

I am of opinion that the doors were kept open for the purpose of ordinary traffic, and that the customers were entitled to use the one entrance as well as the other. I think therefore that the obligation of a tradesman to his customer was not fulfilled here. On the whole matter I am of opinion that the defender was bound to have the premises thoroughly safe, and that he negligently omitted this duty, and is therefore liable in damages.

LORD YOUNG—I am of the same opinion. On the occasion of the accident the hatchway was not in use, and was left open, which it certainly ought not to have been on a dark evening; even the lamp which was hung up manifestly to give light was not lit. There were four pillars, one at each corner with chains attached for protection, but these were off. I may say, then, that when the accident took place the hole was open, unlit, and it was dark. Witnesses speak to these facts. Now, I think this state of things, quite irrespective of liability to anyone in particular, was quite wrong. It is said that the pursuer's husband came in on his own errand to ask if there were barrels to sell; but he had a perfect right to do so, and there is nothing blameworthy in his so doing. He lost his life in consequence of the defender's premises being in a dangerous condition. Therefore, without any difficulty, I think we should recal the Sheriff's judgment, and find that the hatchway was open, unlighted, and unfenced owing to the fault and negligence of the defender, that the pursuer's husband was quite legitimately on the premises, and that he fell into the hatchway owing to their fault and negligence.

LORD CRAIGHILL—I concur in the result at which your Lordships have arrived. The defender maintained that the deceased was improperly in the premises on the evening in question, that if he had any right to enter at all he came in by the wrong door, and that in any case the defender was under no obligation to provide for his safety after he had entered. I do not think it necessary to determine any of those preliminary questions. Brady, the deceased, entered upon a perfectly lawful errand. Norrie, one of the defender's servants, sees him, but does not challenge him—does not tell him that he has no right to be there, or that he has come in by the wrong door, and that he must leave. On the contrary, when the deceased asked him whether he could buy any old barrels for firewood, Norrie told him to go upstairs to the clerk. Surely that was an authority to do that which he was told to do, and implied that he might do it in safety. He got upstairs in safety, and was on his way back when he met with this accident. I think that there was here what amounted to an invitation to enter, and consequently that the defender was under an obligation to have things in a reasonably safe condition for the person so invited to enter both on entering and coming back, and that as things were not in such a reasonably safe condition, the defender must be held liable in damages for the injury sustained by the deceased.

LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

“Find in fact (1) that on the occasion

labelled the deceased Francis Brady entered the premises of the defender for a legitimate purpose, and when leaving the same fell into the well of the hatch or hoist mentioned in the record, and thereby sustained injuries which caused his death; (2) that the said well was not lighted or fenced; and (3) that the death of the said Francis Brady is attributable to the fault and negligence of the defenders in failing to light and also fence the well: Find in law that the defenders are liable in damages to the pursuers, the widow and children of the deceased, accordingly: Therefore sustain the appeal, recal the judgments of the Sheriff and Sheriff-Substitute appealed against, assess the damages at £250, payable to the persons in the proportions following, viz. — to the pursuer Hannah Sweeney or Brady, widow of the deceased, £200; to each of Sarah Ann Brady and Thomas Brady, his children, £16, 13s. 4d.; and to the said Hannah Sweeney or Brady, as tutrix to Hannah Brady, and child of the deceased, £16, 13s. 4d.; ordain the defender to make payment of the said sums to the persons respectively: Find the pursuers entitled to expenses in the Inferior Court and in this Court.”

Counsel for Appellants—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Respondent—Darling—G. W. Burnet. Agent—George Andrew, S.S.C.

Thursday, June 9.

## FIRST DIVISION.

[Lord M'Laren, Ordinary.]

LESLIE v. SINCLAIR.

*Lease—Removing—Title to Sue.*

The right of a tenant-at-will in certain heritable subjects was sold by the trustee on his sequestrated estates, and the purchaser obtained from the trustee an assignation which declared “that I have no title to the said subjects beyond the foresaid act and warrant in my favour, and that I will not be bound to give any, there being no written title or right either in me or in the said . . . the subjects being possessed merely at the will of the proprietor.” The possession subsequently remained unchanged for nine years, when, the tenant being dead, the purchaser, on the averment that he was proprietor of the subjects in question, obtained a decree of removing against his widow. *Held* in a suspension that the respondent had no title to sue as proprietor, and decree *suspended*.

*Diss* Lord Shand, who considered that the respondent should be allowed a proof of his averment in the process of suspension, that the suspender's only title to the subjects was as tenant from the respondent.

William Sinclair, who died in 1886, acquired, a number of years before his death, a piece of ground situated in the village of Urquhart, in

the county of Elgin, as yearly tenant under the Earl of Fife, at the rent of about £1 per annum. He had no other title. He built a hotel upon the ground, and continued in possession down to the year 1876, when his estates were sequestrated. His trustee on 27th January 1877 exposed to public sale his right and interest in the said subjects, and James Leslie became the purchaser for the sum of £82. By assignation dated 5th and 6th February 1887, the trustee conveyed to Leslie, and his heirs and assignees whomsoever, his whole right and interest in the subjects. The assignation contained the following clause:—"And I declare that I have no title to the said subjects beyond the foresaid act and warrant in my favour, and that I will not be bound to give any, there being no written title or right either in me or in the said William Sinclair, the subjects being possessed merely at the will of the proprietor."

Thereafter no change took place in the possession, Sinclair continuing to occupy the subjects for a period of nine years or thereby after the date of the assignation.

On 18th March 1886 Leslie presented a petition in the Sheriff Court of Elgin to have Sinclair removed. In that petition Leslie averred that he was heritable proprietor of the subjects, and that they were occupied by the defender as his tenant for the year ending Whitsunday 1886. The title produced was the above-mentioned assignation. In this action appearance was entered for Sinclair, but he died in April 1886, and the action was not further proceeded with.

On 26th May 1886 Leslie raised in the said Sheriff Court a petition asking warrant for the ejection of Mrs Sinclair. In support of this petition Leslie averred that he was heritable proprietor of the subjects in question, and that William Sinclair had for a number of years been his tenant. Mrs Sinclair in her defences denied the respondent's title, and averred that her husband held of the Earl of Fife, and that, in any case, there having been no decree of removing obtained, the subjects were held by tacit relocation for the current year. Further, that the petition was premature, as she was entitled *qua* executrix of her husband to a period of six months from his death within which to determine whether she should sist herself in his room as defender in the foresaid action of removing. This plea the Sheriff-Substitute (RAMPIN) sustained. On appeal the Sheriff (IVORY) on 29th September 1886 pronounced this interlocutor:—"Recals the interlocutor appealed against: Finds that the defender has no legal right or title to occupy the subjects in question: Therefore decerns, and grants warrant against the defender in terms of the prayer of the petition."

Mrs Sinclair presented a note of suspension, and on 22d October 1886 the Lord Ordinary (TRAYNER) passed the note.

In the suspension the respondent averred in his answers that he had expended considerable sums upon the subjects purchased; that he had paid county assessments as proprietor; that on Sinclair's failure to pay the ground rent due in 1883 he had paid the amount due to Lord Fife's factor; that he had sold the property for £180; and that when he informed Lord Fife's factor of his intention to sell the property, the latter, after the sale, agreed to grant a feu-charter to the

purchaser from the respondent. Further, he averred that from the date of the assignation Sinclair occupied the said subjects as a yearly tenant of the respondent, under a verbal agreement to that effect with the respondent. According to said agreement, the rent payable by Sinclair to the respondent was to be £15 a-year. The respondent also averred that in 1883 he had taken out sequestration against Sinclair for non-payment of rent.

The complainer stated that no tenancy was ever constituted, and that no rent had ever been covenanted or paid, and that the subjects were always entered in the valuation roll as of the yearly value of £10, on which Sinclair was assessed as proprietor.

On 1st February 1887 the Lord Ordinary (M'LAREN) found that the respondent had no title to sue a removing in reference to the subjects libelled, and therefore suspended the proceedings complained of.

"*Opinion*—I am of opinion that the decree of ejection complained of ought to be suspended. The defender's husband William Sinclair was a tenant under the Earl of Fife of a hotel in the village of Urquhart, which I understand he had erected at his own cost and risk, but to which he had no title, and no right to demand a title. On his bankruptcy in the year 1876 the trustee for William Sinclair's creditors exposed Sinclair's right and interest in the hotel and pertinents to sale, and the respondent became the purchaser. But inasmuch as Sinclair had no right susceptible of being asserted in a court of law, the purchase, though followed by a deed of assignation, carried nothing except the right to occupy the premises as tenant until the next Whitsunday term. Sinclair accordingly remained in possession until his death in 1886, a period of nine years, counting from the date of his bankruptcy. If we count from the date of his entry to the subjects, the period of his occupation would, of course, be longer,—how much longer does not appear, and is not essential to the case. On Sinclair's death his possession was continued by his widow, against whom the respondent has obtained decree of ejection before the Sheriff Court of Elgin.

"In this process of suspension the respondent avers that William Sinclair recognised his, the respondent's right, and paid him rent for the hotel. He does not found upon receipts for rent, but he refers to two decrees of sequestration for rent which he obtained against Sinclair in the Sheriff Court.

"The question which I have at present to consider is, whether the respondent has a title to prosecute an action of removing? The title on which the respondent founds is the assignation granted to him in 1876 by the trustee for Sinclair's creditors. I have already expressed the opinion that this assignation carried nothing except the right to possess the subjects until the ensuing term. The proprietor Lord Fife might have given a lease, but no lease was obtained, and the assignation, not being followed by possession, came to an end at the ensuing term. I cannot hold that it was continued by tacit relocation; because I conceive that possession, actual or civil, is the foundation of every title of tacit relocation, and in the present case the possession was that of William Sinclair. The

Sheriff has found 'that the defender (suspender) has no legal right or title to occupy the subjects.'

"This is very probably true in fact. But before I can reach that fact, or apply my mind to its consideration, I must first be satisfied that the person who is going to eject the actual possessor of the building has himself a title of possession. I assume, without proof, that the suspender is in possession. If she were not, the present proceedings would be inappropriate. The proprietor is not interfering. I suppose he is satisfied with Mrs Sinclair as a tenant. If he were supporting the respondent, the case would be very different. Now, at the close of the argument I inquired if the respondent had any further written evidence to offer in support of his claim to the character of principal tenant under the Earl of Fife, and in particular whether he could produce receipts for rent in his own name? The answer was that the respondent desired a proof of his averments. A proof on the question of title to sue is not a proceeding which we would be disposed to allow as a matter of course; and, looking to the admitted facts as to possession, I am of opinion that this is not a question which can be elucidated by parole evidence. Apparently the respondent has been proceeding upon the assumption of some kind of tenant right which he thinks he acquired by the trustee's assignment in his favour. But it has not been made clear to me that any such right is known to the law, and I therefore sustain the plea that the respondent has no title to sue, and suspend the whole proceedings, and find the complainant entitled to expenses in the Sheriff Court and in this Court."

The respondent reclaimed, and argued that as Sinclair's possession flowed from Leslie, the former could not question the latter's title, and that in any case he was entitled to a proof of his averments.

The suspender argued that the respondent had no title to sue a removing. His only title was an assignation of a tenancy at will, which if good for anything was only good until the first term thereafter. A proof should not be allowed of statements which had not been made in the Sheriff Court proceedings, but which had been made as an afterthought in the suspension.

At advising—

LORD PRESIDENT—There is no doubt that the owner of the hotel and the ground on which it is built was the Earl of Fife. How long William Sinclair was in possession of that hotel does not quite appear, but for a number of years apparently he was so. He had originally acquired the ground with some little building upon it, and he himself expended money on the erection of an hotel. This state of matters continued to subsist until the year 1876, when Sinclair's estate was sequestrated and Mr Kynoch was appointed trustee. Notwithstanding the sequestration, however, there is no doubt that William Sinclair continued in possession of the hotel. He had no title as tenant beyond a merely verbal lease. In short, he was a tenant at will; but on the faith of Lord Fife not removing him he had expended money on the building of the hotel as I have already mentioned, and there is no doubt that if the building had been Mr Sinclair's own property it would have formed

a valuable asset of his estate. But unfortunately he had no title to it at all. He had no title to the ground. His right could only endure till the next term, that was the only legal right he had to possession of the subjects at all. It was in the power of Lord Fife to do anything in his favour that he thought equitable and right; but as far as the mere title was concerned William Sinclair never had any right to that ground, or to the buildings upon it, except merely from year to year. The building was erected on Lord Fife's property and it became the property of Lord Fife just as much as the ground itself.

Now, the trustee in Sinclair's sequestration thought he might make something of the supposed right of William Sinclair, and accordingly he persuaded the claimer here to give him £80 for what is called an assignation, and that assignation bears that he was to assign any right that Sinclair had; but it contains this important declaration—"And I, as trustee, and with consent foresaid, assign the rents, and I declare that I have no title to the said subjects beyond the foresaid act and warrant in my favour, and that I will not be bound to give any, there being no written title or right either in me or in the said William Sinclair, the subjects being possessed merely at the will of the proprietor." Now that is certainly a curious declaration on buying such a subject as that at the price of £80; but with that we have nothing to do. The result was that the claimer got it, and it seems to me he got nothing except the right to enter into and occupy the subjects in place of William Sinclair until the next term. If Lord Fife chose to recognise him as tenant of the ground and give him a lease of it, well and good; but he did not derive from the trustee, nor had he, the smallest shadow of right to make any demand on Lord Fife at all. That being the case, we are met by the fact that that is the title upon which the claimer sued the action of removing in the Inferior Court, and he sets it out quite distinctly that he is proprietor of the subject—that he is heritable proprietor of the subject—that is his title in the action for removing; and in support of that allegation he produced this assignation which demonstrates that he is not proprietor. And then he goes on to say that Sinclair is tenant of the subject, having been tenant of Lord Fife at one time, but being now the tenant of the petitioner who is now the proprietor; and there is not another word of averment in the record except what I have read. He produces his assignation, and says—"I am proprietor and you the defender are tenant, and you won't pay your rent and therefore you must remove." That is the whole case. Now the question that naturally occurs to one at first for consideration is, What was it the duty of the Sheriff to do in such circumstances? There surely can be but one answer to that, and that is, to dismiss the action for want of title. If a man sues an action as proprietor, and has not any title as proprietor, it seems to follow of necessity that the summons must be dismissed. But this was not done, and consequently we have this complaint against the decree of removing, and in this process of suspension it is averred for the first time that the pursuer in the removing instead of being proprietor of the subject, which he obviously is not, is a lessor of the

subject through William Sinclair, who is now succeeded by his widow. And it is in that capacity that after it is averred in the third statement "That the respondent having taken no enforceable right under his said assignation, the said William Sinclair continued for a period of nine years or thereby after the date of the said assignation to occupy the said subjects as tenant of the Earl of Fife, to whom he paid his rent," and so forth, the answer is made that "he occupied the said subjects as a yearly tenant of the respondent under a verbal agreement to that effect with the respondent," and that "according to said agreement the rent payable by Sinclair to the respondent was to be £15 a-year."

Now, that statement is made for the first time in the answer to the complainer's statement of facts in support of the suspension, and the respondent asks a proof on that. I see perfectly well from the statement of facts as we have them before us that this is a statement made merely as an after-thought. It never occurred to this gentleman to represent himself in the Inferior Court as a lessor at £15 a-year. He was proprietor, or nothing but proprietor, and on that case as proprietor I think his case must stand or fall from beginning to end. The fact is that William Sinclair never was out of possession of this subject, and his widow has possessed it since, and the rent has been paid by Sinclair and his widow to the proprietor of the subject, and not a penny of the alleged £15 which is said to be payable to the reclaimer has ever been paid. It is said that proceedings have been taken to enforce payment of the rent, but they were not brought to a point, plainly because the reclaimer saw very well that he could not succeed. In fact the position of Sinclair remains undisturbed from the time he became tenant-at-will of that ground from the Earl of Fife down to his death, and has since been continued by his widow.

Now, what was the right? What kind of a right was it that Leslie, the respondent, took under that assignation? As I have already said, it was simply a right to possess the subjects until the next term as a tenant-at-will. But it was said that that might be fortified by tacit relocation. Well there must be some foundation for tacit relocation; there must be some sort of possession or there can be no tacit relocation. I shall assume the possession might be civil possession and not actual possession. The actual possession was with Sinclair, and it could not be that. But was there civil possession—the only civil possession which it was possible he could have? He did not receive a penny. Where was the possession? There was neither actual nor civil possession; and therefore there could be no tacit relocation, and the consequence is that the right of this reclaimer, whatever he had under that assignation, has long ago come to an end. In short, he has no more interest in that subject than any of your Lordships. For these reasons I am quite clear the Lord Ordinary has done right, and that his interlocutor should be adhered to.

LORD MURE.—I have come to the same conclusion. The suspension which is now before us was brought against Leslie on the allegation that he was not proprietor of this hotel. Has he a title? If not, he is not proprietor; and in the circumstances, when that objection is taken, I fail

to see what answer there is to it. It is quite plain that the assignation is not a title to the property. There are a variety of documents produced which show that there has been a sale of this property to him, and that the factor for Lord Fife, who is the superior in the whole matter, has intimated that he is quite ready to recommend Lord Fife to grant a feu-charter; but so far as I can see that has never been done. That being the state of matters, as your Lordship pointed out, the case comes before us on a new view—that Sinclair, on the faith of that arrangement, held as a sort of sub-tenant under the respondent Leslie at a rent of £15 a-year. Now that is said for the first time in this action, and it is not alleged that there has ever been any payment made of rent by Sinclair to Leslie, or that it has ever been asked. Now on that there is a proposal to send the case to proof. I do not see, looking at the variety of documents, that *ex facie* there ought to be such a proof. For there are the receipts granted to Sinclair after this assignation for five consecutive years, in which Lord Fife gives Sinclair a receipt on his paying £1, 0s. 4d. of ground rent; and in the face of that the reclaimer alleges an agreement, and asks for a proof to show that in point of fact he held of him. I do not see that that can be granted. I admit the doctrine that was stated distinctly—that if a party who is not proprietor but has some charge of a property, or right to it, lets that property to another individual, and that individual declines to pay his rent, he is bound to pay it. But there is confusion and contradiction in this case; and I cannot think that the allegation of this verbal agreement, if it was acted on at all, should be sent to proof in an action of ejection which was brought by the reclaimer here as the proprietor of an hotel of which he is not proprietor.

LORD SHAND—I feel constrained in this case to differ from your Lordships and the Lord Ordinary. I concede to the fullest extent that the respondent, the reclaimer, has not a good title to the property; but I think the case ought to be decided on this principle—that if a party takes a tenancy from a man who has a defective title, the person who so takes that tenancy cannot challenge the title in law. The title of his author may be utterly bad, but it is not in the mouth of the man who takes that tenancy to say to the other, "You have no title." And it appears to me that on the facts of this case as averred, it being as I think well averred that the present suspender took and holds that property from the respondent, I think the case ought to go to a proof, and that there is a risk of injustice in deciding it on the view which your Lordships take, without inquiry.

The state of facts as averred—and to that alone we are entitled to look here, for the case has been disposed of upon that—from the respondent's own statement, is this:—William Sinclair, an hotel keeper in the village of Urquhart, seems for a number of years to have held one of these long leases or feus from Lord Fife, and a house seems to have been put up on that feu, and it was held from his Lordship for payment of about £1 a-year. We all know that that is a very common tenancy in the north of Scotland. People do not take care to obtain their titles. They hold on, year by year, knowing that the landlord will act fairly by them and give them a regular valid title if

required; and they go on, year by year, putting up properties on these feus on the faith that the landlord will recognise them as the owners. Mr Sinclair was in possession of the property on an understanding of that kind, and the house was worth much more than £1 a-year. He was sequestrated in 1876, and the trustee then took his right to the property, such as it was, against Lord Fife, and the reclaimer came forward and bought that right, paying £80 for it. It may be that Lord Fife was not bound to recognise that transaction. If he was not, I should think he was probably bound to regard the value of the buildings on that feu, if that was an amelioration, and that the claim for such amelioration was at least a strong ground on which a claim to title could have been based. But however that may be, what followed next is in the averments, and I take the respondent's averments in this matter. His averment is that, having paid £80, he arranged with Sinclair that he should become his tenant, not at £1 but at £15. The relation then which arose between the parties, if that statement be proved, was plainly this, that in the first place, whatever the respondent's right in the subject was, Sinclair agreed to take it; in the next place, that Leslie was the person liable in £1 a-year to Lord Fife; and third, that Sinclair agreed to pay him £15 a-year. So that there was the relation of tenancy or proprietorship, whichever you choose to call it, with reference to the long lease and the subtenancy thereby created, if that statement be true, and the case has been decided on the footing that it is true. Having made that arrangement, Leslie proceeds to lay out a large expenditure on this property. His averment is that he has laid out £80, and he has produced vouchers for some of the expenditure. In what capacity was that done? Plainly in this capacity, that he, following out the arrangement on which he was to get £15 a-year, laid out money in his character as proprietor. In the next place, we find that in addition to that he at one period takes out sequestration against this tenant, and there is no appearance, and decree is granted. It is explained that it was not followed out, as he did not wish to deal harshly with the tenant, and in the next place, that he got caution for the rent. In the third place, we find him assessed for taxes and county assessments, and that he pays these assessments; and in the fourth place, there is at least one if not more payments of that ground rent of £1 to the landlord towards the end of the period we are dealing with. Further than all this is the fact that in the exercise of the right which he had he proceeds to sell the subject, and sells it at the price of £180; and finally we have documents that go to show that the landlord's factor intimated that he was prepared to recognise his right, and would give a feu-charter to the purchaser.

Now, it is in that state of facts as averred that this gentleman is turned out of Court, in a question with the party who, he says, sold the subjects—and turned out of Court on the ground that he has no title. Supposing it to be conceded that this title is as objectionable as possible in a question between him and Lord Fife, it appears to me in that state of the facts that it is not in the mouth of Mrs Sinclair, the widow of Sinclair, to plead want of title, for the

respondent is prepared to prove that Sinclair did take his hotel from Leslie, and has held it from Leslie since that time; and I think there is a great body of evidence in the matters I have alluded to to show that that is the case. It may very well be that in the proof it might be found that neither Sinclair nor Mrs Sinclair ever held it from Leslie. That might arise on the facts; and on that matter I am bound to say I do not much admire the record that has been made up on behalf of Mr Leslie in this case. I think there is a want of explanation as to the continued dealings between Leslie and Sinclair year after year that I think was called for in the circumstances of the case; and, second, there ought to have been explanation as to the payment of £1 from time to time. I do not think the Court is entitled to assume all that in the face of a statement of facts that go to prove the very reverse. The case appears to me to be one in which the respondent has well averred facts and circumstances which go to show that the suspender took and held the property from the respondent, and that the widow takes and holds it still from him. It was a very right thing that Mrs Sinclair should have made payment of £1 of rent to Lord Fife, and should continue to do so to Mr Leslie. She has never got any title. The property stands in Lord Fife's books now in name of Sinclair's representatives simply because there never has been any transfer of the title. But I think this is a case in which the tenant disputes the title of the person from whom he took his premises; and I therefore think this case ought to be sent to proof, and that it is not sufficient to say to the respondent in this case, the record is sufficient—the respondent has no title. That is not my view of the case. On the whole matter I think the case ought to be sent to proof.

LORD ADAM—I think the question for us to decide is, whether the decree of ejectment was properly pronounced in the Sheriff Court or was not? In order to ascertain whether that be so or not, I think we must go to the averments on which the reclaimer founded his case *ab initio*. I do not think that in a case of summary action of this sort you can defend a decree in an action pronounced in the Sheriff Court by averments of other rights and titles for the first time in the Court of Session. If that be a correct view of the case, and I think it is, the question is, what was averred in the Sheriff Court? The only averment in the Sheriff Court was that the pursuer there was proprietor of premises in the village of Urquhart, in the county of Elgin, occupied by Mrs Eliza Lamb or Sinclair, who is the widow of William Sinclair, sometime innkeeper at Urquhart. I think the first duty of the Sheriff was to see the title produced. If he looked at the title produced it was as clear as anything could be that he was not the proprietor. I think the Sheriff should have dismissed the action, and it is on that ground that my judgment here is founded.

I do not know, nor have I made up my mind, whether or no the averments now made would be sufficient to support the eviction. I could very well see that it might require a great deal of inquiry. But I think it is too late. I quite endorse all that has been said by Lord Shand and by Lord Mure—that if a

party takes a right from another he cannot question it. I do not dispute that in the least. But that was not what was said in the Sheriff Court. Mr Leslie did not say that he had a right to this subject under certain documents, and that Mrs Sinclair was a sub-lessee. If that had been the case that would have been a matter for inquiry in the Sheriff Court into the right of Mr Leslie and Mrs Sinclair. But that was not the case in the Sheriff Court. The pursuer in that Court produced a document which showed that he had no title at all—at least not the title he founded on in the Sheriff Court—and that was the ground of judgment.

I have only to add that so far as my judgment goes, what we decide ought to have no influence with Lord Fife as to which of the two shall get a title to the subjects. I think the case is quite apart altogether from that question.

The Court adhered, with additional expenses.

Counsel for Complainer (Respondent)—R. Johnstone—M'Lennan. Agent—Robert Stewart, S.S.C.

Counsel for Respondent (Reclaimer)—J. A. Reid—Orr. Agents—Philip, Laing, & Trail, S.S.C.

## HOUSE OF LORDS.

Monday, June 13.

(Before Lord Chancellor (Halsbury), and Lords Watson and Fitzgerald.)

CAIRD *v.* SIME.

(*Ante*, vol. xxiii. p. 19; 13 R. 23.)

*Literary Property—Professor in a University—Publication.*

*Held* (rev. Second Division, *diss.* Lord Fitzgerald) that a professor in a university is entitled to prevent by interdict the publication by any of his students of lectures delivered by him in the ordinary university course.

*Per* Lord Watson—"Where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture to the extent of taking it down in shorthand for their own information and improvement, but cannot publish it."

*Observations* upon the construction of the Act 5 and 6 Will. IV. cap. 65, entitled "an Act for preventing the publication of lectures without consent."

*Process—Appeal from Sheriff Court—Judicature Act 1825* (6 Geo. IV. cap. 120), sec. 40—*Findings in Fact.*

In a petition in a Sheriff Court by a professor for interdict to prevent the defender publishing a book alleged to be a reproduction of the pursuer's lectures, the Sheriff-Substitute found, on the evidence, that the book was in substance a reproduction of the

lectures, and in law that the defender was not entitled to publish them, and granted interdict. On appeal the case went to the whole Court, with the result that nine judges were of opinion that the book was in substance a reproduction of the lectures, three were of opinion that it was not, whilst the remaining judge reserved his opinion on the point.

On the question whether the pursuer was entitled to interdict, six judges were of opinion that he was, five that he was not, whilst the two remaining judges gave no judgment on the question, holding that the book was not a reproduction of the lectures. The Second Division (*diss.* Lord Rutherford Clark) then pronounced judgment, finding that the lectures were delivered by the pursuer as part of his course, and that the book complained of was published by the defender, having been compiled by a student who had attended the lectures and taken notes; they then found "that such publication did not constitute an infringement of any legal right of property belonging to or vested in the pursuer," and refused interdict.

*Observed* that there was a statutory duty upon the Court under the Judicature Act to insert a finding in fact in the interlocutor expressing the opinion of the majority of the consulted Judges upon the question of infringement.

The appeal was accordingly heard on the merits as if the interlocutor had contained an express finding to the effect that the book complained of was in substance a reproduction of the lectures.

This case is reported *ante*, vol. xxiii. p. 19, and 13 R. 23.

Professor Caird appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case I have had much greater difficulty in dealing with the question of form than with the substantial question between the parties which it was intended to raise by the appeal. It is I think manifest that the interlocutor does not comply with the provisions of the Judicature Act of 1825, and I cannot but regret that the suggestion of Lord Rutherford Clark was not adopted, by which that which was fact would have been found as fact, and the question of law, which alone under that statute is open to your Lordships to review, would have been left to be determined. Nevertheless, although with some doubt, I have come to the conclusion that your Lordships may treat the questions of fact as having been determined, and the questions of law as sufficiently severed from those questions of fact to enable your Lordships to pronounce a final judgment between the parties.

My Lords, the question which it was intended to raise was the legal right of the respondent to publish in the form of a pamphlet certain literary compositions of the appellant which were orally delivered to the students of the University of Glasgow attending his class. A majority of the Court has determined that the pamphlet in question is a reproduction of the appellant's literary composition, and I do not stop to discuss what some of their Lordships