available of ascertaining his exact position by touching the wall on each side with his hands. I cannot for a moment accept the view which, as I understand, finds favour with both of your Lordships, viz., that the mere fact of the pursuer having made a mistake in regard to her exact position on the dark staircase must be accepted as a confession of negligence in the absence of some pointed explanation on her part to the contrary, for example, that the darkness made her feel giddy. As a matter of evidence a defender must prove contributory negligence as clearly as the pursuer must prove negligence on the part of the defender. Accordingly, unless a pursuer's averments are such that in no reasonably possible view can his injury be attributed to the fault of the defender, the question whether contributory negligence did or did not intervene so as to relieve the defender of responsibility for his fault must be left over for decision at the trial. As regards this point I may here cite an observation of Lord Kincairney, who was the Lord Ordinary in *Driscoll's* case (*cit.*) (at p. 372)—"There is certainly considerable danger in going down a stair in the dark; even considerable care may not prevent accident; and it seems going too far to affirm that a person doing so could not possibly fall without such contributory negligence as would be a sufficient answer to an action of damages." I do not regard that as a proposition of law, but as an accurate statement of an ordinary fact of daily life.

In my opinion the judgment which your Lordships propose to pronounce is contrary to the practice of this Court, and in substance amounts to a usurpation of the duties pertaining to the jury, or to the judge whose duty it is to discharge the functions of a jury.

LORD CULLEN—I concur with the Lord President in thinking that this action should be dismissed.

The particular danger to which the pursuer says she was exposed owing to the unlit condition of the stair, and which she says she failed to cope with successfully, was the danger of mistaking in her ascent the right-hand side of the stair for the left-hand side or the middle.

As the pursuer was well acquainted with the stair, and is in full knowledge of all the facts bearing on the alleged accident, it lies on her, in stating her claim, to present an intelligible explanation of how she came to be on the wrong side of the stair consistently with the exercise of such reasonable measures of precaution for avoiding that danger as were available to her and as the conditions of the case make obvious.

The pursuer says that there was no handrail to guide her—a state of matters which is common and usual on tenement stairs where there is no well to be fenced. But in the absence of a handrail, a precaution easily available to her, and which was as obvious in purpose to a person minded to take due precaution to avoid the danger in question as it was simple in execution, was to keep in touch by means of her left-hand with the wall on the left hand side, and safe side, of the stair. The pursuer is studiously reticent on record regarding this very natural and ordinary precaution.

It is legitimate and proper, in my opinion, to read the pursuer's averments as implying that she did not, in her ascent of the stair, resort to the foresaid precautionary measure, seeing that it was one which, had it been taken, was calculated to ensure her avoidance of the danger in question, in the absence of exceptional circumstances capable of frustrating it, and that she does not set forth any such exceptional circumstances. So taking the pursuer's averments, the result, in my opinion, is that they sufficiently disclose that the danger of which she complains was one which might have been avoided by reasonable care on her part, and that she failed in the exercise of such reasonable care.

LORD JOHNSTON and LORD MACKENZIE were not present.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer (Respondent)—Anderson, K.C.—R. MacGregor Mitchell. Agent—A. W. Low, Solicitor.

Counsel for the Defenders (Reclaimers)—The Lord Advocate (Clyde, K.C.)—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Thursday, November 15.

FIRST DIVISION.

[Sheriff Court at Airdrie.

JACK AND ANOTHER *v.* WADDELL'S TRUSTEES.

Process—Sheriff—Jurisdiction—Poinding—Interdict—Competency in Sheriff Court of Interdict of Sale of Poinded Goods.

An interdict of the sale of goods poinded in execution of an arbiter's award, based on the ground that some of the goods attached were in the possession of the debtor only as executrix-nominate of her father and as custodier for members of her family and others, and that some belonged to her son, brought by the debtor and her son after the Sheriff has granted warrant for sale of the goods, is competent in the Sheriff Court.

Mrs Alice Aitken Crafty or Jack, as executrix-nominate of her late husband and as custodier for members of her family, and James Jack, her son, *pursuers*, brought an action in the Sheriff Court at Airdrie against John Malcolm and another, as trustees of James Waddell of Airdriehill, *defenders*, craving the Court to interdict the defenders or others acting on their instructions from selling or removing or in any way interfering with certain goods which were enumerated in three lists, the goods in the first of which were alleged to be in the possession of Mrs Jack as executrix-nominate of her late husband, the

goods in the second of which were alleged to be in possession of Mrs Jack as custodier for members of her family, to whom the goods belonged, and the goods in the third of which were alleged to belong to James Jack.

The pursuers averred—"(Cond. 1) The male pursuer the said James Jack is a farmer, and is tenant of Holehill Farm, near Airdrie. The female pursuer the said Mrs Alice Aitken Crafty or Jack resides in one of the dwelling-houses on said farm, which dwelling-house has been sub-let to her by the male pursuer. The said James Jack boards with the said Mrs Alice Aitken Crafty or Jack in said house. (Cond. 2) The items detailed under I. in the crave belong to or are in the possession of the female pursuer as executrix foresaid and in trust, in terms of the trust-settlement of the said deceased Andrew Jack. The items detailed under II. in the crave belong to members of her family, and are in her possession only as custodier. The items detailed under III. in the crave belong to the male pursuer. (Cond. 3) On 2nd June 1917, acting on the instructions of the defenders, Alexander Smith, sheriff officer, Coatbridge, by virtue of an alleged extract registered award by the arbiter in the reference between the defenders and the said female pursuer, as an individual, containing warrant to poind, dated 3rd April 1917, passed to the premises occupied by the male pursuer the said James Jack and the female pursuer the said Mrs Alice Aitken Crafty or Jack, as an individual, and there apprehended and poinded the goods, gear, stock, effects, and others before mentioned, respectively belonging to or possessed by the said Mrs Alice Aitken Crafty or Jack as executrix-nominate foresaid, or in her possession as custodier foresaid, and to the said James Jack. (Cond. 4) At the time of the poinding it was pointed out by the pursuers, or one or other of them, to the officer that the subjects he was poinding were not the property of the female pursuer as an individual; and by letter of date 7th June 1917 pursuers' agent, Mr James Bell, solicitor, Airdrie, on pursuers' instructions, intimated to the agents for the defenders, Messrs Motherwell & M'Murdo, solicitors, Airdrie, in similar terms. (Cond. 5) The defenders, however, profess to be resolved to proceed under the said poinding with the sale of the goods, gear, stock, effects, and others, and have advertised these for sale on 20th July 1917, at 2 o'clock afternoon, conform to advertisement in the issue of the *Airdrie and Coatbridge Advertiser* of date 7th July 1917, and this action is rendered necessary to preserve pursuers' rights. (Cond. 6) The female pursuer the said Mrs Alice Aitken Crafty or Jack objects to the sale of the articles in which she is concerned on the ground that they are not her property as an individual, but are in her possession either in trust as executrix-nominate or as custodier foresaid. (Cond. 7) The male pursuer the said James Jack objects to the sale of the goods, gear, stock, effects, and others in which he is concerned on the ground that they are his personal property and are not the property of the female pursuer in any capacity whatever."

The defenders pleaded, *inter alia*—"The action is incompetent."

On 31st July 1917 the Sheriff-Substitute (LEE) sustained the first plea-in-law for the defenders, and dismissed the petition for interdict as incompetent.

Note—"This is an action craving interdict of the sale of poinded effects. The poinding was on 2nd June, under and in virtue of an extract registered award by an arbiter in a reference between the defenders and the female pursuer, and both she (in a representative capacity) and her son now claim a number of the lots poinded, and in assertion of their claim raised this action of interdict on 10th July. Though no mention was made of this important step in the diligence in the petition and condescendence, on which interim interdict was granted, it appears from the process now made up that warrant of sale of the poinded effects was granted by me here on 3rd July, and was intimated on 9th July to the female pursuer, who resides with her son, the male pursuer. Intimation was made to the agent of both pursuers on 28th June that instructions for sale of the poinded effects were to be given.

"These being the circumstances the defenders plead that the action is incompetent.

"It seems a somewhat startling proposition that a Sheriff has power to alter or review his own warrant and stop its execution, and I am satisfied that it is not a proposition which can be maintained. No authority has been adduced in support of it, and the only one which I have been able to find is parenthetical, and unsupported by any decision of the Courts. Mr Dove Wilson in his work on Sheriff Court Practice, which was not referred to by the pursuers, states in a note on page 340 (4th edition), 'It is sometimes thought that the only remedy of a third party is by interdict, and this may be true if warrant of sale has been granted, but prior to this an objection to the poinding seems competent.' In the text Mr Dove Wilson states that the proper way to prevent a sale under an illegal poinding is to lodge objections in the poinding, whether the aggrieved party is the debtor or a third party. This learned author appears to have written from his own wide experience of practice only, and does not refer to the decisions on the point at all. In the older treatise on Sheriff Court Practice—Mr Barclay's edition of M'Glashan—the matter is dealt with (section 1907) not very clearly, but from the authorities which the author quotes and relies on it is evident that he must mean 'before warrant of sale is granted' when he writes 'before the sale is carried through.' The authorities quoted are *Scotland* v. *Lawrie*, 6 S. 961, and *Kincaid* v. *Love*, 14 D. 188. In the first of these cases it is clearly stated in the rubric, and appears from the report itself, that what was decided was that a third party claimant's remedy was before the Sheriff until warrant of sale was granted. *Kincaid* v. *Love* is precisely to the same effect. The Sheriff in this case granted interdict against sale

of the poinded effects, but it was not till afterwards, and after the claimant had judicially abandoned his application, that a warrant of sale was granted. What the Court decided was that the Sheriff Court was competent to grant interdict at the stage at which it did grant it. The result of these two cases is, in my opinion, correctly stated by Mr Stewart in his Book of Diligence, at p. 354. He says—'If a warrant of sale has not been granted' the claimant's 'proper course is to lodge objections in the poinding. But if warrant of sale has been granted, his remedy is by suspension and interdict.' None of the other cases cited to me seem to question this rule, and in *Crawford & Co.* v. *Scottish Savings Investment and Building Society*, 12 R. 1033, it was held that an action to interdict the sale of poinded goods, after warrant of sale had been granted in a poinding of the ground, was in effect a suspension, and therefore incompetent before the Sheriff. An action of poinding of the ground is different, both in form and in nature, from the diligence of personal poinding, and I am not sure that the two are sufficiently analogous to make *Crawford's* case an actual authority for the present one. At the same time I do not see why a different principle should rule the two cases. In each case there is a warrant to suspend, which is outwith the province of the Sheriff.

"The Personal Diligence Act of 1838 is not directly applicable, but section 26 appears to contemplate that any inquiry by the Sheriff into disputes as to ownership shall precede the grant of warrant to sell.

"No speciality was made at the debate—and I do not think any can be made—of the fact that the male pursuer lodged objections with the sheriff officer at the poinding. He did not afterwards appear to press his objections to a warrant to sell. That he was not formally cited to prosecute his objections may or may not be a ground for suspension. It cannot affect the Sheriff's jurisdiction to review, and stop the execution of, his own warrant."

The pursuers appealed to the Sheriff (A. O. M. MACKENZIE), who on 18th September 1917 adhered.

Note—"This is an action raised in the Sheriff Court at Airdrie, in which the pursuers seek to have the defenders interdicted from selling certain goods which were poinded by the defenders, and for the sale of which the defenders obtained warrant in the Sheriff Court at Airdrie prior to the date upon which the present action was raised.

"Such being the nature of the action, it appears to me to be clear that it is in effect equivalent to a suspension of the warrant of sale, the Sheriff-Substitute being invited to stop the execution of that warrant.

"Now I agree with the learned Sheriff-Substitute that it is a somewhat startling proposition that a Sheriff has power to alter or review a warrant which he himself has granted, and I agree also in the conclusion at which the Sheriff-Substitute has arrived, that the present action is incompetent.

"So far as the decisions in the Court of Session are concerned there appears to be none which bears directly on the question raised. The nearest case is *Crawford & Company* v. *The Scottish Savings Investment and Building Society*, 12 R. 1033, 22 S.L.R. 684, in which it was held that an action to interdict the sale of poinded effects after warrant of sale had been granted in a poinding of the ground, was in effect a suspension and incompetent in the Sheriff Court. In that case, however, the pursuers in the action of interdict had themselves been parties to the action of poinding of the ground, and the circumstances therefore are not on all fours with those of the present case; but the principle applied appears to me to be applicable, viz., that a sheriff cannot entertain an interdict which is in effect equivalent to a suspension of a decree granted by himself. This principle, it will be observed, does not apply where warrant of sale has not been granted, for a warrant to poind does not entitle a creditor to poind the goods of a third party. This distinction, it appears to me, explains the decisions in *Kincaid* v. *Love*, 14 S. 188, and *Scotland* v. *Lawrie*, 6 S. 961, and I agree entirely with the observations which the Sheriff-Substitute has made in regard to these two cases. The conclusion at which the learned Sheriff-Substitute has arrived, it appears to me, is also supported by a decision of the late Lord Pearson in the case of *Hobbin* v. *Burns*, 11 S.L.T. 681, in which his Lordship held that an application for interdict of a sale of poinded goods could not be entertained where warrant of sale had been granted and suspension of that warrant was not applied for.

"As regards Sheriff Court decisions, Sheriff Ivory in *Pagan* v. *Boyd*, 7 S. L. Rev. 175, held that an application similar to the present was incompetent, but a contrary decision was pronounced by Sheriff Ferguson in *Urquhart* v. *Wood*, 22 S. L. Rev. 255. For the reasons I have stated, I prefer the judgment of Sheriff Ivory, and I am fortified in this opinion by finding that it accords with the view expressed by Mr Graham Stewart in his book on Diligence, p. 354.

"I accordingly refuse the appeal and adhere to the interlocutor of the Sheriff-Substitute."

The pursuers appealed, and argued—The action was competent. It was competent for an objector to compear in a poinding, at any rate before warrant for sale had been granted —*Lamb* v. *Wood*, 1904, 6 F. 1091, 41 S.L.R. 825. There was no authority to the effect that after the warrant for sale had been granted an application to the Sheriff was no longer competent, and that the only remedy was by suspension and interdict. The balance of authority was in the other direction. The Sheriff had jurisdiction in all that belonged to the warrant of sale—Bell's Comm. (5th ed.), ii, 63, (7th ed.) ii, 61. And consequently a third party's remedy was before the Sheriff—Bell's Prin., sec. 2287, note (*f*). That remedy might be by interdict—Dove Wilson, Sheriff Court Practice (4th ed.), p. 340; M'Glashan, Sheriff Court Practice (4th ed.) sec. 1907. Graham Stewart, Diligence,

p. 354, was not supported by the authorities referred to, viz., *Kincaid* v. *Love*, 1835, 14 S. 188, 8 Sc. J. 116, where, on the contrary, the Court assumed that an application such as the present was competent. The Sheriff's powers with reference to the warrant of sale were ministerial, and he could deal with questions of the liability of particular articles to be pointed—*Mitchell* v. *Cuddie*, 1822, 1 S. 496 (461); *Clark* v. *Clark*, 1824, 3 S. 143 (96); *Scotland* v. *Lawrie*, 1828, 6 S. 961, *per* Lord Newton at p. 962. *Crawford & Company* v. *Scottish Savings Investment and Building Society*, 1885, 12 R. 1033, 22 S.L.R. 684, was distinguished, for there the attack was not upon the diligence in execution of the decree but the decree itself, and was really an attempt at reduction of the decree. The competency of such an application as the present was assumed in *Hobbin* v. *Burns*, 1904, 11 S.L.T. 681, *per* Lord Pearson at p. 682. *Pagan* v. *Boyd*, 1891, 7 S. L. Rev. 175, was in effect an attempt to get a Sheriff to suspend his own warrant. Such an application as the present had been held competent in the Sheriff Court—*Urquhart & Son* v. *Wood*, 1906, 22 S. L. Rev. 255. *Harkies* v. *Welsh & Cuming*, 1789, M. 14,077, was exactly in point, for if a third party not cited to the poinding could recover his property by action of delivery, surely he could proceed by interdict to prevent the loss of his property. The warrant for sale had to be served on the debtor or possessor of poinded effects—Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), sec. 26. There had been no service here, and the obvious purpose of the service was to enable a custodier to claim the goods before the Sheriff instead of applying for suspension and interdict in the Bill Chamber. There was no question of the Sheriff reviewing himself, for the warrant for sale was not a decree but a ministerial act. The present application was really one of repetition to get rid of the *nexus* on the poinded goods, and it could properly be entertained only in the sheriffdom where the competition arose—*M'Kechnie* v. *Duke of Montrose*, 1853, 15 D. 623, *per* Lord President M'Neill at p. 626.

Argued for the defenders (respondents)—The action was incompetent. Prior to the granting of the warrant the pursuers had had ample opportunity to recover their property. They could have applied by minute, or could have proceeded by interdict against the creditors. It appeared that the true owner of the goods could raise the question with a poinder in a separate process—Stair, i, 9, 22. *Scotland's*, *Clark's*, and *Mitchell's* cases (*cit.*) were in the defenders' favour. In *Kincaid's* case (*cit.*) the warrant for sale was granted before the interdict was asked for, but there was no argument on the present point, and the only interdict granted may have been interim. Interdict in the Sheriff Court after the warrant of sale had been granted was not referred to in Dove Wilson (*cit.*), and all the cases cited in M'Glashan (*cit.*) were in the Bill Chamber except *M'Donald* v. *Fowler*, 1832, 10 S. 477. *Crawford's* case (*cit.*) was not an application to review the decree upon which the execution was proceeding, and the warrant for sale was regarded as a final judgment. The present application was an attempt to suspend a final decree in the Sheriff Court, and was incompetent—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 3 (*h*) and sec. 5 (5); *Thom* v. *North British Bank*, 1848, 10 D. 1254. In a sequestration for rent such an application as the present was incompetent—*Lindsay* v. *Earl of Wemyss*, 1872, 10 Macph. 708, *per* Lord Mackenzie (Ordinary) at p. 710, 9 S.L.R. 458; *Bell* v. *Andrews*, 1885, 12 R. 961, 22 S.L.R. 640. Graham Stewart, Diligence (*cit.*), was in favour of the defenders.

LORD PRESIDENT—It is noteworthy that the registered award extracted on 3rd April 1917, on which all the proceedings before us follow, is not quarrelled with or questioned by anybody. But the unsuccessful party to the arbitration, having refused to obtemper the arbitrator's award, the defenders took the matter into the region of the jurisdiction of the Judge Ordinary of the bounds, there to enforce execution. They obtained a decree of poinding of the debtor's effects on 2nd June. The execution of the poinding was duly reported, and thereafter on 3rd July a warrant of sale of the effects was granted by the Sheriff. To these proceedings, which were intended exclusively for the purpose of enforcing the award, the pursuers here were not parties. They, however, say that they are the owners of part, it may be all, of the poinded effects, and accordingly they seek to have interdict against their sale. It is not disputed that the pursuers have a remedy. They might have entered their objection when the poinding was being executed, or at any stage before the warrant of sale. They might, it is freely allowed, have availed themselves of their remedy after the warrant of sale was granted by bringing a suspension in the Bill Chamber. And the sole question we have to decide to-day is whether or no the remedy which they have sought—interdict in the Sheriff Court—is competent.

I am of opinion that it is competent, and that the Sheriff may, at the instance of those who are not parties to the proceedings at all, but who allege that they are the owners of the poinded goods, vindicate their right even after the warrant of sale has been granted. I say nothing against the general statement of the law which I find in the learned Sheriff's opinion to the effect that "a Sheriff cannot entertain an interdict which is in effect equivalent to a suspension of a decree granted by himself." That is, generally stated, a perfectly accurate proposition, but it must be observed that this decree was really a step in the process of diligence, and a step to which the pursuers were no parties and of which, presumably, they had no notice.

The decisions on the question, which have been carefully analysed and commented upon by the Sheriffs in their extremely able and well-reasoned opinions, are, in my judgment, inconclusive of the question raised. I prefer to take the general statement of the law as I find it laid down in

Bell's Commentaries (7th ed., ii, 61) to the effect that "the Sheriff in all that belongs to the warrant of sale has jurisdiction which entitles him to decide on the regularity of the diligence *ex facie*, on the correctness of the poinding of particular articles, on the expediency of the mode of sale, upset price, and other particulars relative to the conduct of the process." I rather think from the opinion, very briefly reported, of Lord Glenlee in one of the cases he at all events expressed a very decided opinion to the effect that where the question related to the correctness of the poinding of particular articles the Sheriff had jurisdiction even after the warrant was granted. To the same effect Mr Bell in his Principles (sec. 2287), says—"If any stranger"—and that is the case we have before us here—"claims the goods, his remedy is before the Sheriff." And there is a significant note to the effect that "in practice this is generally by interdict, though the claimant might appear in the poinding and vindicate his right." I rather gather from that statement of the practice that, even after the warrant of sale has been granted, interdict is obtainable. And that view is strongly supported by the passage from Mr M'Glashan's work (4th ed., sec. 1907) quoted to us to-day, which I read exactly as written. If Mr M'Glashan means what he says, then unquestionably the practice is to allow interdict even where the warrant of sale has been granted, before the sale has actually been carried into effect. This seems a reasonable course. It would, it appears to me, be unreasonable to suppose that the only remedy open to any humble person in the county, when he finds that goods belonging to him and not to the debtor in the cause are being poinded, should be to come to this Court by way of suspension and interdict in the Bill Chamber, and that he should be precluded from seeking his remedy before the Sheriff, who is master of the whole proceedings. On these grounds, and without saying anything against the general principles on which the learned Sheriffs proceeded, I am of opinion that the action is competent, that we ought to recal the interlocutors of the Sheriffs, and remit to the Sheriff-Substitute to proceed with the action.

LORD JOHNSTON—I agree with your Lordship. I think that the Sheriffs have gone too far in identifying the warrant of a Sheriff with a decree. There is a distinction between a poinding and an ordinary action. They are both processes in a technical sense; but the process of poinding is a mere process of diligence in which the Sheriff acts ministerially, unless in the course of so acting he is called on to determine some incidental matter of right—it may be by the party on whom the process is served, or it may be by some other party interested intervening before the warrant is granted. So far as the debtor is concerned the warrant may be the Sheriff's final word, but so far as the world at large is concerned the application is made and the warrant granted *periculo petentis*. And I cannot conceive any reason why the Sheriff, at the instance of a party who has necessarily had no intimation of the process of diligence or of the granting of the warrant, should not be able to stay the sale of the whole of the goods poinded or of some part of the goods poinded, as the case may be, at the instance of anyone, not the debtor, claiming an interest who has not been made a party to the process of poinding by having the application served upon him.

I think one has got to look at the extraordinary results, not merely of inconvenience but of injustice, which the opposite view to that taken by your Lordship would lead. I put the question in the course of the discussion as to what would happen with regard to the passing of the property in the goods once a poinding were carried out. I give no opinion on the point, but counsel did not maintain that anything but a complete title would be transferred to the purchaser. Whether that be so or not, it would be an extraordinary result that a person who never heard of a poinding until a day or two before the sale should have his property reft from him by a wrongous poinding and an unjustifiable warrant of sale, and should be left to try and vindicate his property from the purchaser, with the alternative of an action of damages against the person taking out the poinding, who may or may not be worth powder and shot. I cannot conceive that there is any principle, and there is certainly no convenience, to justify the result to which the learned Sheriffs in their very able notes have come.

LORD MACKENZIE — I agree with the judgment which your Lordship proposes. The effect is to confirm the opinion expressed by Mr Dove Wilson in his work on Sheriff Court Practice (which is quoted by the Sheriff-Substitute) at page 340 of the 4th edition, where he says:—"It is sometimes thought that the only remedy of a third party is by interdict, and this may be true if warrant of sale has been granted, but prior to this an objection to the poinding seems competent." Upon this the observation of the Sheriff-Substitute is—"This learned author appears to have written from his own wide experience of practice only, and he does not refer to the decisions on the point at all."

The decisions have been brought under our notice, and there does not appear to be any decided case which is against giving the remedy which is here asked.

The Court recalled the interlocutors of the Sheriffs and remitted to the Sheriff-Substitute to proceed.

Counsel for the Pursuers (Appellants)—Ingram. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Defenders (Respondents)—Wilton—Forbes. Agents—Drummond & Reid, W.S.