I am therefore clearly of opinion that the second party is entitled to the heritable property as fiar, she being the heir-at-law of John Lindsay, her brother, in whom the whole came to be vested in fee.

LORD MURE concurred.

LORD SHAND—I am of the same opinion as your Lordships.

It appears to me that the question between the parties is solved by the circumstance that the provision with regard to survivorship was brought to an end by the death of the first of the sons, who died on 21st April 1864. By the terms of the trust-deed the heritable property is given in liferent to the widow, and then practically in fee to the two sons of the truster, subject to the condition that if either of them should predecease the widow without leaving issue, then the other should take. It seems to me that the only object the truster had in view, in inserting the survivorship clause was completely served on the death of the first son, and that it cannot be said the vesting was to be postponed until the death of the widow.

The clause making provision for the sons does not contain the words "in the event of" which, as in the daughter's case, would have made the benefit conditional. Nor was the survivorship clause intended for the protection of a series of conditional institutes, who would have taken according to their survivance at the death of the liferentrix. It may no doubt be said that the vesting might not have been absolute so as to give the property to the surviving son if he left issue. The clause is so framed as to leave that question open, and it might have been that if the surviving son had left issue, there would have been defeasance, as there was in the cases of *Snell's Trustees*, 4 R. 709; and *Fraser's Trustees*, Nov. 27, 1883, 11 R. 196; but that does not affect the present question. On these grounds I agree in thinking that the second party should succeed.

LORD ADAM concurred.

The Court pronounced this interlocutor—

"Find and declare that the heritable subject contained in the fourth purpose of the testator's settlement was vested in his son John Lindsay in fee after the decease of his brother George, and that the same now belongs to the second party as heir-at-law of her brother, the said John Lindsay, and decern."

Counsel for First and Second Parties—Pearson—Wallace. Agent—Alex. J. Napier, W.S.

Counsel for the Third Party—Rhind. Agent—Robert Menzies, S.S.C.

Friday, May 22.

SECOND DIVISION.

[Sheriff of the Lothians.

BELL *v.* ANDREWS.

Process—Appeal—Court of Session (Scotland) Act 1868 (31 *&* 32 *Vict. c.* 100), *sec.* 69—*Party "Appearing" in an Appeal.*

In a process of sequestration for rent by a landlord against an urban tenant in the Sheriff Court, a claim made by the tenant's minor daughter to have an article removed from the tenant's house by the landlord under the Sheriff's warrant excluded from the sequestration, and restored to her, was disallowed by the Sheriff, who also repelled the tenant's defences to the petition for sequestration. Against this interlocutor the tenant, as defender, noted an appeal to the Court of Session in the form given in section 66 of the Court of Session Act. No appeal was noted for the claimant. At the calling of the case on the Short Roll in the Court of Session, counsel (who also appeared for the defender) appeared and argued the case for the claimant, and she was represented by a separate agent. *Held* that the claimant had "appeared" in the sense of section 69 of the Court of Session Act, and was entitled to the benefit of the defender's appeal.

Landlord and Tenant—Hypothec — Invecta et illata—*Piano the Property of Tenant's Daughter.*

Held that a piano the property of the minor daughter of an urban tenant, and which was kept by her in her father's house, where she herself resided, was not subject to the landlord's hypothec for rent.

James Andrews was tenant of a flat which he used as a dwelling-house at No. 7 North St David Street, Edinburgh, and of which the proprietor was Henry Montgomerie Bell, residing at Oundle, from Whitsunday 1879 to Whitsunday 1884, at a yearly rent of £48. At the last mentioned term Andrews left the house, taking with him his household furniture and other effects to another house at 4 Marchmont Street. He left unpaid a balance of rent of £33.

Thereafter Henry Montgomerie Bell and his mandatory John Montgomerie Bell, Writer to the Signet, presented a petition to the Sheriff of the Lothians against Andrews for sequestration of the whole furniture, goods, gear, and other effects which were or might have been within the dwelling-house at No. 7 North St David Street, and for warrant to carry them back to said dwelling-house or other place of safe custody, and for warrant to sell so much of the sequestrated effects as would satisfy the unpaid balance of rent of £33.

Having obtained a warrant accordingly, the pursuer instructed a Sheriff-officer to proceed to the defender's house at 4 Marchmont Street for the purpose of removing his furniture, which was accordingly done by the officer. The furniture removed was placed in the premises of an auctioneer. Among the effects so sequestrated and removed was a pianoforte.

Andrews lodged answers to the petition for sequestration. In these he averred that John

Montgomerie Bell had agreed to his (the defender's) removing the furniture from the house in North St David Street to that in Marchmont Street, and had undertaken that it should not be removed from the house to which he had taken it so long as nothing was done to endanger the pursuer's right of hypothec, and that the removal thereof by the Sheriff-officer under his instructions was a violation of that agreement, and therefore illegal.

A minute having been lodged for Jessie Williamina Strachan Andrews, the defender's daughter, a minor, stating that the piano removed by the Sheriff-officer belonged to her, the Sheriff-Substitute (BAXTER) appointed her to lodge a claim for the piano, which she did. She claimed to have the piano withdrawn from the sequestration and restored to her by being brought back to the house at Marchmont Street. She averred that the piano was her exclusive property; that she had received it in the beginning of 1883 as a joint-present from her paternal grandmother and another lady; that it did not belong to her father, and was not subject to the pursuer's hypothec; that it was deposited in her father's house as her own absolute property, and for her sole use and benefit; and that, having in view the proper use of it by her, it could not have been placed or deposited anywhere else.

The pursuer pleaded—"(4) The pianoforte in question, even if the property of the claimant Jessie Williamina Strachan Andrews, having formed part of the furnishings of pursuer's house during the whole year of the defender's tenancy, it is subject to the pursuer's right of hypothec, and the claim therefor ought to be rejected, with expenses."

The claimant pleaded—"(1) The pianoforte in question being the absolute property of the said Jessie Williamina Strachan Andrews, as condescended on, is not subject to the pursuer's hypothec in the said sequestration, and she is therefore entitled to decree in terms of her claim, with expenses. (2) The said pianoforte being placed or deposited in the defender's house as the absolute property of the said Jessie Williamina Strachan Andrews, and for her sole use and benefit, it is not subject to the pursuer's hypothec, and she is entitled to decree as claimed, with expenses."

The Sheriff-Substitute (HAMILTON), before answer, allowed a proof of the alleged agreement, *quoad ultra* repelled the defences, and disallowed the claim for J. W. S. Andrews.

"*Note.*—Besides the question as to the agreement above referred to, the only point in the defences which calls for special notice is whether the pianoforte claimed by the defender's daughter is subject to the landlord's hypothec. Upon that point the authorities are against the defender's contention.—Bankton, i. 17–11; Bell's Pr. sec. 1276."

The claimant appealed to the Sheriff (DAVIDSON), who recalled the Sheriff-Substitute's interlocutor, and before answer allowed the parties a proof of their averments, so far as denied or not admitted.

A proof was thereafter led before the Sheriff-Substitute, in which the defender failed to prove the alleged agreement with the pursuer John Montgomerie Bell.

Thereafter the Sheriff-Substitute pronounced an interlocutor finding that the defender had failed to prove the agreement alleged, and that the warrant of sequestration obtained against him was duly and competently executed, and that the pianoforte belonging to the defender's minor daughter Jessie W. S. Andrews was rightly included in the sequestrated effects. He therefore repelled the whole defences; of new disallowed the claim of J. W. S. Andrews, and granted warrant for sale of as much of the sequestrated effects as would pay the balance of rent due.

The defender appealed to the Sheriff (DAVIDSON), who dismissed the appeal and adhered to the interlocutor appealed against.

The defender appealed to the Court of Session. No appeal was noted for the claimant J. W. S. Andrews. She was represented in the Court of Session by a separate agent from the defender, his name being marked on the back of the print as "agent for claimant." The same counsel appeared for defender and the claimant.

Argued for the claimant J. W. S. Andrews—The piano not being the landlord's property could not be pledged by him to his landlord in security for his rent. To render the property of a third party in the house of the tenant subject to the landlord's hypothec, two requisites must be present, namely, it must be there with consent of the owner, and must be there permanently—Bell's Com. (7th ed.) ii. 29; *Cowan* v. *Perry*, note to Bell's Com. (7th ed.) ii. 30; *Wilson* v. *Spankie*, December 17, 1813, F.C.; *Jaffray* v. *Carrick*, November 18, 1836, 15 S. 43, *per* Lord Moncreiff; *Adams* v. *Sutherland*, November 3, 1863, 2 Macph. 6, *per* Lord Deas. Furniture on hire met both of these requisites, because the broker is held, in respect of the hire paid to him, to take the risk of its being sequestrated for the hirer's rent—Bell's Com. ii. 30. But furniture gratuitously lent (*Cowan, supra*) or detained against the tenant's will (*Jaffray, supra*) was exempt. Neither requisite was present here. The owner of the article here had no choice but to put it in her father's house. It was not lent to the tenant to form part of his furniture; it was merely deposited by his daughter in his house (in which she resided) for safe custody, and that only temporarily, for she might have left her father's house, as, for example, to be married, and take it with her. Being the subject of deposit in his hands, it could not be made by him the subject of pledge for his own debt. There was no case in which a single article, the property of a third party, had been held liable—*Countess of Callander*, 1703, M. 6244, Bell's Com. ii. 30, note. The piano in *Pearson* v. *Robertson*, June 6, 1820, F.C., was hired.

Argued for the respondent—The piano was properly included in the sequestration; it was in the house for the whole period during which rent was due, and furniture permanently in the house is subject to the landlord's hypothec. The argument would apply to any musical instrument, but in the present case the piano was used as part of the furniture of the room. The general law was laid down in Stair, iv., 25, 3; *Adam* v. *Sutherland* (*supra cit.*); *Jaffray* v. *Carrick* (*supra cit.*). Without this piano, which was one of the best things in the house, the house would not have been properly furnished to afford the landlord security for his rent. It was not a valid objection that

the article did not belong to the tenant.—See cases of *Cowan* v. *Perry* (*supra cit.*); *Wilson* v. *Spankie* (*supra cit.*); Bell's Prin. 1276; More's Stair, 83; Hunter's Landlord and Tenant, ii. 377. If the piano was brought in to form permanently a part of the ordinary furniture of the house, it was subject to the landlord's hypothec.

At advising—

Lord President—There were three points decided by the interlocutor of the Sheriff-Substitute of 8th December 1884.

The first of these was the matter raised by the defender's fifth plea-in-law, and that plea the Sheriff-Substitute repelled. The second was the matter about the alleged agreement, and that the Sheriff-Substitute found the defender had entirely failed to prove. The third was a finding that the pianoforte belonging to the defender's minor daughter, Jessie W. S. Andrews, was rightly included among the sequestrated effects, and he of new disallowed the claim of Jessie W. S. Andrews.

Now, against this interlocutor an appeal was taken to the Sheriff by the defender, and by him alone.

The Sheriff affirmed the interlocutor appealed against, whereupon the defender, and he alone, appealed to this Court. Upon the first two points decided by the Sheriff-Substitute I may say the Court entertain no doubt whatever; but as to the third this difficulty arises, that that point is not raised by the present appeal. The averments about the piano being the property of the defender's daughter having been made on record, the Sheriff-Substitute very properly allowed a condescendence and claim for this young lady to be put in. She pleaded that the pianoforte in question being her absolute property it was not subject to the pursuer's hypothec in the sequestration, and that she was entitled to have it restored to her.

Now, this point has been dealt with by the Sheriff-Substitute, and decided by him in that part of his interlocutor of 8th December 1884 in which he finds "that the pianoforte belonging to the defender's minor daughter Jessie W. S. Andrews was rightly included among the sequestrated effects," and he "of new disallows the claim of the said Jessie W. S. Andrews."

Against this portion of the Sheriff-Substitute's interlocutor no appeal has been taken, so that the point with reference to the piano is not before us unless the counsel for the parties can show us that we can competently deal with it.

Young for the claimant argued—The interlocutor of the Sheriff-Substitute disallowing her claim was competently brought under review by counsel having appeared for her at the bar, and having argued on behalf of her claim. Section 69 of the Court of Session Act 1878 gave a party so "appearing" the same privileges as one for whom an appeal was noted in the process, for it distinguished between an "appellant" and a party "appearing," and declared that the one should be in the same position as the other. In any case the claimant might still note an appeal if necessary.

Lord President—I think that this difficulty may be avoided by reference to section 69 of the Court of Session Act of 1868.

It appears that this young lady's interests were attended to both in this and in the Inferior Court by a separate agent, although she was not represented by separate counsel, and under the provisions of the section of the Court of Session Act to which I have referred she was entitled to take the benefit of her father's appeal.

Now, on the merits, this is I think an entirely new question, and one of considerable interest.

The lady, a minor *pubes*, is living in family with her father. She receives from a person outside her family the present of a piano. It is quite a lawful thing for a minor *pubes* to own and possess such a musical instrument, and as she was living with her father it is clear if she was to derive any benefit from the present which had been made to her, she could not keep the instrument anywhere but in her father's house. If she kept it anywhere else she could not have the use of it, which was the object of the donor in presenting it to her. A son or a daughter in minority may have complete and effectual possession of a musical instrument although residing in his or her father's house, because that is his or her dwelling-place, and therefore the proper and suitable place in which his or her property should be deposited. As to the law of hypothec in urban subjects, that is well settled. It proceeds on the footing that all moveables belonging to the tenant which are in the house are subject to the landlord's hypothec for rent, and that even though in certain cases the property of these moveables may be in another than the tenant. This is the rule which prevails in the case of hired furniture, the articles so hired being subject to the landlord's hypothec, and the reason which Mr Bell in his Commentaries assigns for this is that the hirer takes the chance of the article being hypothecated as one of his risks and charges accordingly. Now, this is an intelligible ratio, and may I think be further illustrated, for if the hired furniture were not subject to his hypothec the landlord might insist on furniture which was subject to it being put there, and so compel the tenant to plenish the house with furniture belonging to himself in order to provide a security for the rent. Now, this ratio plainly does not apply to articles in a different position, and particularly not to single articles.

There have not been many cases in which the question of a single article came up for consideration, but I am not prepared to hold that a single article, the property of a party other than the tenant, and not lent on hire, is to be held as subject to the landlord's hypothec. In the case of *Cowan* v. *Perry*, referred to by Mr Bell, a person of the name of Wilson had hired a country house, and had furnished it partly with his own furniture and partly with furniture from a broker. Some articles were also lent by Miss Perry without hire, she having no need for them at the time. Wilson's and the broker's furniture were sold without opposition under the landlord's sequestration, but Miss Perry claimed her furniture as not subject to the landlord's hypothec. It was held that this furniture could not be sequestrated, and an order was pronounced for its delivery to Miss Perry. Now, the case of *Cowan*, if it is to be considered as an authority, must be taken to rule the present case, and so far as I can see there is no authority adverse to it. No doubt the case of *Wilson* v. *Spankie* has been supposed to throw some doubt upon the

case of *Cowan*, but I do not see any reason for these doubts. In *Wilson* v. *Spankie* the landlord's hypothec was held to be good over furniture belonging to the tenant, and which his creditors, though he had become bankrupt, allowed to remain in the house. But this was the case of the whole furnishings of a house. If these had been removed the tenant would not have been permitted by the landlord to continue in possession without refurnishing the house, and the creditors in allowing the furniture to remain were held to have given the landlord so far a security for his rent. These cases justify me in holding that this piano was not within the landlord's right of hypothec. It would be a very inconvenient thing if a child not forisfamiliated while living with his or her father, the tenant of urban subjects, could not possess any moveable article which could by any possibility be classed as furniture, without its falling under the landlord's hypothec. The use of the piano would have been entirely lost to this young lady if she had put it elsewhere, and her deposit of it in her father's house could not be viewed to any extend as a permanency. It might have been of short duration. If she had been married—and she was of marriageable age—it would undoubtedly have flitted with her to her husband's house. Upon these various grounds I think this piano was not embraced within the landlord's sequestration.

Lord Mure—I agree in the opinion expressed by your Lordship. The point is a new one, and has not as far as I have been able to discover been made matter of decision, but the rule of law is undoubtedly that laid down in the case of *Cowan* v. *Perry*, to which your Lordship referred, and that being so I think that the landlord's hypothec does not cover the piano in question. In the case of *Jaffray* v. *Carrick* Lord Moncreiff says—"There can be no question that abstractedly and on general principles the rule of law is that a man cannot pledge property which is not his own—*Res aliena pignori dari non potest.* All the cases in which express pledge or tacit hypothec is admitted are exceptions from that rule, and proceed upon a presumption of the consent of the real owner by the possession voluntarily given, and the title of such possession as implying such consent." In dealing with the facts of that case the Court held that the hypothec did not apply, and in the case of *Cowan* it was decided that while furniture hired was subject to the landlord's hypothec, furniture lent was not.

I can see no principle upon which this piano, the undoubted property of the daughter, can be taken possession of in order to pay a debt of her father.

Lord Shand—I am entirely of the same opinion. It is clear that in his present contention the landlord is asking us to go a step further than we have yet gone in the law of hypothec. Looking to the circumstances of the case I think it is clear that this article cannot be held to have been deposited by its owner in her father's house in any way as security for his rent, and as a subject of his landlord's hypothec. Suppose a person takes rooms for a time as a lodger, and to make himself more comfortable adds a few extra articles of furniture of his own, could it be said that in doing so he renders them liable to the landlord's hypothec? I think the case of *Cowan* v. *Perry* has settled that articles of furniture in such a position would not be liable. The only case attended with any difficulty was that of *Pearson* v. *Robertson*. As here, it was in that case a musical instrument, presumably a piano. That, however, was a case of hire, in which, as has been pointed out, the rule is different, but it is not one which I for my part should like to see extended. I confess I do not find the reason given for holding hired furniture liable altogether a satisfactory one, namely, that the broker, in respect of the hire paid to him, takes the risk of the furniture being sequestrated; but so it has been decided, and the rule at least draws a clear distinction between hired furniture and that which is merely lent or deposited gratuitously.

Lord Adam concurred.

The Court pronounced the following interlocutor.—

> "The Lords having heard counsel for the parties in the appeal against the interlocutors of the Sheriff-Substitute and Sheriff, dated 8th December 1884 and 2d January 1885 respectively, Alter the said interlocutors in so far as they find that the pianoforte belonging to the compearer Miss Jessie W. S. Andrews was rightly included in the sequestration, and disallow her claim: Find that the said piano was not liable to the pursuer's right of hypothec, and was wrongfully included in the sequestration: Appoint the same to be struck out of the summons, and ordain the pursuer to return the same to the compearer the said Jessie W. S. Andrews: *Quoad ultra* refuse the appeal, and decern: Find the defender James Andrews liable in expenses to the pursuer in both Courts: Find the pursuer liable in expenses to the said Jessie W. S. Andrews and her administrator-in-law in both Courts: Allow accounts of said expenses to be given in, and remit the same when lodged to the Auditor to tax and report," &c.

Counsel for Pursuers (Respondents)—W. C. Smith. Agent—James Junner, S.S.C.

Counsel for Defender (Appellant)—A. J. Young—Russell Bell. Agent—Party.

Counsel for Claimant J. W. S. Andrews—A. J. Young—Russell Bell. Agents—Whigham & Cowan, S.S.C.

Friday, May 22.

FIRST DIVISION.

YOUNG'S TRUSTEES *v.* HALLY AND OTHERS.

Succession—Trust—Mutual Settlement—Right of Property in Survivor—Destination.

A mutual trust-disposition and settlement executed by three sisters contained the provision that on the death of the first deceaser whatever residue remained of her estates after payment of legacies was to be divided and made over equally between the survivors, and on the death of the second deceaser whatever