Tuesday, March 12.

FIRST DIVISION.

[Sheriff Court at Ayr.

WYLLIE *v.* FISHER.

Diligence—Poinding—Poinding of Effects Previously Sequestrated for Rent—Competency.

Where a landlord has taken out a sequestration for rent, a personal creditor of the tenant is entitled to poind the sequestrated effects, although he is not entitled to sell them or remove them from the premises.

Process — Appeal from Sheriff Court — Appeal merely on Question of Expenses —Expenses Forming Merits.

A personal creditor of a tenant of urban subjects poinded certain effects belonging to the tenant which had already been sequestrated for rent. The proprietrix brought an action in the Sheriff Court against the creditor and the sheriff officer whom he employed, to obtain interdict against a sale under the poinding, but having herself sold, she restricted her conclusions to a crave for expenses. An award having been given by the Sheriff, the sheriff officer appealed.

The Court *entertained* the appeal on the ground that the expenses were the merits, the whole question being whether the application for interdict was justified.

Caldwell v. *Dykes*, May 25, 1906, 8 F. 839, 43 S.L.R. 606, *distinguished.*

Expenses—Interdict—Principal and Agent — Diligence — Sheriff Officer — Expenses where Interdict Granted against Sheriff Officer as an Agent.

Where interdict is applied for *ob majorem cautelam* against a party and the sheriff officer he employs, while the applicant may be entitled to the interdict against the sheriff officer as an agent, he cannot recover expenses against him unless the sheriff officer has shown an intention of doing the illegal diligence.

Miss Mary Ann Wyllie, the pursuer in this action, was the proprietrix of the subjects 85, 86, and 87 Templehill, Troon, of which one Alexander Blackwood was tenant. The defenders were Eli Zive, a personal creditor of the tenant Blackwood, and James Fisher, sheriff officer, Ayr.

On 23rd October 1905 the pursuer obtained from the Sheriff of Ayrshire warrant to sequestrate the effects of the tenant Blackwood, in security and for payment of the rents of the pursuer's subjects due and payable at Martinmas 1905 and Whitsunday 1906. Following on the warrant certain of the tenant's effects were inventoried and appraised by a sheriff officer.

On 14th November 1905 the defender Fisher, in virtue of a decree obtained by the defender Zive against Blackwood, executed a poinding of certain articles, which were included in the sequestration for rent.

On 16th November 1905 the pursuer brought the present action against the defenders Zive and Fisher, to interdict the defenders from selling or removing the poinded effects. Defences were lodged for both defenders, in which they averred that they had no intention of selling or removing the poinded effects.

On 19th December 1905 the pursuer lodged a minute in which she stated that she had sold the sequestrated effects, and that she restricted the conclusions of the petition to a crave for expenses against the defenders.

On 23rd January 1906, a joint minute renouncing probation having been lodged, the Sheriff-Substitute (SHAIRP) found the defenders jointly and severally liable to the pursuer in £7 sterling of modified expenses.

The defenders appealed to the Sheriff (BRAND), who on 29th March 1906 adhered.

Note.—"I have carefully considered the reclaiming petition, answers thereto, productions, and whole pleadings, and am satisfied that the Sheriff-Substitute has arrived at a just and wise conclusion on the question of expenses, which indeed is the only question before me. The pursuer points out in her answers that the defenders were made aware of the sequestration having taken place before they effected a poinding, because there was displayed in the window of the premises in question and at the entrance thereto copies of the inventories and appraisements which had been made by the sheriff officer acting on behalf the pursuer. The pursuer distinctly sets forth this material fact and circumstance in her condescendence, and it is not denied by the defenders, either in their defences or in the reclaiming petition. The sequestration by the pursuer took place on 23rd and 24th October 1905. It is out of the question to suppose that when the said poinding was executed the defenders did not know of the sequestration which had been obtained by the pursuer, and which no doubt would be made public in the usual way. If the defenders knew, as they must be taken to have known, of the sequestration some short time after the 23rd and 24th October 1905, then they had no right to take further proceedings at their own hand. In particular, they had no right to poind. Moreover, the letters of 14th and 15th November from Mr Waddell, solicitor, Troon, to the defender Zive, also to Shaw, the sheriff officer, and to Fisher, the sheriff officer, distinctly intimating to each of these individuals that the carrying through of any sale would be interdicted, should have caused them and each of them to communicate at once in reply that no sale was to be proceeded with.

"It is, besides, a matter of importance that immediately after the warrant of sequestration had been obtained, Zive was informed by the officer Dalling that such warrant had been got, yet, nevertheless, he took decree against the tenant Blackwood, and followed it up with the poinding before mentioned.

"Again, why did not the defenders intimate the said poinding in a regular way to the pursuer or her agent, and not leave it to be discovered, as it was, by accident. The notice by the pursuer's agent, that unless the poinding was withdrawn, an action of interdict would be served to make good the pursuer's right over the goods in question, required an immediate answer, but did not receive any answer whatever. An answer by letter might easily have been sent by the 15th November 1905, and an answer by telegram might possibly have been sent earlier.

"The point taken by the pursuer to the effect that the poinding creditor under a small debt decree can sell poinded effects after the lapse of forty-eight hours from the date of the poinding without notice to the pursuer as landlord is not without its importance. In this case the pursuer received no intimation that the defenders would not carry through a sale under their poinding.

"Upon the whole matter I cannot resist the conclusion that the defenders, having known of the sequestration, acted irregularly in poinding the goods and effects in question.

"Moreover, they ought certainly to have at once acceded to the request made for recal of the poinding."

The defender Fisher appealed, and argued —The Sheriff was wrong in holding that the poinding was illegal. The defender was entitled to poind the sequestrated effects, although he was not entitled to sell or remove them to the prejudice of the proprietrix (Stair, i, 13, 11; Bell's Com. v, 3, vol. ii, p. 60 M'Laren's edn., p. 63 5th. edn.; Graham Stewart, Diligence, p. 340). The defenders had not threatened to sell or remove, and there was no ground for an interdict. The defenders were therefore right on the merits and were entitled to expenses. In any event expenses should not be awarded against the sheriff officer, who was merely the hand of the creditor.

Argued for pursuer—This was an appeal solely on a question of expenses. Such an appeal would not be entertained by the Court (*Caldwell* v. *Dykes*, May 25, 1906, 8 F. 839, 43 S.L.R. 606). Further, the poinding was illegal. It was the duty of the sheriff officer to inquire whether there had been a sequestration for rent or not (*Jack* v. *M'Caig*, January 16, 1880, 7 R. 465, 17 S.L.R. 351).

Lord President—The pursuer in this case was proprietrix of certain premises which were let, and of which the rent was in arrear. The tenant began to remove some of his effects, upon which the pursuer instituted sequestration proceedings, with the result that the tenant's effects were sequestrated and those which he had removed were brought back. The tenant had also a personal creditor, by name Zive, who instructed the appellant, who is a sheriff officer, to execute a poinding of the tenant's effects. The appellant did so and included in the poinding the goods which had already been sequestrated. I assume that the appellant was aware of the previous sequestration. On this the pursuer raised an action in the Sheriff Court against Zive and the appellant to interdict them from removing or selling the goods in question. The defenders lodged defences in which they averred that they did not intend to sell the goods. During the course of the action the pursuer lodged a minute stating that since the action was raised she had sold the sequestrated effects, and restricting the conclusions of the action to a crave for expenses against the defenders jointly and severally. Following on that, the parties lodged a joint minute renouncing probation and reserving the question of expenses to be dealt with by the Court. The Sheriff-Substitute heard parties, and, without giving his reasons, decerned against the defenders jointly and severally for £7 of modified expenses. The Sheriff on appeal adhered, and gave his reasons, which I may take from his note in two sentences—"If the defenders knew, as they must be taken to have known, of the sequestration, then they had no right to take further proceedings at their own hand. In particular they had no right to poind." He reverts to that point later—"Upon the whole matter I cannot resist the conclusion that the defenders, having known of the sequestration, acted irregularly in poinding the goods and effects in question." He also states a supplementary ground of judgment—"The letter of Mr Waddell, solicitor, Troon, to the defender Zive and to Fisher, the sheriff officer, distinctly intimating to each that the carrying through of any sale would be interdicted, should have caused them, and each of them, to communicate at once in reply that no sale was to be proceeded with."

The first point taken by the respondent is that this is an appeal on expenses alone, and reference was made to the case of *Caldwell* v. *Dykes*, May 25, 1906, 8 F. 839. It is not likely we should go back on that case. But it is a different class of case. In it there were merits in the action, and what we were asked to do was to adhere on the merits and reverse on expenses. In this case the expenses are the merits, and there is nothing else owing to the action of the pursuer in selling the sequestrated goods. The only question to be decided was whether the pursuer was justified in rushing into Court to get an interdict.

Now, it is clear that a person is not entitled to interdict people from doing an illegal act which they have shown no intention of doing. But if they have given cause for apprehension that they intend to do the illegal act, then an interdict *quia timet*, as it would be called in England, may be brought. If the Sheriff was right in his principal ground of judgment that the defenders had no right to poind at all, then his conclusion would be right. But I am of opinion that the Sheriff was wrong. It is clear from the passages quoted to us from Bell and Stair that a creditor has a right to poind effects which have been sequestrated, for the purpose of attaching any reversion that may be left after the landlord's debt is

satisfied, though he may not proceed to remove or sell the goods.

The sheriff officer was then entitled to poind the goods, and the question arises—Was the pursuer entitled to interdict him from selling? That must depend on whether there was any disposition evinced to sell or not. How that would stand between the pursuer and Zive there is no need to determine because Zive has not appealed. But as against the sheriff officer I am of opinion there was no ground for the interdict at all. If it were a case of balancing evidence I should not disturb the Sheriff's judgment. But if the Sheriff were right, then the proposition must be, that because the sheriff officer has done a thing he was entitled to do he will go on to do something he is not entitled to do. It may be that the pursuer was entitled *ob majorem cautelam* to an interdict against the appellant as Zive's agent, but that would not entitle him to expenses against the appellant. If this had been an action of damages against the appellant for executing, on the telling of another, an illegal diligence, the principle would be different. But in an action of interdict against the sheriff officer as an agent, expenses cannot be recovered unless he has shown an intention of doing the illegal diligence.

Lord M'Laren suggested a good illustration in consultation. You can get interdict against a person and his guests from fishing in your waters, but you could not get interdict with expenses against a guest who was to arrive in the following week.

I am of opinion that we should recall the interlocutor appealed against and assoilzie the appellant, with expenses.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court recalled the interlocutors of the Sheriff-Substitute and the Sheriff in so far as the defender and appellant Fisher was concerned, assoilzied him from the conclusions of the action, and found him entitled to expenses in the Court of Session and in the Sheriff Court.

Counsel for the Pursuer (Respondent)—A. M. Anderson—A. A. Fraser. Agent—J. M. Glass, Solicitor.

Counsel for the Defender (Appellant)—Graham Stewart, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Tuesday, March 12.

FIRST DIVISION.

[Lord Dundas, Ordinary.

KUFNER *v.* BERSTECHER.

Reparation—Slander—Malice and Want of Probable Cause—Lodging Information with Criminal Authorities—Averments by Defender as to Whole Information Lodged—Relevancy.

A and B had been partners in business, but the partnership had been dissolved. A brought an action of damages for slander against B, alleging that B had maliciously and without probable cause lodged an information with the police charging A with embezzlement. B averred that he had discovered a number of suspicious acts on the part of A, in addition to the facts giving rise to the charge of embezzlement, and that he had placed the whole facts before the procurator-fiscal. He denied that he had acted maliciously or without probable cause. *Held* that B was entitled to prove the whole facts he had communicated to the police, in order to show that he had not acted maliciously or without probable cause.

A v. *B*, February 23, 1895, 22 R. 402, 32 S.L.R. 297, *distinguished.*

Charles F. J. Kufner, furrier, 49 Buchanan Street, Glasgow, on 18th July 1906, brought an action of damages for slander against Ernst Berstecher, furrier, 261 Sauchiehall Street, Glasgow. The pursuer and the defender had been partners in a fur business in Glasgow, but the partnership was dissolved on 17th March 1905.

The pursuer averred that in April 1905 the defender had maliciously and without probable cause lodged an information with the criminal authorities charging the pursuer with having embezzled certain sums of money, being wages which had been set aside for a Miss M'Arthur, one of the firm's employees, in respect of certain periods of time during which she was absent from the business. The pursuer also averred that he had been apprehended on said charge, but that on the matter being investigated by the procurator-fiscal the charge was dropped.

The defender in answer 6, after giving his account of the matter of M'Arthur's wages, stated—"In the case of another employee in the Buchanan Street shop, a Miss Thomson, one week's wage was also in May 1904 entered in the wages book as paid to her at a time when owing to slack trade she was absent on holiday and not in receipt of wages. The entry was made by the cashier on the instructions of the pursuer, and the sum entered as wages was paid over to the pursuer but not received by the employee. The defender only became aware of this matter in or about March 1905." And in answer 8 stated—". . . Admitted, further, that in consequence of the actings of the pursuer hereinafter mentioned, and, in particular, the above matter of the girl M'Arthur's wages, the defender laid the facts, so far as then known to him, before the procurator-fiscal at Glasgow for investigation; that the criminal authorities made inquiry into the same; and that in the result no prosecution was instituted against the pursuer. *Quoad ultra* denied under reference to the proceedings mentioned for their terms. The matters referred to related not only to the girl M'Arthur's wages, but also *inter alia* to certain transactions in fur had by the pursuer as an individual with third parties, and in particular with Messrs Miller & Co., Glasgow, Messrs A. & W. Nesbitt, London, and a firm of Muller