in: *Quoad ultra* finds that the defence stated is irrelevant: Therefore sustains the pursuers' third and repels the defender's fifth plea-in-law; adheres to the Sheriff-Substitute's interlocutor of 1st August last; dismisses the appeal, and remits the case to the Sheriff-Substitute; Finds the defender liable to the pursuers in additional expenses," &c.

The defenders appealed to the Court of Session.

On the case being called in the Single Bills doubts were expressed by the Court as to the competency of the appeal.

By section 24 of the Sheriff Court Act 1853 it is provided—"It shall be competent, in any cause exceeding the value of £25, to take to review of the Court of Session any interlocutor of a sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses, or although the expenses, if such have been due, have not been modified or decreed for; but it shall not be competent to take to review any interlocutor, judgment, or decree of a sheriff not being an interlocutor sisting process or giving interim decree of payment of money, or disposing of the whole merits of the cause as aforesaid."

By section 53 of the Court of Session Act 1868 it is provided—"It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which either by itself or taken along with a previous interlocutor or interlocutors disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause . . . and for the purpose of determining the competency of appeals to the Court of Session this provision shall be applicable to the causes in the Sheriff or other inferior courts, the name of the Sheriff or other inferior judge or court being read, instead of the words 'the Lord Ordinary,' and the name of the Sheriff Court or other inferior court being read instead of the words 'Outer House.'"

Counsel for the defender argued that the appeal was competent, in respect that the whole subject-matter was disposed of, and the cause continued only for executorial purposes, and cited *Malcolm v. M'Intyre*, October 19, 1877, 5 R. 22; *M'Ewan v. Sharp*, January 13, 1899, 1 F. 393.

Counsel for the pursuers did not dispute the competency of the appeal.

LORD ADAM—The words which have occasioned some doubt as to the competency of the appeal are the words "*quoad ultra* continue the cause" in the interlocutor of

the Sheriff-Substitute.

Is such an interlocutor appealable under sec. 53 of the Court of Session Act 1868, or of sec. 24 of the Sheriff Court Act 1853. In my opinion there is no difference between these two sections so far as this present action is concerned. Section 53 of the 1868 Act defines a final judgment as one which disposes of the whole subject-matter of the cause, and enacts that for the purpose of determining the competency of appeals to the Court of Session this provision shall be applicable to causes in the Sheriff and other inferior courts. Section 24 appears to me to say the same thing when it says that it shall be competent to take to review of the Court of Session any interlocutor disposing of the whole merits of the cause.

In my opinion the whole merits of the cause have been disposed of by the interlocutor now appealed against, for the whole defences have been repelled and the Sheriff has granted warrant to sequester and sell. The whole of the pleas of the defender have been repelled, and what remains to be done is purely executorial. Now, in these circumstances there would be the greatest inconvenience if there were no appeal at this stage, for the whole effects of the defender might be taken from his house and sold, although afterwards, on appeal to this Court, it might be held that his defences had been well founded. The cause having been continued, therefore, solely for executorial purposes, I do not think that the words to which I have referred make the interlocutor any the less a final judgment.

LORD M'LAREN—The competency of this appeal depends on the combined effects of section 24 of the Sheriff Court Act 1853, and sections 53 and 65 of the Court of Session Act 1868. The 65th section of the Court of Session Act merely continues in force the then existing law as to the competency of appeal; it in effect makes section 24 of the Sheriff Court Act, which refers to advocacy, applicable to the new form of appeals. With reference to the observation made in argument, I can see no ground for the suggestion that section 24 of the Sheriff Court Act has been repealed by section 53 of the Court of Session Act. It is only under section 24 that an appeal can be taken from an interlocutor sisting process, or an interlocutor giving interim decree for payment of money. I see no reason to suppose that these valuable rights have been taken away by the later statute.

The peculiarity of this action—an action for sequestration—is that it is a combined action and diligence. In ordinary actions, after the merits of the cause have been exhausted, the executorial part is carried out by the successful party at his own risk, and without any application to the judge. But in this case, although the merits are disposed of when all the defender's pleas are repelled, yet in respect of the peculiar nature of the relief which is sought, the executorial part of the case is continued, and the decree must be carried into effect by an order of the Court, and

not by a messenger on the pursuer's order. I think that does not make any difference as to the competency of appeal; the merits of the case are exhausted when the defender's pleas are repelled, and an interlocutor is pronounced which leads necessarily to payment of the money sued for.

LORD KINNEAR—I am quite clearly of opinion that this appeal is competent. First, because the defender, against whom the judgment was given, has appealed, and the pursuer has appeared, and does not maintain that the appeal is not competent. But if the question is to be decided as a litigated point, I agree with your Lordships that the interlocutor appealed against disposes of the whole merits of the cause. I entirely agree with Lord M'Laren that section 53 of the Court of Session Act 1868 does not, directly or by reasonable implication, repeal the 24th section of the Sheriff Court Act of 1853. I am unable to see how an interlocutor which repels all the pleas-in-law for the defender does not dispose of the whole merits of the cause. The Sheriff-Substitute repelled the whole defences. The defender then appealed to the Sheriff, who repelled the first four pleas-in-law for the defender in respect that these were not insisted in, and then went on to repel the fifth plea-in-law, so that there was no defence remaining. Nothing remained to be done except an executorial proceeding for the purpose of carrying into effect the judgment of the Sheriff already given on the merits.

The case was sent to the Summar Roll.

Counsel for the Appellant—Munro.  
Agent—Robert Broatch, L.A.

Counsel for the Respondent—Balfour.  
Agent—J. W. Chessier, S.S.C.

Thursday, December 21.

## SECOND DIVISION.

### CATHCART'S TRUSTEES v. ALLARDICE.

*Marriage-Contract—Provision for Widow—Gift of "Liferent Use" of House—Right of Occupancy—Incidence of Rates.*

In the antenuptial contract of marriage a husband, *inter alia*, assigned and disposed to his wife in absolute property the whole household furniture in or about his house at the time of his death, "and also the liferent use of any one house he may die possessed of."

By his trust-disposition and settlement the husband conveyed his whole means and estate to trustees, to be applied, *inter alia*, in implementing the provisions in the marriage-contract.

The husband died possessed of one house which he had burdened to over two-thirds of its value. The house was let at the time of his death.

Held (*dub.* Lord Young) that the gift

was not one of proper liferent, but only of a right of occupancy, and that the widow was liable only for rates payable in respect of occupancy, and that she was entitled to the rent of the house without deduction of the interest payable on the bonds.

*Clark v. Clark*, January 19, 1871, 9 Macph. 435; and *Bayne's Trustees v. Bayne*, November 3, 1894, 22 R. 36, *followed*.

By antenuptial contract of marriage between James Weir Cathcart and Miss Constance Margaret Valentine Hagart, dated 27th and 28th November 1885, Mr Cathcart, *inter alia*, gave, assigned, and disposed to his said wife as her absolute property, if she should survive him, the whole household furniture which should be in or about his house at the time of his death, "and also the liferent use of any one house he may die possessed of." This was Mr Cathcart's second marriage. No children were born of the marriage.

Mr Cathcart died on 29th July 1890, leaving a trust-disposition and settlement by which he, after conveying to trustees generally his whole heritable and moveable means and estate, *inter alia* directed them to apply said means and estate, "In the first place, in payment of all my just and lawful debts, sickbed and funeral charges, and the expense of executing this trust, which debts, charges, and expenses my trustees may pay without requiring legal constitution: In the second place, in implement, so far as the same have not been implemented, of the provisions contained in my antenuptial contract of marriage with my wife, the said Constance Margaret Valentine Hagart or Cathcart."

At the date of his marriage and at the date of his death Mr Cathcart was owner of a house No. 29 Palmerston Place, Edinburgh. Mr Cathcart had no other heritable property. The children of Mrs Cathcart's first marriage were, in terms of his settlement, firs in the property and residuary legatees.

For some time after their marriage Mr and Mrs Cathcart occupied this house, but prior to Mr Cathcart's death they had gone to live elsewhere, and the house was let by Mr Cathcart to a rent-paying tenant. The house was burdened with bonds amounting to £2750.

On 20th April 1895 Mrs Cathcart married Mr Allardice.

In 1897 Mr Cathcart's testamentary trustees, with the approval of Mrs Allardice and all parties interested in Mr Cathcart's estate, sold the house at the price of £3600. It was part of the bargain that the purchaser should take over the bonds along with the property. The testamentary trustees accordingly received the purchase price of the house under deduction of the sum of £2750, the net balance received being £850.

Certain questions thereafter arose with regard to the rights of Mrs Allardice in relation to the house and the price that was obtained for it; and for their settlement a