weekly payments. If he shows in that application that the workman has recovered he may get a decree from the arbiter ending the weekly payments; and if such decree is given no weekly payments can ever again be claimed from him even although supervening incapacity should result.

But there has been no application of that sort in this case. What happened was this. There had been an agreement, which was never recorded, between the workman and the employers fixing the compensation during incapacity at 15s. 7d. per week. On 20th October 1908 the employers stopped making that payment upon the ground that the incapacity had ceased. I gather that the workman did not agree with that; and accordingly the parties joined in asking the Sheriff-Clerk to make a remit to the medical referee. What was remitted to the medical referee was the workman's condition or fitness for employment at the time. The referee reported that at 20th October, when the weekly payments ceased, the workman was no longer incapacitated. Of course, that settled the question of fact and justified the employers in stopping the weekly payment upon 20th October.

Now the workman comes forward and says—I accept all that, but in May of the following year 1909 I again became incapacitated owing to the original accident. Why is he not to be entitled, under the section of the Act to which I have referred, to weekly payments during that incapacity? The obligation of the employers to give him weekly payments during incapacity has never been terminated in any way whatever. All that has been settled by the report of the medical referee is that at a certain date he was not incapacitated. That being so I am clear that the Sheriff-Substitute was right in holding that the certificate of the medical referee did not bar the application for the resumption of the weekly payments upon the incapacity again supervening. Accordingly I think that the question in the case should be answered as Lord Ardwall suggests.

LORD DUNDAS concurred.

LORD JUSTICE-CLERK—I am of the same opinion. I think it requires to be noted that a referee's report is nothing beyond conclusive evidence upon certain matters. Now, evidence upon any question is a very different thing from a decision of that question, although it may well be that a question must inevitably be decided in a certain way if the evidence is conclusive and the party who desires the decision takes the proper proceedings for obtaining effect to the evidence. In this case the employers, founding on the certificate of the medical referee, might, under section 16 of the first schedule, have applied to have the compensation "ended" in terms of the Act. They did not do so, and there is accordingly no ground upon which it can be held that the compensation "ended" under the Act. I am accordingly of opinion that the question falls to be answered in the negative.

The Court answered the question in the negative.

Counsel for Pursuer (Respondent)—Constable, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for Defenders (Appellants)—Cooper, K.C.—Strain. Agents—W. & J. Burness, W.S.

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*Wednesday, November 3.*

## FIRST DIVISION.

[Sheriff Court at Inverness.

## INGLIS' TRUSTEES *v.* MACPHERSON.

*Sheriff—Process—Removing—Caution for Violent Profits—Failure to Instantly Verify Defence—Discretion of Sheriff—Sheriff Courts (Scotland) Act* 1838 (1 *and* 2 *Vict. c.* 119), *sec.* 12—*A.S.* 10*th July* 1839, *sec.* 34—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, c.* 51), *First Schedule, sec.* 121—*Heritable Securities* (*Scotland*) *Act* 1894 (57 *and* 58 *Vict. c.* 44), *sec.* 5.

In an application by the holders of a bond and disposition in security for warrant to eject the defender, the proprietrix, in virtue of section 5 of the Heritable Securities (Scotland) Act 1894 from a dwelling-house which formed part of the security subjects, the Sheriff-Substitute, in respect that the defender had failed to instantly verify her defences, ordained her, in terms of section 34 of the A.S. of 10th July 1839, which is imperative in its terms, to find caution for violent profits, and on appeal the Sheriff adhered.

*Held* that as the Sheriff Courts (Scotland) Act of 1838, on which the A.S. of 10th July 1839 depended, had been repealed by the Sheriff Courts (Scotland) Act of 1907, the A.S. of 10th July 1839, on which the Sheriffs had proceeded, was no longer in force, and that as the Sheriff Courts (Scotland) Act 1907, First Schedule, section 121, supposing that that section could have been made applicable to a petition for warrant to eject the proprietrix, was not imperative, but left the matter to the Sheriff's discretion, which discretion had not here been exercised, the judgment appealed from was wrong and must be recalled. *Held* further that the section could not be made to apply.

The Sheriff Courts (Scotland) Act 1838 (1 and 2 Vict. cap. 119), section 12, provides with regard to summary removings "that the Sheriff shall in all such cases, where the defences cannot be instantly verified, ordain the defender to find caution for violent profits."

The A.S. 10th July 1839, section 34, enacts —"In actions of removing, and in summary applications for ejection, the defender shall come prepared with a cautioner for violent profits at giving in his defences or answers, unless he instantly verify a defence excluding the action."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 38, enacts—"Where houses or other heritable subjects are let for a shorter period than a year, any person by law authorised may present to the Sheriff a summary application for removing, and a decree pronounced in such summary cause shall have the full force and effect of a decree of removing and warrant of ejection. Where such a let is for a period not exceeding four months notice of removal therefrom shall . . . be given as many days before the ish as shall be equivalent to at least one third of the full period of the duration of the let; and where the let exceeds four months, notice of removal shall . . . be given at least forty days before the expiry of the said period." The First Schedule, section 121, enacts with regard to summary removings as provided for in sec. 38 of the Act—"The Sheriff may order written answers or adjourn the hearing of such causes, but where defences cannot be instantly verified the Sheriff shall ordain the defender to find caution for violent profits, unless the Sheriff shall dispense with caution, which he may do if he see fit."

The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), sec. 5, enacts—"Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant, provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security or in due payment of the principal after formal requisition."

Mrs Catherine A. Hugonin or Inglis, Alton House, Inverness, and Etienne Hugonin, solicitor there (Mr and Mrs Hugh Inglis' marriage-contract trustees), brought an action against Mrs Rebecca Brown or Macpherson, widow of the late Donald Macpherson, teacher, Inverness, in which they craved warrant to summarily eject the defender in virtue of sec. 5 of the Heritable Securities (Scotland) Act 1894, from a dwelling-house there occupied by her, known as Hanover House, Ness Bank, Inverness.

The *facts* are given in the note (*infra*) of the Sheriff (WILSON), who on 13th July 1909, adhering to the decision of his Substitute (GRANT), ordained the defender to find caution for violent profits within seven days from the date of his interlocutor.

*Note.*—"The pursuers are the holders of a bond and disposition in security for £600, granted in 1901 in their favour by the late Donald Macpherson and the defender, his wife.

"The security subjects conveyed by the bond and disposition in security were vested in the said Donald Macpherson and the defender and the survivor.

"Mr Macpherson died on or about 1902, and the defender then became the sole proprietor of the security subjects.

"These include a dwelling-house known as 'Hanover House,' which the defender now occupies.

"By section 5 of the Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), it is provided as follows . . . (*quotes, v. supra*) . . .

"The pursuers allege that the interest payable at Martinmas 1908 and Whitsunday 1909 is in arrear, and that the defender retains occupation of the dwelling-house above referred, and refuses to yield possession thereof. In these circumstances they crave warrant to eject her.

"The defender entered appearance and tendered defences to the effect (*a*) that she was not proprietor of the subjects in respect that she had conveyed them to Mr Hugonin by absolute disposition in 1905; and (*b*) that the interest was not in arrear.

"The absolute disposition referred to is produced, and it bears to have been granted on 3rd July 1905. But there is also produced a letter dated 17th July 1905, addressed by the defender to Mr Hugonin, in which the disposition is referred to as an '*ex facie* absolute disposition,' and in which the defender gives authority to Mr Hugonin to sell the property thereby conveyed by public roup or private bargain at such price as Mr Hugonin in his discretion may think fit, and further authorises him to output and input tenants.

"This letter, therefore, was granted on the footing that the defender, notwithstanding the *ex facie* disposition, remained the proprietor of the property, and that it had been conveyed to Mr Hugonin only in security. Moreover, the defender, who is in personal occupation of part of the subjects, has not produced any evidence that she occupies the dwelling-house on any other title than that of proprietor.

"In these circumstances I am of opinion that she has failed 'instantly to verify' the defence that she is not the proprietor.

"The other defence, to the effect that Mr Hugonin has paid the interest said to be in arrear, is not established by the production of any voucher or in any other way.

"Accordingly I think that the Sheriff-Substitute was right in holding that the provision of section 34 of the Act of Sederunt of 10th July 1839 is applicable to this case, and that the defender must find caution for violent profits as a condition-precedent of the right to defend the action."

The defender appealed, and argued—(1) That she was not bound to find caution for violent profits. The Acts on which the Sheriffs founded, viz., the Sheriff Courts (Scotland) Act 1838 (1 and 2 Vict. c. 119), and the Act of Sederunt of 10th July 1839, had been repealed by the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51). Under the older Acts finding caution for violent profits was an imperative condition of defending a summary removing application—Fyfe's Sheriff Court Code, p. 110. Under the Act of 1907 it was matter for the

discretion of the Sheriff—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), Schedule 1, section 121—and in the present instance that had not been exercised. (2) The application was incompetent in respect that the defender was not a "proprietor" in the sense of sec. 5 of the Heritable Securities Act 1894 (57 and 58 Vict. c. 44), in respect that she had granted an *ex facie* absolute disposition of the property.

Argued for respondents—(1) *Esto* that the Sheriff Courts Act 1838 had been repealed, the provisions of the Act of Sederunt of 10th July 1839 were still in force, for the provisions in the First Schedule annexed to the Sheriff Courts Act of 1907 with regard to summary removings (viz. secs. 115 to 122) were virtually the same as those of the Act of Sederunt in question. The appellant had therefore been rightly ordained to find caution. (2) The appellant was proprietor of the subjects, for the disposition founded on though *ex facie* absolute was really in security—*Scottish Property Investment Company Building Society* v. *Horne*, May 31, 1881, 8 R. 737, at p. 740, 18 S.L.R. 525.

LORD KINNEAR—In this case certain heritable creditors have brought a process against the defender and appellant in the Sheriff Court of Inverness for summary ejection from certain subjects including the dwelling-house which she now occupies. We have nothing to do with the merits of the process. It may or may not be the case that her creditors have a good right to take possession and eject the appellant, but that depends upon considerations which are not before us. The Sheriff-Substitute, and on appeal the Sheriff-Depute, have found that before being heard on the merits the appellant must find caution for violent profits within a certain time, and the only question we have to consider is whether that judgment is sound.

The learned Sheriffs found their decisions on the 34th section of the Act of Sederunt of 10th July 1839, which regulates the forms of process prescribed by the Sheriff Courts (Scotland) Act 1838 (1 and 2 Vict. cap. 119), and the only ground which they assign for their decree that she must find caution is the condition of that Act of Sederunt making it imperative that "in actions of removing and in summary applications for ejection the defender shall come prepared with a cautioner for violent profits, at giving in his defences or answers, unless he instantly verify a defence excluding the action." The Sheriffs have not observed that the Act of Parliament on which the Act of Sederunt depends has been repealed, and the Act of Sederunt falls with it. There is a different series of provisions prescribed by the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), which must now be substituted for the former Act and Act of Sederunt, and the new regulations are to be found in section 38 of the statute and in a series of clauses in the first schedule applicable to summary removings. Section 38 enacts that "where houses or other heritable subjects are let for a shorter period than one year, any person by law authorised may present to the Sheriff a summary application for removing, and a decree pronounced in such summary cause shall have the full force and effect of a decree of removing and warrant of ejection." The clauses of the schedule which are applicable to a right to obtain caution for violent profits are clauses 115 to 121. Clause 115 begins by defining the cases to which the regulations are applicable, and clause 121 says—"The Sheriff may order written answers or adjourn the hearing of such causes, but where defences cannot be instantly verified the Sheriff shall ordain the defender to find caution for violent profits, unless the Sheriff shall dispense with caution, which he may do if he see fit."

That is the rule applicable to the liability of a person in occupation of heritable property to find caution, and it appears to me in the first place that it applies only where houses or heritable subjects are let to a person who refuses to remove, and in the second place that it makes the material alteration on the former law that instead of it being imperative on the Sheriff to order caution, it is now a matter for his discretion. That is a sufficient ground for recalling the Sheriffs' interlocutors. There is no positive rule applicable to this case, and even if the case were within the rule of the Sheriff Courts Act the Sheriffs have not considered it as a matter within their discretion. The fact that they have pronounced an order in the belief that it was imperative is no proof that they would have made the same order if their attention had been called to their discretionary powers. Furthermore, I cannot see any good ground in law or practice for ordering caution for violent profits in a case of this kind. The respondents' counsel founded on section 5 of the Heritable Securities (Scotland) Act of 1894 (57 and 58 Vict. cap. 44), which enacts—"Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without a title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant."

On the authority of this section the respondents say that the present appellant, being proprietor and in personal occupation, may be ejected as if she had no title. I assume that she is in the same position as if she were proprietor and that the pursuers have a good heritable bond, but though the Act says that a creditor may summarily eject his debtor, it does not follow that he has all the rights competent to a landlord in a process of removing. The two processes of ejection and removing are distinct; in the case of a tenant ejection is only an accessory process to that of removing. I cannot find any authority in the statute for holding that a heritable creditor is entitled in a process of removing to require that a per-

son in the position of this defender, before defending the action, shall find caution for violent profits.

I do not say that a person holding heritable subjects without a title may not be liable for violent profits when the rights of parties have been determined; but liability on a final determination is one thing, and liability to find caution beforehand is a totally different thing, which cannot be imposed except by virtue of some statutory enactment or long established practice.

I am therefore of opinion that the Sheriff's interlocutor should be recalled.

LORD JOHNSTON—I agree that this lady must succeed in her appeal. It may be that under some other enactment the Sheriffs might have competently dealt with caution for violent profits, but the pursuers here have founded on section 5 of the Heritable Securities Act 1894 and section 34 of the Act of Sederunt of 10th July 1839. The Act of Sederunt was of no force of itself. It depended on the Act (Sheriff Court Act of 1838) which authorised it. Now section 12 of that Act contained a very distinct proviso that in summary actions of removing raised under the authority of the Act the Sheriff "shall in all such cases where the defences cannot be instantly verified ordain the defender to find caution for violent profits." That was a distinct enactment having reference to removings in general. That provision, however, is no longer in force, for the Sheriff Courts Act of 1907 repealed the Act of 1838, with the exception of certain sections which are not in point, and therefore swept away the foundation of the Act of Sederunt in question. No doubt new provisions have been put in its place, but these deal with a limited class of removals of which this is not one. I think the Sheriffs have gone wrong in not adverting to the fact that the Act of 1907 repealed the Act of 1838, and therefore also the Act of Sederunt of 1839, and have put nothing in their place governing the matter of caution for violent profits in other than a limited class of cases.

LORD SALVESEN—I entirely agree with both your Lordships and have nothing to add.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court sustained the appeal, recalled the interlocutors of the Sheriff and the Sheriff-Substitute dated 13th July 1909 and 3rd June 1909 respectively, and remitted the cause to the Sheriff to proceed as accords.

Counsel for Defender (Appellant) — Party.

Counsel for Pursuers (Respondents)—James Stevenson. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

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*Wednesday, November* 10.

FIRST DIVISION.

(SINGLE BILLS.)

## DUNNACHIE, PETITIONER.

*Husband and Wife—Wife's Separate Estate—Married Women's Property (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 5—*Wife Living Apart from Husband—Husband in Lunatic Asylum and Incapable of Giving Consent.*

The Married Women's Property (Scotland) Act 1881, section 5, enacts—"Where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

A wife, whose husband was confined in a lunatic asylum, presented a petition to the Court for authority to dispense with her husband's consent to any charge over or sale of certain heritable property belonging to her. The Court *granted* the prayer of the petition.

On October 27, 1909, Mrs May or Mary Hargrieve or Dunnachie, Milngavie, near Glasgow, wife of John Dunnachie, then an inmate of the Stirling District Asylum, Larbert, presented a petition under the Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 5, in which she craved the Court to dispense with her husband's consent to any bond and disposition in security for a loan to her on the security of Grasmere Cottage, Loanhead, or to any disposition or other deed of transfer of the said property by her in favour of a lender or purchaser.

The petitioner averred—"(2) On or about 23rd July 1909, in consequence of the deranged state of mind of the said John Dunnachie, it was found necessary to remove him to Stirling District Asylum at Larbert. He was discharged on 17th September 1909, but in consequence of a relapse he was again committed to the said Asylum on 29th September 1909, and is now an inmate there. Owing to his suspicious and delusional condition of mind he is incapable of giving consent to any deed by the petitioner.

"(3) The late David Hargrieve, sometime merchant, Loanhead, thereafter residing there, by his trust-disposition and settlement, dated 12th January 1891, and recorded in the Books of Council and Session, 31st July 1894, *inter alia,* directed his trustees to convey to his niece Margaret M'Allister, in liferent for her liferent use allenarly, and to the petitioner, then unmarried, and her heirs and assignees in fee, his heritable property in Loanhead, called Grasmere Cottage, according as the same is described in the title-deeds, and the said David Hargrieve declared, by his said trust-disposition and settlement, that the legacies or provisions therein mentioned, so far as payable