formal part of the deed he dispones his heritage to him, but always under the express condition of his continuing to profess the Roman Catholic religion, and so far it applies to James Hay only; but the deed goes on thus—"and failing the said James Hay by death or by abandoning his said religion, then to my own nearest heirs professing the Roman Catholic religion." Now, if the dispositive clause had stopped there a different question would have arisen, but there is this addition—"and to the heirs and assignees whomsoever of my said disponees." And it is said that the disponees are James Hay in the first place, and the nearest heirs of the testator who profess the Roman Catholic religion in the second place, who are to take on the failure of James Hay. The way in which I read the deed is this—"I convey to James Hay, under the express condition of his continuing to profess the Roman Catholic religion, and to his heirs and assignees whomsoever," and there can be no doubt that this condition is personal to James Hay; the fee vested in him on the death of the testator, and unless he committed an irritancy by becoming a Protestant the fee goes to his heirs or assignees on his death. That is exactly the case which has occurred here, and it is impossible to say that the destination to the nearest heirs professing the Roman Catholic religion is to take effect, because James Hay's heirs are preferred to them.

The Sheriff and the Sheriff-Substitute say that the nearest heirs professing this religion must be held to be conditional institutes, and that must be so if I have read the prior part of the deed right. The case of *Smith* which has been cited to us was a very difficult one, and led to considerable difference of opinion. There there was a proper substitution "to and in favour of William Stewart, my nephew . . . and the heirs of his body, whom failing before me, then to Adam Stewart . . . and the heirs of his body," and after exhausting the other heirs *seriatim* called, "whom all failing, then to my own nearest heirs and assignees whomsoever." The difficulty occurred on account of the expression "before me" which is inserted before each branch of the destination, and seems to indicate a conditional institution. The Court, however, on considering the whole terms of the deed, held that there was a substitution, which they certainly could not have done had the destination been to "my nephew William, and his heirs whomsoever," which would have excluded the idea of substitution.

Lord Glenlee in his opinion touches the real point of the case when he says,—"It is scarcely possible to attend to the whole deed and provisions and to doubt that the real purpose was that the nephews and their heirs should take *seriatim;* and I cannot possibly go into Lord Cringletie's view that the heir of conquest should be preferred. Suppose Adam" (that is to say, the party opposing) "out of the way: Though William were fully vested, yet he must, before he could serve heir of provision by conquest, show that heirs of conquest are substituted; while, on the contrary, the property stands destined to heirs whatsoever of the granter, and the only destination to the heirs of William is to heirs of his body." I think that clearly shows that the case has no application here, and I am accordingly for affirming the judgment of the Sheriff.

Lord Deas—I agree with your Lordship and with the Sheriff and the Sheriff-Substitute as to the construction to be put upon this settlement. There is no conveyance to the Roman Catholic heirs unless either of two things happens—unless the nephew dies in the testator's lifetime, or unless he abandons the Roman Catholic religion. The testator conveys direct to James Hay and his heirs and assignees whomsoever, unless one of these two things happens.

Lord Shand—I concur. I think this is a simple question, and I have no doubt about it. The disposition is to and in favour of James Hay, his heirs and assignees, under a certain condition which is limited to him, and does not attach to his heirs and assignees; and I cannot read the words "by death" as referring to anything but his death before the granter and not after.

Lord Mure was absent on Circuit.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellants—Strachan. Agent—William Officer, S.S.C.

Counsel for Respondents—M'Kechnie—D. J. Mackenzie. Agent—John Macpherson, W.S.

Friday, January 19.

FIRST DIVISION

[Sheriff of Dumfries and Galloway.

M'KEAND OR KING *v.* THOMPSON & COMPANY.

Process—Appeal—Competency—Expenses—Court of Session Act 1868, *sec.* 67.

An interlocutor by a Sheriff-Substitute disposing of the whole merits of a case and awarding expenses was adhered to by the Sheriff on 27th June 1881. The process then fell asleep and was wakened on 19th October 1882. On 26th October the Sheriff-Substitute decerned for the amount of expenses found due, and allowed decree to go out in the name of the agent-disburser. On 24th November the Sheriff altered this interlocutor, to the effect of finding that the agent-disburser had discharged his claim. On 2d January 1883 the defender appealed to the Court of Session. *Appeal dismissed as incompetent*, on the ground (1) that under the 67th section of the Court of Session Act 1868 the interlocutor of the 27th June had become final by the lapse of six months from its date without appeal being taken; and (2) that the interlocutor of 24th November merely decerning for expenses was not subject to appeal—*Cf. Tennents* v. *Romanes*, 8 R. 824, 18 Scot. Law Rep. 583.

In an action in the Sheriff Court of Dumfries and Galloway, at the instance of J. & R. Thompson & Co., manufacturers, Glasgow, against Mrs Hannah

M'Keand or King, Stranraer, the Sheriff-Substitute (RHIND) upon 5th April 1881 pronounced this interlocutor:— . . . . "Repels the defences, and decerns against the defender in terms of the prayer of the petition: Finds her liable in expenses, of which allows an account to be given in, and remits the same to the Auditor to tax and report, and decerns."

On appeal the Sheriff (MACPHERSON) adhered on 27th June 1881. Thereafter the process fell asleep. It was wakened by an interlocutor of the Sheriff-Substitute dated 19th October 1882, and on 26th October 1882 this interlocutor was pronounced—"Decerns against the defender for payment of the sum of £23, 10s. 7d. sterling of taxed expenses of process attour the dues of extract; and, as craved, allows decree for £17, 18s. 5d. sterling, part of said expenses, to go out and be extracted in name of William Black jun., solicitor, Stranraer, agent-disburser for the pursuers to that extent; and also allows decree for £5, 12s. 2d., being the remaining part of said expenses, to go out and be extracted in name of Messrs Maclean & Matthews, solicitors, Stranraer, agents-disbursers for the pursuers to that extent; and decerns."

The pursuers then appealed to the Sheriff, and answers to their reclaiming petition were lodged by William Black jun.

On 24th November 1882 the Sheriff pronounced this interlocutor:—"Recals the interlocutor appealed against: Finds the respondent the said William Black jun., by his letter to the pursuers dated 5th July 1882, accepted from them the sum of £6, 10s. in payment of his account of expenses: Finds that he thereby discharged any claim which he had as agent for the pursuers to the expenses awarded to them by the interlocutors of 5th April 1881 and 27th June 1881, and that he is not entitled to any part of these expenses: Approves of the Auditor's report on the pursuers' account of expenses, and, in terms thereof, decerns against the defender in payment to the pursuers of £23, 10s. 7d. sterling of taxed expenses of process attour the dues of extract: Finds the respondent the said William Black jun. liable to the pursuers in the expenses of this appeal."

On 2d January 1883 Mrs King appealed to the Court of Session.

The respondents objected to the competency of the appeal, and argued—The interlocutor of 27th June 1881, which disposes of the merits of the case, had become final in terms of the 67th section of the Court of Session Act 1868, which enacts that "it shall not be competent to take or sign any note of appeal after the expiration of six months from the date of final judgment in any cause depending before the Sheriff or other Inferior Court or Judge, even although such judgment has not been extracted." The interlocutor appealed against contained merely a decerniture for expenses, and was therefore not appealable—*Tennents* v. *Romanes*, June 22, 1881, 18 Scot. Law Rep. 583, and 8 R. 824; *Fleming* v. *The North of Scotland Banking Company*, October 20, 1881, 9 R. 11.

The respondent replied that the interlocutor of 19th October 1882 had the effect of wakening the whole process in accordance with section 49 of the Sheriff Courts Act 1876—*Cruickshank* v. *Smart*, February 5, 1870, 8 Macph. 512.

At advising—

LORD PRESIDENT—It appears to me that the case of *Tennents* v. *Romanes* is conclusive on this point. The interlocutor disposing of the merits of this case is not subject directly to appeal, because six months have elapsed since it was pronounced. That interlocutor disposed of the merits of the case and awarded expenses in favour of the pursuer, and it is final within the meaning of section 67 of the Court of Session Act 1868. In *Tennents'* case I stated the point thus—"The interlocutor on the merits, therefore, not being subject to appeal, the question comes to be whether there is any appeal at all. To bring up to this Court a decree for expenses, to the effect of letting the appellant get into a review of the interlocutors upon the merits, would be by a mere evasion to set at nought the provisions of the statute." I am afraid that is directly applicable to the present case, for how do the facts stand? The interlocutor pronounced by the Sheriff-Substitute is dated 5th April 1881, and was affirmed by the Sheriff on 27th June following, and a period of eighteen months has elapsed since that final interlocutor was pronounced. Then the process fell asleep, and was wakened on the 19th of October 1882, and thereafter nothing could be done except to decern for expenses which had been found due. The circumstance that there was a dispute between two agents as to how the expenses were to be divided does not affect the parties to the suit; it is merely a side issue, and the interlocutor of 24th November 1882 is one of which the appellant cannot complain, and he confesses that he cannot ask the Court to alter it. That makes this case stronger than *Tennents* v. *Romanes*, and I am for refusing the appeal as incompetent.

LORD DEAS concurred.

LORD SHAND—I think this case is directly ruled by the decision in *Tennents* v. *Romanes*. There it was held that extract barred appeal, and here by the 67th section of the Court of Session Act 1868 the six months clause operates in precisely the same way as the extract did in *Tennents'* case, and bars appeal. It was said that the interlocutor wakening the process enabled the appellant to appeal against any interlocutor after that date to the effect of opening up all the prior interlocutors. But the only purpose of the interlocutor of 24th November 1882 was to decern for expenses, and *Tennents'* case settles that any interlocutor which merely gives decree for expenses cannot be appealed against.

LORD MURE was absent on Circuit.

The Court dismissed the appeal as incompetent.

Counsel for Appellant—Brand. Agent—J. Watson Johns, L.A.

Counsel for Respondents—Lang. Agent—Thomas Carmichael, S.S.C.