herself avers that the defender had admitted paternity, and paid the inlying expenses together with a quarter's aliment in advance at the rate sued for, and to the extent of the sums so paid she restricts her claim. The action is thus one of constitution only, since *ante litem motam* the defender had admitted that he was the father of the child, and owed nothing to the pursuer at the date when the action was instituted.

The defences are limited to the question of expenses. The defender pleads that if the pursuer wishes to constitute her claims, she must in the circumstances do so at her own expense, and that he is himself entitled to expenses. Some words have been accidentally omitted from the fifth plea, but it is obvious that the dismissal there asked is a dismissal *quoad* the pursuer's crave for expenses against the defender.

In this state of the pleadings the Sheriff-Substitute granted decree in terms of the crave of the initial writ, finding the pursuer entitled to the expenses of bringing the action into Court, and to a small sum of modified expenses in respect of the subsequent procedure. The Sheriff-Substitute states that in the matter of expenses he followed the case of *Doyle* v. *Reilly* (1919, 35 S.L. Rev.), decided in the Sheriff Court at Glasgow. But in that case there was no admission of paternity by the defender before the institution of proceedings—a most material distinction between that case and the present one.

The defender appealed to the Sheriff, who recalled the Sheriff-Substitute's interlocutor and sustained the defender's first plea-in-law. That plea, as I have already pointed out, related like the defender's remaining pleas solely to the question of expenses. The learned Sheriff, however, apparently upon the view that the pursuer was not justified in bringing the defender into Court at all, went on to dismiss the action. Some mistake seems to have occurred in this matter, for we were informed that at the hearing of the appeal before the Sheriff the defender (appellant) confined his argument entirely to the question of expenses and made no motion for dismissal of the action—a motion for which, indeed, his pleadings afforded no warrant whatever.

It is not doubtful that the mother of an illegitimate child is entitled (where the circumstances make it a reasonable course for the protection of her rights) to ask decree against the father notwithstanding a prior admission of paternity by him, and notwithstanding discharge by him of all his consequent liabilities to date. Thus in the present case the defender is an Englishman and a member of His Majesty's Forces, and as he may leave or be ordered to remove from the jurisdiction of the courts of Scotland at any time it is intelligible that the pursuer should have taken these proceedings for the protection of rights which she might otherwise find it possibly difficult to enforce at some future time in an English Court. I am therefore of opinion that the Sheriff-Substitute was right in granting the decree, on the merits, which the pursuer asked, and that the Sheriff-Principal erred in recalling this part of the Sheriff-Substitute's interlocutor.

But there is no ground whatever for throwing the expense of this precautionary measure on a defender who has already admitted his paternity and has discharged and is discharging his consequent liabilities. I think therefore the Sheriff-Substitute was wrong in giving the pursuer any expenses, and that the Sheriff-Principal was right in recalling that part of the Sheriff-Substitute's interlocutor which dealt with expenses. The defender was in no way responsible for the mistake of the Sheriff-Principal in dismissing the action, and in the whole circumstances, while I think the pursuer must have her decree (on the merits) restored, my opinion is that she is not entitled to any expenses in the Court below, and for the same reasons I think that there should be no expenses in the present appeal.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, decerned against the defender in terms of the crave of the initial writ, and found no expenses due to or by either party.

Counsel for the Pursuer and Appellant — Dykes. Agents — Cornillon, Craig, & Thomas, W.S.

For the Defender—Party.

Saturday, June 7.

SECOND DIVISION.

[Sheriff Court at Kilmarnock.

HENDRY AND ANOTHER *v.* WALKER.

Process — Appeal — Competency — Sheriff — Lease — Decree of Removing — Court of Session Act 1825 (6 *Geo. IV, cap.* 120), *sec.* 44—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 78.

Lease — Removing — Sheriff — Appeal — Competency.

The Court of Session Act 1825 (The Judicature Act), section 44, enacts—"When any judgment shall be pronounced by an inferior court, ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply . . . by bill of advocation to be passed at once, but only by means of suspension. . . ."

The Court of Session Act 1868, section 78, enacts—"Where by any statute now in force the right of review by advocation to the Court of Session is excluded or restricted, such exclusion or restriction of review shall be deemed and taken to apply to review by appeal under this Act."

In an application by the proprietors of a farm for (1) a declarator that the tenant's lease had expired, and (2) a warrant for summary ejection, the

Sheriff-Substitute granted decree as craved. The defender having appealed, the pursuer objected to the competency of the appeal. *Held* that a decree in an action of removing could be reviewed only by way of suspension; that the addition of the declaratory conclusion to the record made no difference; and that the appeal must therefore be dismissed as incompetent.

Campbell's Trustees v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115, *followed.*

Robert Henry, farmer, Fairlie Crevoch, Stewarton, and Mrs Janet Dickie Dunlop or Hendry, wife of and residing with the said Robert Hendry, brought an action against Robert Walker, farmer, Kirkmuir, Stewarton, in which they craved the Court (1) to find and declare that the lease to the defender of the farm and lands and pertinents of Kirkmuir, in the parish of Stewarton and county of Ayr, expired at Martinmas 1923 as regards the arable lands, and will expire at Whitsunday 1924 as regards the houses and lands in grass; (2) to ordain the defender summarily to flit and remove.

Walker lodged defences in which he averred, *inter alia*, that the notice of removal was inept in respect that at the date thereof the pursuers were not infeft.

On 17th April 1924 the Sheriff-Substitute (ROBERTSON) found and declared in terms of the first conclusion of the prayer of the initial writ, and ordained the defender to remove as craved.

The defender reclaimed, and argued—The competency of the appeal depended upon the interpretation given to section 44 of the Court of Session Act 1825 (6 Geo. IV, cap. 120). That section disallowed appeal from a decree of removing; but it did not apply here where an action of removing was combined with a declarator. In *M'Nair* v. *Blantyre's Tutors*, 11 S. 651, two processes—an action of interdict and a removing—were brought in the Sheriff Court. They were conjoined, and an advocation was brought to the Court of Session. The Court held that the action was incompetent so far as the removing was concerned, but perfectly good so far as the interdict process was concerned. Reference was also made to *Fleming* v. *Morrison*, 13 S. 859; *Macpherson* v. *Graham*, 1 Macph. 973; *Duke of Argyll* v. *Campbeltown Coal Company*, 1924 S.L.T. 514. Accordingly the competency of the appeal should be sustained. [The argument on the merits is not reported.]

Argued for respondents—An appeal from a decree of removing was forbidden by statute; the only competent remedy was by way of suspension. The defender sought to justify his appeal by pointing to the declaratory conclusion, and contending that it had the effect of changing the character of the decree, which ceased to be a mere decree of removal. But, in fact, the declarator was merely ancillary to the removal clause, which was the operative part of the decree. Its omission would not have effected the decree, though the facts stated in it were necessarily implied in any decree ordaining the removing. Consequently this was a pure decree of removal, and as such not subject to review by way of appeal. *Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188, 48 S.L.R. 115, was exactly in point and should be followed.

At advising—

LORD JUSTICE-CLERK (ALNESS)—Section 44 of the Court of Session Act 1825 (6 Geo. IV, cap. 120) provides—"When any judgment shall be pronounced by an inferior court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above, by bill of advocation to be passed at once, but only by means of suspension as hereinafter regulated." Section 78 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) provides—"Where by any statute now in force the right of review by advocation to the Court of Session is excluded or restricted, such exclusion or restriction of review shall be deemed and taken to apply to review by appeal under this Act." The provisions of the Act of 1825 in this particular are not affected by subsequent legislation—*cf. Campbell's Trustees*, 1911 S.C. 188.

In the case before us the pursuers as proprietors of a farm occupied by the defender brought an action of removing against him in the Sheriff Court. The initial writ craves the Court to find and declare that the lease of the defender's farm expired at Martinmas 1923 as regards the arable lands, and will expire at Whitsunday 1924 as regards the houses and lands in grass, and for decree ordaining the defender to remove from these subjects. The defence to the action is substantially two-fold—(1) that an uninfeft proprietor is not entitled to give an effective notice to quit, and (2) that a *pro indiviso* proprietor cannot competently do so. If either of these propositions had been affirmed by the Sheriff-Substitute, the basis of the pursuers' action would disappear, for they were admittedly uninfeft when the notice was given, and it was given by one of the pursuers only. The Sheriff-Substitute, however, rejected both these defences. He found and declared in terms of the first conclusion of the prayer of the initial writ, and ordained the defender to remove from the subjects as craved.

The defender has appealed against that interlocutor. The pursuers object to the competency of the appeal and maintain that, having regard to the combined effect of the sections of the Acts of 1825 and 1868 which I have cited, the appellant's only competent remedy is by way of suspension.

Now there are three points which appear to me to be quite clear.

In the first place the objection taken by the respondents is not so technical as might at first sight appear. There is an essential difference between the process of advocation or appeal on the one hand and of suspension on the other hand. In the latter case caution is usually exacted as a condition of a stay of execution. In the former case an advocation or appeal of course proceeds

unhampered by any such condition. Indeed it may well be that distinction weighed with the Legislature in passing section 44 of the Judicature Act.

In the second place it is clear that the criterion to be applied in determining the competency of the appeal is not what the parties plead but what the judge decides. Has he or has he not pronounced a judgment ordaining a tenant to remove? That is the test.

In the third place I think it is manifest that apart from the fact that the Sheriff-Substitute found and declared in terms of the first conclusion of the prayer of the initial writ, *i.e.*, the declaratory conclusion—the appeal would, having regard to the terms of the sections cited, be incompetent. Indeed that was not disputed by the appellant. His contention, however, was that the declarator introduced by the petitioners in the initial writ and echoed by the Sheriff-Substitute in his interlocutor, saves his appeal and renders it competent. In this connection it is necessary to bear in mind the precise purpose of an action of removing. It is brought in order to decide whether the tenant's right to occupy the subjects has expired or not. A declarator such as we find in this case is inherent in every such action. The pursuers in this case have merely made express what is implied in every process of removing. In other words the first conclusion is entirely superfluous, it might without disadvantage have been omitted from the pleadings, and it raises no separate or separable problem from that involved in the second. That fact differentiates this case from the case of *M'Nair* v. *Blantyre* (11 S. 651) founded on by the appellant. There, a process of interdict and a process of removal having been combined in the Sheriff Court, and an appeal having been taken to the Court of Session, the appeal was held competent *quoad* the process of interdict but incompetent *quoad* the process of removing. The former, as appears from the opinion of Lord Balgray, was treated as a "separate question." Here the conclusions relate to the same question and cannot be dissevered.

The question I ask myself is this—Can I affirm that the Sheriff-Substitute's judgment is not a judgment ordaining a tenant to remove from the possession of lands or houses? I am quite unable to do so, and that being so, the statutory bar operates to exclude appeal. It was suggested in argument that while where a declarator is incidental to a decree of removing appeal may be incompetent, nevertheless where a decree of removing is incidental to a declarator appeal may be competent. I must respectfully decline to be drawn into a discussion of such refinements. The statute ignores them. In any event in the case before us I regard the declaratory conclusion as prefatory, subordinate, and even supererogatory in its character. Its presence or its absence from the conclusions or the interlocutor are alike immaterial. The question of the competency of the appeal is therefore unaffected by it. The action remains in essence what it always was—an action of removing, and nothing else. In these circumstances I am of opinion, to quote what was said by Lord Gillies in the case of *Roy* (2 D. 1345, at p. 1347), that this appeal "has been brought in the teeth of the statute," and that it falls to be refused. I venture to advise your Lordships accordingly.

LORD ORMIDALE—The pursuers object to the competency of this appeal. They maintain that the subject of appeal is a judgment of an inferior court ordaining a tenant to remove. They found their objection on section 44 of the Judicature Act 1825 (6 Geo. IV, cap 120), which enacts that "when any judgment shall be pronounced in an inferior court ordaining a tenant to remove," the tenant shall not be entitled to apply to the Court of Session by advocation but only by means of suspension. This exclusion of review by advocation is made equally applicable to review by appeal — Court of Session Act 1868, section 78 — and it does not appear to be in any way affected by the Sheriff Courts (Scotland) Act 1907—*Campbell's Trustees* v. *O'Neill*, 1911 S.C. 188. Under reference to the Sheriff-Substitute's interlocutor, which I need not recite, the objection is, in my judgment, well founded.

The defender seeks to differentiate this case from an ordinary action of removing on the ground that the initial writ starts out with a crave for a declaratory finding, and that the interlocutor under appeal, *inter alia*, finds and declares accordingly. This appears to me to be quite immaterial. The action is in sum and substance an action of removing and nothing else. The declaratory conclusion merely expresses the grounds on which the pursuers base their right to get a decree of removing, introducing no matter that is, in any sense, foreign or irrelevant to that object. It is in truth superfluous, and the action could have proceeded and the same result been reached without it. One question and one question only is raised in the action—whether the pursuers are entitled to have the defender removed from certain subjects—and the Sheriff-Substitute has answered that question in the affirmative and ordained the defender to remove. His judgment falls precisely within the terms of section 44. It is the operative order that matters, and I fail to understand how the judgment becomes less a judgment ordaining the defender to remove by reason merely of the Sheriff-Substitute also finding and declaring in terms of the first conclusion of the initial writ.

The case of *M'Nair* (11 S. 651), especially when considered along with its sequel reported at p. 935 of the same volume, does not seem to me to assist the defender. In it two perfectly distinct questions were raised, each in its own separate process, one of interdict and the other of removing. The processes had been conjoined by the Sheriff, but the Court, while it entertained the advocation in the interdict and in that process recalled the Sheriff's judgment, sustained the objection to the competency of the advocation in the removing in the

same interlocutor, and refused to look at it; and the merits of the removing had afterwards to be brought before the Court on a bill of suspension. The case appears to me to emphasise the inflexibility of the rule that advocations or appeals in removings are incompetent. As Lord Moncreiff says with reference to this at p. 937—"The Lord Ordinary holds it to be his duty to take care that the rule of the Act which permits decrees of removing to be reviewed only by suspension shall not be defeated." No doubt the reason why review by appeal is excluded is because "actions of removing demand despatch"—Rankine on Leases, p. 589—and because the tenant, on presenting a bill of suspension, is required to find caution, it may be for violent profits, in respect of his being allowed to continue in possession of the subjects.

As there is nothing in the circumstances of the present case to take it outside the operation of the rule, I agree that we should sustain the objection to the competency of the appeal.

LORD HUNTER—I agree. The appellant has been ordained by the Sheriff-Substitute to remove from certain subjects of which he was tenant under a verbal lease. Objection is taken by the respondents, who are the owners of the subjects, that the present appeal is incompetent. They found upon the terms of section 44 of the Judicature Act of 1825, in virtue of which provision review of a decree of removing is only competent in a process of suspension, and is not competent by way of an advocation. As your Lordships are aware, a reclaiming note has been substituted for an advocation, but the provision limiting review of a decree of removing to a process of suspension has in no way been altered.

The words of section 44 of the Act of 1825 appear to me to be so clear in favour of the respondents' contention that it would be impossible—assuming even that there were no decision upon the matter—to give effect to the appellant's application, unless a subsequent statute had been passed, or unless after consideration a court of equal or of greater authority had taken a different view as to the meaning of the language used in the Judicature Act of 1825. Nothing of that sort, however, has occurred. On the contrary, the question as to the competency of reviewing a decree of removing by way of an ordinary appeal has been made matter of consideration in more than one case. Quite recently the matter was considered—and considered in detail—by the First Division in the case of *Campbell's Trustees*, 1911 S.C. 188. Unless we were going to go contrary to the view expressed by the First Division in that case, it appears to me it would be impossible for us to entertain this appeal as competent, because that decision is perfectly clear. After an examination of the legislation dealing with the subject of review, the opinions of Lord Johnston and the Lord President (Dunedin) make it quite clear that the only mode of reviewing a decree of removing is by way of suspension. As the Lord President pointed out in that case, a landlord has a material interest in insisting in the prescribed form of review being followed, because if application is made to review by way of suspension it is usual, if not indeed invariable, that the suspender is made to find caution for violent profits. Now, in an ordinary appeal, no such protection is given to the landlord in the event of his being ultimately successful.

No doubt in one case to which we were referred, the case of *Barbour* v. *Chalmers* (18 R. 610), it was held that an ordinary appeal was competent where a judgment of a Sheriff-Substitute took the form of a removal; but, in reality, it was a case of a person being ejected from premises, where the contention of the landlord was that the person claiming to be tenant had no right or title whatever to possess. In that case the First Division of the Court held that the situation was not governed by the provisions of section 44 of the Act of 1825, and accordingly the appeal was entertained. On its facts *Barbour* is a case clearly distinguishable from the present.

The circumstances in *Campbell's* case appear to me to be identical with the circumstances of the present case, with the single exception that in the present case there is prefixed to the application for removing a declaratory conclusion. Now, the declaratory conclusion, when it is examined, is to my mind nothing more than what both your Lordships indicated as the natural preliminary to every action of removing because, unless it can be truly and properly affirmed that a lease has come to an end at the term when removal is asked, it is impossible for the removal to be granted. It is a necessary precedent that the lease should be terminated. All that is asked in the present case is a declarator to that effect. That does not, to my mind, cause the action in the present case to be anything other than, in substance and reality, an action of removing. As your Lordship has already pointed out, the test of the competency of review is the decree that has been pronounced, and the decree in the present case is a decree of removing.

On the whole matter I entirely agree with the course proposed by your Lordship—that this appeal should be refused on the ground of incompetency.

LORD ANDERSON—The respondents objected to the competency of the appeal, their contention being that, as decree of removing had been granted, review could competently proceed only by way of suspension. This contention was based on the provisions of section 44 of the Judicature Act 1825, which enacts that any judgment pronounced by an inferior court, ordaining a tenant to remove from the possession of lands or houses, shall not be reviewable by bill of advocation but only by suspension. Section 78 of the Court of Session Act 1868 provides that "where by any statute now in force the right of review by advocation to the Court of Session is excluded or restricted, such exclusion or restriction of review shall be deemed and taken to apply

to review by appeal under this Act." These statutory provisions appear to support conclusively the contention advanced by the respondents.

The rejoinder of the appellant was to the effect that these provisions do not apply where the leading conclusion of the initial writ is, as in the present case, of a declaratory nature. It is plain that the legal argument in the Court below was directed entirely to this declaratory conclusion, and the lengthy note of the Sheriff-Substitute is concerned wholly with that conclusion. All this, however, appears to me to be immaterial where the true purpose of the action is to effect a removing. It was urged by the appellant that the decree of removing was ancillary and subordinate to the decree of declarator. It seems to me, on the contrary, that the decree of declarator is merely the necessary preliminary to the decree of removing, the obtaining of which was the *causa causans* of the *lis*. The statutory provisions, in short, would appear to apply in every case in which the litigation has resulted in the granting of a decree of removing. The enactment of the statute of 1825 refers, not to the conclusions of the summons or petition, but to the terms of the decree, and provides, in effect, that if the decree ordains removing, review can only be by way of suspension. These views seem to be supported by the case of *Campbell's Trustees*, 1911 S.C. 188. The case of *M'Nair* (11 S. 651), relied on by the appellant, is really an authority against him, because it expressly decided that the decree of removing which had been pronounced could not be reviewed by advocation. The action of interdict, however, which had been conjoined with the removing, was treated by the Court of review as a "separate question," and advocation of the interdict was allowed. In the present case it does not appear to me to be competent to dissociate the declarator from the removing and treat it as a "separate question" reviewable by way of appeal. It is to be borne in mind that the objection to competency taken by the respondents is not without real substance. The effect of the statutory procedure is to put the person against whom a decree of removing has been obtained in the position of a vitious intromitter or *mala fide* possessor who may be required, as a condition of having the decree of removing suspended *ad interim*, to find caution for violent profits and expenses. The respondents have thus a real interest to press their objection to competency, which, in my opinion, ought to be sustained.

The Court refused the appeal.

Counsel for the Defender and Appellant —Mackay, K.C.—Patrick. Agent—James Bee, Solicitor.

Counsel for the Pursuers and Respondents — Fleming, K.C.—Hunter. Agents—Laing & Motherwell, W.S.

Tuesday, June 10.

SECOND DIVISION.

[Sheriff Court at Kirkcudbright.

WRIGHT *v.* KESWICK.

Lease — Outgoing — Valuation of Sheep Stock—Arbitration—Basis of Valuation —"Loss Directly Attributable to Quitting the Holding" —Averments—Relevancy—Agricultural Holdings (Scotland) Act 1923 (13 *and* 14 *Geo. V, cap.* 10), *sec.* 12 (6).

The Agricultural Holdings (Scotland) Act 1923, section 12 (6), provides, *inter alia*—"The compensation payable under this section shall be a sum representing such loss or expense directly attributable to the quitting of the holding as the tenant may unavoidably incur upon or in connection with the sale or removal of his . . . farm stock on or used in connection with the holding. . . ."

The outgoing tenant of a farm whose sheep stock was not bound to the ground went to a farm on which there was a bound stock, and as the proprietor declined to purchase the stock he sold the same by public roup. Having claimed for loss unavoidably incurred by him and directly attributable to his quitting the holding in terms of the Agricultural Holdings (Scotland) Act 1923, section 12 (6), the matter was referred to arbitration. In a condescendence of a record made up in the course of the arbitration the tenant stated his loss as the difference between the going-concern value and the break-up value got at the public roup. The landlord maintained that the statement of loss was irrelevant in respect that the value of the stock must be taken to be its value in the open market as tested at the sale by public roup. *Held* that the tenant had relevantly stated in sufficiently specific terms a claim for loss under the Act.

William Johnston Keswick, Cowhill Tower, Dumfries, proprietor of Glenkiln Farm in the stewartry of Kirkcudbright, *appellant*, being dissatisfied with a decision of David Edgar, farmer, Caerlaverock, arbiter, in a reference between him and Thomas Wright, farmer, the outgoing tenant of Glenkiln Farm, *respondent*, obtained a Stated Case under the Agricultural Holdings (Scotland) Act 1923 for the opinion of the Sheriff.

The Case stated, *inter alia*—"By minute of agreement entered into between Thomas Wright, farmer, Glenkiln Farm, in the parish of Irongray and stewartry of Kirkcudbright, the outgoing tenant of said farm (hereinafter referred to as 'the tenant'), and Major Henry Keswick of Cowhill Tower, Dumfries, guardian for William Johnston Keswick, Cowhill Tower, Dumfries, the proprietor of said farm (hereinafter referred to as 'the landlord'), and the Cowhill Estate Company, Limited, incoming tenants of said farm, and dated 2nd and 12th days of July 1923, the said David Edgar was appointed sole arbiter to ascer-