pursuer and defender are creditors in separate debts, either of which may be discharged or enforced irrespective of the other. It is true that these two creditors hold securities over the same estate, but the securities are just as clearly separate and distinct as the debts, and it follows that either creditor may realise his security independently of the other.

It seems to have been supposed that the pursuer cannot sell without the defender's consent, because a sale by one of these creditors would in some way prejudice the security of the other. But that is a misapprehension. There is indeed one case in which a creditor may sell under a bond and disposition in security to the effect of disencumbering the estate of another creditor's debt without the consent of the latter, and without paying his debt in full—that is the case where lands burdened with prior and postponed bonds are sold by the first bondholder, and do not bring a large enough price to pay the postponed bonds. But that is because the later bondholders have accepted a security with due notice on record that the subject is already burdened, and may therefore be carried away from them for payment of the preferable creditor's debt.

It is very clear that the parties to this case, between whom it is stipulated that their debts are to rank *pari passu*, are in an entirely different position. I am unable therefore to see any reason why the pursuer should require the defender's concurrence in a sale. He cannot compel the defender to realise his security, but he may sell as against the debtor in the exercise of his powers under his own bond, with which the defender has no concern. If he chooses to sell, the purchaser must take the land subject to the defender's security, and that will no doubt affect the amount of the price, but that is a consequence of which the pursuer cannot complain, because the defender derives her right from him, and she can do nothing to prejudice the interest of his assignee. The notion that there is any such partnership or community of interest between the parties as the pursuer's counsel has maintained, or that they are joint mandatories, is in my opinion without foundation.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—Rankine—Goudy. Agents—Fraser, Stodart & Ballingall, W.S.

Counsel for the Defenders—H. Johnston—Burnet. Agents—Henderson & Clark, W.S.

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*Friday, November 6.*

## FIRST DIVISION.

[Sheriff of Fife and Kinross

## CULROSS SPECIAL WATER SUPPLY DISTRICT COMMITTEE *v.* SMITH-SLIGO'S TRUSTEES.

*Sheriff—Jurisdiction—Property—Possession—Service.*

A Sheriff has jurisdiction over the proprietors of lands lying within his sheriffdom in any competent action relating to the possession of these lands, or of things locally situated within them, although such proprietors reside beyond and are not served with the action within the sheriffdom.

A local authority brought an action in the Sheriff Court of Fife at Dunfermline against the proprietors of certain lands in the county, to have them interdicted from drawing a supply of water for these lands from a pipe belonging to the pursuers, and situated within the county. The defenders were resident beyond, and the action was not served upon them within the sheriffdom.

*Held* that the Sheriff had jurisdiction to deal with the action, in respect that its subject-matter was the possession of certain heritable property within his sheriffdom, and the defenders were proprietors of lands within it.

In the year 1885 the local authority of Culross being desirous of procuring a suitable supply of water for the district, entered into an agreement with Archibald Vincent Smith-Sligo of Blair and Inzievar, and other proprietors in the district, who were anxious to obtain a supply of water for their respective properties. The local authority agreed to proceed forthwith to obtain the formation of a special water supply district, and the other parties agreed to bear certain proportions of the expense of securing the requisite supply of water. It was part of the agreement that the main pipe of supply should be so laid as to give a constant supply of water to Mr Smith-Sligo's estates of Blair and Inzievar, and it was provided that he should have liberty to lay branch pipes to connect the main pipe with these properties, and should pay at a fixed rate for the water drawn off by him. After the agreement was concluded the special supply district was formed, and the works were constructed.

In May 1891 the Committee of Management of the Special Water Supply District of Culross, appointed under the Local Government (Scotland) Act 1889, brought an action in the Sheriff Court at Dunfermline against Archibald Dominic Smith-Sligo and others, the testamentary trustees of the said Archibald Vincent Smith-Sligo, and as such trustees proprietors of, *inter alia*, the estate of Comrie, in the parish of Culross, praying the Court to interdict the defenders "from taking for the

supply of the estate of Comrie, in the parish of Culross, belonging to the defenders, or for any part thereof, or for the supply of any property whatever other than the estate of Blair and Inzievar, belonging to them as trustees foresaid, any of the water which is conveyed by pipes forming part of the waterworks" constructed under the agreement already mentioned, and further "to ordain the defenders instantly to disconnect a pipe which they have recently laid for the purpose of supplying with said water certain portions of the said estate of Comrie, and which pipe they have connected with a pipe forming part of said waterworks, . . . and through which pipe recently laid as aforesaid they have, illegally and without the consent of the pursuers, for some time past been drawing a supply of water for portions of the said estate of Comrie."

The pursuers averred that the defenders had laid a pipe from certain parts of the estate of Comrie, for which they wanted to get a supply of water, and had without the pursuers' knowledge or consent connected the same on or about 1st June 1890 with the branch pipe connected with the property of Inzievar, and since then had, notwithstanding the repeated objections of the pursuers, drawn a supply of water through the pipe so laid for the said portions of the estate of Comrie.

The defenders admitted having laid and connected the pipe, but averred that they had a right to do so, in respect that the lands of Comrie were part of the estate of Blair and Inzievar.

They further in separate statement of facts averred that none of the defenders were resident or carried on business within the sheriffdom of Fife and Kinross, and that they had not been personally cited within the sheriffdom. The pursuers admitted the truth of this averment, but explained in answer that the defenders were proprietors of large heritable properties within the sheriffdom, and that the subject-matter in dispute was situated within the sheriffdom.

The defenders, *inter alia*, pleaded—"No jurisdiction."

On 27th June the Sheriff-Substitute (GILLESPIE) pronounced an interlocutor repelling, *inter alia*, the first plea-in-law for the defenders, and before answer as to the relevancy of the defenders' averments, allowing parties a proof of their averments.

"*Note.*—Notwithstanding the able argument for the defenders, the Sheriff-Substitute is humbly of opinion that the jurisdiction of this Court is undoubtedly *ratione rei sitæ*, and that personal service within its territory is not necessary, as was contended.

"The defenders' counsel built an ingenious argument on such cases as *Pirie* v. *Warden*, February 20, 1867, 5 Macph. 597; and *Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984; but these cases belong to a different chapter of the Sheriff's jurisdiction. If the question were open, good reason could be given why personal service within the territory should be required in the one class of cases and not in the other. But the Sheriff-Substitute cannot regard the question as open. It appears to him to be settled by authority and uniform practice.

"'Civil jurisdiction,' says Erskine, i. 2, 17, 'is founded, secondly, *rationæ rei sitæ*, if the subject claimed by the pursuer lies within the territory, whether the defender resides within it or not—*Durie*, November 28, 1635, Williamson (Dict.) p. 4815. And, indeed, if the subject in question be immoveable, the judge of the territory where it is situated is the sole judge competent, in so far as he has the cognisance of heritable rights; for things that are immoveable are incapable of shifting places, and must therefore be restored in that place where they lie, and by the warrant of that judge whose jurisdiction reacheth over them.'

"This is an action to regulate the possession of a heritable subject—a class of action of which the Sheriff Court has undoubted cognisance. Even if it can be said that the action involves a question of heritable right and title, there is no allegation that the value of the subject in dispute exceeds the limit of the jurisdiction conferred on the Sheriff by the Sheriff Courts Act 1877. Section 8, which contains an express provision that 'actions relating to questions of heritable right or title raised in a Sheriff Court shall be raised in the Sheriff Court of the county in which the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall be subject in such action to the jusirdiction of the Sheriff and Sheriff-Substitute of such county.' Nothing is said here as to personal service within the county being necessary.

"Turning back to the passage in Erskine, he goes on to point out how the difficulty arising from the doctrine that a judge cannot grant a warrant to cite beyond his own territory is got over. He says—'No suit can proceed against a defender till he be lawfully summoned to appear in judgment; neither can a judge issue a warrant to cite one who resides in another territory. Where, therefore, one whose domicile is not within the territory is to be sued before an inferior court, *ratione rei sitæ*, the pursuer must apply to the Court of Session, whose jurisdiction extends over the whole kingdom, for letters of supplement, which are granted of course, containing a warrant to cite the defender to appear before the judge of the territory where the controverted subject lies—November 28, 1635, Williamson (*supra cit.*).' Therefore, according to Erskine, the only condition necessary for a Sheriff Court exercising its jurisdiction, *ratione rei sitæ*, is not that the defender shall be personally cited in the sheriffdom, but that letters of supplement from the Court of Session be obtained.

"It is not necessary to examine the changes made by section 24 of the Sheriff Courts Act 1838 (1 and 2 Vict. c. 119), and by section 12 (1) of the Sheriff Courts Act 1876, for whatever forms may be necessary the acceptance of service by the defenders'

agent amounts at least to an agreement to hold the petition as duly served at their dwelling-houses in Edinburgh—for this much the pursuers could have done in spite of the defenders.

"It is instructive to notice that when he comes to deal with jurisdiction *ratione contractus* (Inst. i. 2. 20), Erskine points out the necessity of personal service within the territory (or its equivalent in certain cases)."

The defenders appealed, and argued—The defenders were not resident nor did they occupy premises within the sheriffdom for the purposes of trade, and the ground of action was nothing more nor less than delict. In such a case it was necessary, if the defender did not reside within the territory of the judge before whom the action was brought, that it should be served upon him within that territory—*Kermick* v. *Watson*, July 7, 1871, 9 Macph. 984 (*per* Lord President, 985); *Bird* v. *Brown*, Aug. 30, 1887, 25 S.L.R. 1. The action not having been served within his territory the Sheriff had no jurisdiction.

The pursuers argued—The Sheriff must have power to restrain by interdict injury to property within his territory. The lack of authority on the point was to be attributed to the fact that the Sheriff's power to interfere in such a case had never before been questioned.

At advising—

LORD PRESIDENT—The defenders in this petition are the proprietors in trust of certain lands in the county of Fife. Under an agreement with the local authority of Culross a supply of water has been conducted by pipes into certain parts of those lands. Since the laying of those original pipes the defenders have opened a connecting pipe conducting some of the water thus supplied to another part of their lands called Comrie. The local authority dispute the right of the defenders to do this, alleging that the lands thus introduced to the benefit of the water supply do not fall within the agreement. The present proceeding is a petition to the Sheriff of Fife, praying for interdict against the defenders taking any of the water for the supply of Comrie, and for an order on the defenders to disconnect the pipe which they have laid for this purpose.

The first defence is that the Sheriff has no jurisdiction over the defenders, all of whom reside in Edinburgh. It happens that the defenders accepted service, but this places the question in no other position than if they had been served in Edinburgh. They maintain that they not having been served within the sheriffdom of Fife there is no jurisdiction.

In my opinion this plea has been rightly repelled. The subject of the application is the possession of pipes and water laid in lands in Fife. So far as the present question is concerned, it is substantially the same as if the dispute regarded the tapping a natural watercourse within that jurisdiction. To restore against unlawful changes in such subjects is a judicial duty which can effectively and conveniently be done by the local court of the territory alone, as is most clearly seen perhaps in the case of the judge being asked to appoint the work of restoration to be done at the sight of the court. I consider that the proprietor of lands in any county is answerable to the judge-ordinary in any competent action relating to the possession of those lands, or of things locally situated within those lands, whether he be served within the sheriffdom or not.

LORD ADAM—I concur with your Lordship. The pursuers are proprietors of certain water-pipes which run through the defenders' lands in the county of Fife. The defenders have, according to the petitioners, tapped these pipes and abstracted the water belonging to them, and the leading conclusion of the petition is for interdict against the defenders continuing so to abstract the water. Accordingly this appears to me to be an application to the judge-ordinary of the bounds for protection of property situated within his territory. It appears to me that the Sheriff, as judge-ordinary of the bounds, has *ratione rei sitæ* jurisdiction over persons who are proprietors of subjects situated within his territory although they may reside beyond his jurisdiction. There is no doubt that the pipes which are the subject-matter of this action lie within the bounds of the Sheriff's jurisdiction, and the question raised is a merely possessory one, whether the pursuers are to be protected in the possession of these pipes. I think therefore that it is not doubtful that the Sheriff has jurisdiction.

LORD M'LAREN—I concur in the opinion of your Lordship in the chair.

LORD KINNEAR was absent.

The Court dismissed the appeal.

Counsel for the Pursuers—Jameson—C. Johnston. Agents—Wallace & Begg, W.S.

Counsel for the Defenders—W. Campbell. Agents—Tait & Crichton, W.S.

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*Tuesday, November* 10.

## FIRST DIVISION.

## THE CALEDONIAN INSURANCE COMPANY, PETITIONERS.

(*Ante*, vol. xxviii., p. 899.)

*Process—Appeal to the House of Lords—Leave to Appeal—Interlocutory Judgment.*

Circumstances in which the Court *refused* a petition for leave to appeal to the House of Lords against an interlocutory judgment.

This was an action at the instance of Andrew Gilmour against the Caledonian Insurance Company for recovery of loss occasioned by fire to certain premises