something and had directed them to deliver them. That is a clear indication that the pursuer did not intend to part with his right of retention of the goods. Accordingly Messrs Aitken Dott & Son were not debtors to the defenders; they held the goods for the pursuer, and were bound on demand to redeliver to him. If that be so, the arrestment was not good. It is not enough to say merely that the goods were the property of the defenders. That might be a good ground of jurisdiction in principle if the law recognised it, and extended to moveables the analogy of heritable property. But it results from all the authorities that proprietary right is not enough to snpport jurisdiction founded on arrestment, unless the arrestee is also under obligation to account or to deliver to the common debtor.

I agree therefore with Lord Adam.

LORD KINNEAR—I am of the same opinion. The meaning and effect of the diligence of arrestment is settled beyond question. According to Mr Bell's definition arrestment is an attachment followed by adjudication. The method of attachment is that the Court, at the instance of the arresting creditor, issues a warrant by which the arrestee, or debtor's debtor, is prohibited from discharging his obligations to his own creditor, the common debtor, and the arresting creditor ultimately obtains the benefit of his arrestment by compelling the arrestee to perform this obligation to him. It follows that arrestments are of no effect unless there are some goods or debts in the hands of the arrestee which he is under an obligation to deliver or discharge to the common debtor. I agree that it is unnecessary to decide that the obligation must be created by a direct contract between the arrestee and the common debtor. It may be so, but at anyrate there must be a direct personal obligation to pay or deliver, whether arising *ex contractu* or *quasi ex contractu*. Now, if Messrs Aitken Dott & Son had been under an obligation to deliver to the defenders, then the pursuer's arrestment would have been effectual to prevent their performance of that obligation till the pursuer's claims were satisfied. But I agree that, on the contract of deposit, as described in the evidence by both parties, the obligation to deliver was not to the defenders but to the pursuer. The goods were deposited with Messrs Aitken Dott & Son with instructions not to send them on to the defenders till the pursuer told them to do so. It is, I think, of no consequence that these instructions were not given at the moment of deposit but subsequently. The pursuer says he would not have allowed the goods to go to the defender till he had been paid his commission, and Messrs Aitken Dott & Son say they would have returned them to the pursuer if ordered so to do. Under these circumstances I agree in thinking that they held for the pursuer, and had undertaken no personal obligation to the defenders. It follows that they might deliver to the pursuer according to their obligation without any breach of arrestment, and therefore that the goods are not effectually attached. The pursuer founds upon the case of *Appine's Creditors*, M. 749, and maintains that the goods might have been arrested in the hands of either himself or Messrs Aitken Dott & Son. I am not sure that I fully apprehend the grounds on which it was held that goods might be effectually arrested by different creditors in the hands of different arrestees at the same time. But at all events, I do not think the case helps the pursuer. It is clear that the pursuer could not have arrested in the hands of another goods which might at that very time have been validly arrested in his own hand as the true debtor in the obligation to deliver.

The LORD PRESIDENT concurred.

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

Counsel for the Pursuer — Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—C. S. Dickson —C. N. Johnston. Agents — Hagart & Burn Murdoch, W.S.

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*Tuesday, December* 11.

## FIRST DIVISION.

[Sheriff of Ross and Cromarty.

## ROSS *v.* ROSS.

*Process—Sheriff—Interlocutory Judgment —Jurisdiction—Appeal—Competency—* 50 *Geo. III. c.* 112, *sec.* 36—*Sheriff Court Act* 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24.

Section 36 of 50 Geo. III. c. 112, enacted that bills of advocation from the sheriffs "against interlocutory judgments shall be allowed only on the following grounds, viz., first, of incompetency, including defect of jurisdiction." . . .

Section 24 of the Sheriff Court Act of 1853 provides that it shall not be competent "to take to review" of the Court of Session any interlocutor of a sheriff "not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause," and repeals the provisions of 50 Geo. III. c. 112, so far as inconsistent with this enactment.

In an action of summary ejection brought in the Sheriff Court, the defender pleaded that the action was incompetent in the Sheriff Court, in respect that it involved a question of heritable right exceeding £50 in yearly value. The Sheriff having pronounced an interlocutor repelling this plea, the defender appealed to the Court of Session.

*Held* that the object of the appeal was to bring the interlocutor of the Sheriff under review, and that the appeal was therefore incompetent under section 24 of the Sheriff Court Act 1853.

Sir Charles Ross of Balnagown, Ross-shire, raised an action in the Sheriff Court of Ross against his mother, Lady Ross, praying the Court "summarily to eject the defender, and her goods, gear, and effects . . . furth and from" . . . the farms of Ardmore, Garty, and Marybank, in the county of Ross and Cromarty.

The defender pleaded, *inter alia*, (1) that the action was incompetent in the Sheriff Court, in respect that it raised a question of heritable right and validity of tenancy of subjects above £50 in yearly value, and £1000 in capital value; (2) that the pursuer's averments were irrelevant; and (7) that the pursuer had homologated the defender's tenancy.

After various procedure the Sheriff (JOHNSTON), on 4th September 1894, pronounced an interlocutor, by which he repelled the above-mentioned pleas for the defender, and allowed her a proof in support of other pleas stated by her upon the merits, and to the pursuer a conjunct probation.

The defender appealed against this interlocutor of the Sheriff to the First Division of the Court of Session.

The pursuer objected to the competency of the appeal.

By section 36 of 50 Geo. III. c. 112, it was enacted—"That bills of advocation from the sheriffs and other inferior judges in Scotland against interlocutory judgments shall be allowed only on the following grounds, viz., first, of incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party; secondly, of contingency; thirdly, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for a partial payment, provided that in the cases specified in this third head leave is given by the inferior judge."

By section 24 of the Sheriff Court Act of 1853 (16 and 17 Vict. c. 80) 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 found due, have not been modified or decerned 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 for payment of money, or disposing of the whole merits of the cause as aforesaid;" and the provisions of 50 Geo. III. c. 112, in so far as inconsistent with this enactment were thereby repealed.

Argued for the pursuer — The appeal was incompetent—(1) If brought under the Act of 1825 (6 Geo. IV. c. 120), sec. 40, as originally maintained, it was incompetent without leave of the inferior judge, which had not been obtained, in respect that the claim in the action was not simply pecuniary, and did not bear on the face of it to be above £40 in amount—Act of Sederunt, July 11, 1828, sec. 5. No application having been made to the Sheriff in terms of that section, the appeal should be dismissed. The present case fell under that section, as was shown by the analogous cases of *Ritchie* v. *Ritchie*, October 22, 1870, 9 Macph. 43; *Rain* v. *Gibb*, May 19, 1877, 4 R. 732; *Hamilton* v. *Hamilton*, March 20, 1877, 4 R. 688; *Matheson* v. *Mackenzie & Company*, June 13, 1837, 4 Scot. Jur. 512. (2) The appeal if brought under 50 Geo. III. c. 112, sec. 36, was excluded by sec. 24 of the Sheriff Court Act of 1853, which, with certain exceptions, repealed the provisions of that Act. The present appeal did not constitute one of those exceptions. The interlocutor appealed against was not one giving interim decree for payment of money, or disposing of the whole merits of the case, or sisting process. Therefore the appeal was not included in the exceptions, and was incompetent.

Argued for the defender—1. The appeal was competent under 6 Geo. IV. cap. 120, sec. 40, for the purpose of removing the case to the Court of Session. The value of the subject in dispute was manifestly far more than £40. The question at issue was as to the right of occupancy of farms for which a rental of £600 per year was paid, and the loss to the defender if summarily ejected would obviously far exceed £40. The Court would not look merely at the sum concluded for, but beyond it to the subject substantially in dispute—*Drummond* v. *Hunter*, January 12, 1867, 7 Macph. 347; *Cunningham* v. *Black*, January 9, 1883, 10 R. 441. 2. The Sheriff was not a competent judge, because the questions at issue were of heritable rights, and, as had been shown, the amount at stake exceeded £50 per year. The cases of *Robertson's Trustees* v. *Lindsay*, December 20, 1873, 1 R. 323, *Waterstone* v. *Mason*, June 30, 1846, 8 D. 944, and *Nisbet* v. *Aikman*, January 12, 1866, 4 Macph. 284, showed that a competition between property and leasehold titles introduced the element of heritable right sufficiently to exclude the jurisdiction of the Sheriff. An appeal was competent under 50 Geo. III. c. 112, sec. 36, on the ground of "incompetency, including defect of jurisdiction," which was the defender's first plea and ground of appeal, and this ground of appeal was not inconsistent with and was therefore not taken away by section 24 of the Sheriff Court Act of 1853—Mackay's Practice, i. p. 456. This was not a question of reviewing the Sheriff's decision, but merely of holding that he was an incompetent judge — *Harrington* v. *Richardson*, January 20, 1854, 16 D. 368.

At advising—

LORD ADAM—This is a petition at the

instance of Sir Charles Ross against his mother, Lady Ross, to have her summarily ejected from certain farms on his estate, of which it is alleged she is in possession without legal title.

After considerable procedure, and after various interlocutors had been pronounced in the case, the Sheriff on 4th September 1894 pronounced an interlocutor, by which he, *inter alia*, repelled the first, second, and seventh pleas for the defender, and before answer allowed her a proof in support of her third, fourth, and fifth pleas, and to the pursuer a conjunct probation.

This interlocutor has been brought under appeal, and the only question argued to us was, whether the appeal was competent or not?

The competency of the appeal was originally maintained under the 40th section of 6 Geo. IV. cap. 120, as being an appeal of an interlocutor allowing a proof, but it was objected that such an appeal was incompetent without leave of the inferior judge, in respect that the claim in the action was not simply pecuniary, and that such leave had not been obtained as required by the 5th section of the Act of Sederunt of 11th July 1828. I understood that the appellant did not press the competency of the appeal on this ground, but however that may be, I think that the objection is well founded.

The appellant further maintained that the appeal was in any view competent under section 36 of 50 Geo. III. c. 112, the appeal being against an interlocutor repelling a plea to incompetency in respect of want of jurisdiction.

The 36th section of the Act referred to declared that advocation against interlocutory judgments should be allowed only upon the ground (1st) of incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party; (2nd) contingency; and (3rd) legal objection with respect to the mode of proof, or with respect to some change of probation, or to an interim decree for partial payment, provided that in cases under the third head leave were given by the inferior judge.

Now, the first plea-in-law for the defender which has been repelled by the interlocutor reclaimed against is a plea of incompetency, in respect that the Sheriff had no jurisdiction in the case. If, therefore, the provisions of the 36th section of the 50 Geo. III. c. 112, are still in force, as the appellant maintains, the appeal is competent.

It will be observed that an appeal under this Act is not an appeal, as under the 40th section of 6 Geo. IV. c. 120, to have the case removed to the Court of Session with a view to further procedure merely. It is an appeal against the interlocutor brought under appeal for the purpose of its being submitted to review, and the first thing we should be asked to do in this case would be to recal the interlocutor of the Sheriff repelling the plea of incompetency.

If that be so, then I think the appeal is excluded by the 24th section of the Sheriff Court Act of 1853.

That section appears to me to state very clearly what interlocutors of the Inferior Court it shall in future be competent, and what interlocutors it shall not be competent, to take to review of the Court of Session.

It says that it shall be competent to take to review any interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause, although no decision has been given as to expenses, and that it shall not be competent to take to review any interlocutor not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause. No interlocutor, therefore, which is not an interlocutor falling under one or other of these heads can be submitted to review of the Court of Session by way of appeal.

It appears to me that any provision of an Act of Parliament which allows an interlocutor which cannot be brought under one or other of these heads to be taken to review is necessarily inconsistent with the enactments of the 24th section of the Act of 1853, and is therefore repealed.

The interlocutor which is appealed against in this case is, as I have said, an interlocutor by which the Sheriff repelled a plea to the incompetency of the action on the ground of want of jurisdiction. It is not an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause. It is therefore an interlocutor which the Act says it shall not be competent to take to review.

I think, therefore, that this appeal is incompetent. In so deciding, we are not deciding anything contrary to the decision in the case of *Harrison*, 16 D. 368—that was the case of an appeal under section 40 of 6 Geo. IV. c. 120, for removal with a view to procedure merely, and not for the purpose of review, as I think this appeal is.

LORD KINNEAR—I entirely concur with Lord Adam. It may be possible to remove a process from the Sheriff Court to this Court, on the ground that the Sheriff has no jurisdiction, provided that be done without submitting an interlocutor of the Sheriff to the review of the Court: but the sole purpose of this appeal is to submit to our review the interlocutors pronounced not only by the Sheriff-Substitute but by the Sheriff.

Upon the grounds stated by Lord Adam I think that is incompetent.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court dismissed the appeal.

Counsel for the Pursuer—Graham Murray, Q.C.—C. S. Dickson—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defender — D.-F. Sir Charles Pearson, Q.C.—Ure—Clyde. Agent—Keith R. Maitland, W.S.