ment that it should be so. I think it is the same as if it had been a hedge or a wall. The configuration of the ground required some divergence from a mathematical line between the two subjects and the terms of the title specially provided for it. I think the row of trees formed a march fence within the latitude allowed by the title. It was not against but in accordance with the right of parties as expressed in the titles.

The Court adhered.

Counsel for the Reclaimer—Craigie, K.C. —D. Anderson. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Respondent—Clyde, K.C. — M'Robert. Agents — Ross, Smith, & Dykes, S.S.C.

Saturday, June 3.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles at Edinburgh.

M'INTOSH *v.* POTTS.

Landlord and Tenant—Sequestration for Rent—Landlord's Hypothec—Goods on Hire Belonging to Third Party—Right of Landlord to Sell—Sale of Third Party's Goods while Some of Tenant's still Unexposed—Oppression.

Included among a tenant's effects sequestrated by her landlord for rent was a piano known to the landlord to have been hired from and to be the property of a third party. In the course of the sale, and when £92, 19s. had been realised, the piano was exposed and sold for £17, 6s. 6d., the remainder of the effects subsequently bringing £60. The rent due to the landlord with interest and agent's expenses amounted to £80, 2s. 6d. and the expenses of the sale together with taxes due amounted to £31, 18s.

In an action by the owner of the piano against the landlord for damages on the ground that the sale was illegal and unwarrantable because the piano had been sold at a time when (*firstly*) enough had already been realised to pay the whole debt, and when (*secondly*) effects belonging to the tenant were still unsold, *held* (1) that looking to the amount of the debt, the expenses of sale and the sum due for taxes, no such margin had been recovered when the piano was exposed as to make the sale of the piano oppressive or illegal; (2) that the pursuer was barred from founding on the order in which the articles had been sold by the fact that he had neither applied to the Sheriff nor the judge of the roup to have the piano reserved until the end.

On 31st August 1897 the trustees of the deceased Henry M'Intosh (the father of the pursuer of the present action) let a piano on hire to Mrs Helen M. Turnbull, who resided in a house rented by her from Miss Mary Potts, the defender in the present action. On 5th March 1900 Miss Mary Potts presented a petition to the Sheriff of the Lothians and Peebles for sequestration of Mrs Turnbull's effects in security and for payment of her rent for the year ending Whitsunday 1900 and obtained a warrant to inventory and serve. In the inventory was included the piano. Subsequently, on 13th March 1900 and 25th January 1901, warrants to sell were obtained, but as Mrs Turnbull continued to pay her rent by instalments the warrants were never carried into effect. On 3rd May 1900 the hirer's agent wrote to the defender's agent in the following terms:—"I give you formal notice that the piano is our property. . . . If it should be ultimately necessary for you to realise the effects will you kindly communicate with us, as we would be willing to come to an arrangement in the event of the tenant's own effects not being sufficient to cover your claim."

On 20th July 1904 Miss Mary Potts presented another petition for the sequestration of Mrs Turnbull's effects for arrears of rent and obtained a warrant to sell. The piano, which had all along remained in the house, was again included in the inventory, and a correspondence took place between the agents of the hirer and the agents of Miss Potts, in which the former objected to the inclusion of the piano in the inventory but no appearance was entered by them in the sequestration. The piano was thereafter sold along with Mrs Turnbull's other effects.

On December 1904 Henry W. M'Intosh brought this action in the Sheriff Court at Edinburgh against Miss Mary Potts in which he sued her for £33 sterling, being the value of the piano. He averred, *inter alia*—"(Cond. 8) After sundry procedure the defender obtained a warrant of sale under said sequestration "to sell so much of the sequestrated effects as will pay' the two rents in question, being £70, and expenses. Under this warrant effects belonging to the said Mrs Turnbull, amounting in value to £142, 14s. 6d., being more than double the rents for which the said process of sequestration was obtained, were sold. This sale was greatly in excess of what the warrant authorised, yet notwithstanding thereof defender wrongfully and illegally sold the pursuer's said piano over and above Mrs Turnbull's said effects, the value of which is at least £33, and for which value the defender is liable to the pursuers. (Cond. 9) It was the defender's duty to have, in any event, sold her tenant's effects before touching the pursuer's piano, and to have stopped the sale as soon as the effects sold were reasonably sufficient to cover the sums in the warrant, and the sale so far as regards the pursuer's piano was, to the knowledge of the defender, wholly illegal and without warrant or justification of any kind."

The pursuer also referred to the roup roll, which showed that the whole effects realised £170, 15s., and that £92, 19s. was realised

before the piano was put up for sale. The piano realised £17, 6s. 6d. The expenses of sale amounted to £20, 13s. 7d., the taxes due to £10, 13s. 5d., and the rent due to the defender with interest and agent's expenses to £80, 2s. 2d.

The pursuer pleaded, *inter alia*—"(2) *Esto* that the piano was properly included in the sequestration for the rents which became due (1) at Martinmas 1903, and (2) at Whitsunday 1904, and these rents having been more than met by the proceeds of the sale of the effects belonging to the defender's tenant Mrs Turnbull, and the defender being aware that the instrument was the property of the pursuers, said sale was illegal and unwarrantable, and the defender is liable for the value of the instrument."

The defender pleaded, *inter alia*—"(2) The pursuer's averments are irrelevant."

The Sheriff-Substitute pronounced the following interlocutor:—"Sustains the second plea-in-law for the defender Miss Potts, and therefore dismisses the action as irrelevant: Finds the defender Miss Potts entitled to expenses," &c.

The pursuer appealed, and argued—It was not disputed that the piano fell under the landlord's hypothec, and that in different circumstances the landlord might have been entitled to sell it; but in the circumstances disclosed in the present case her action had been illegal and oppressive, because (1) knowing it to be the property of a third party she had exposed it for sale at a time when, as the roup roll showed, the effects already sold more than covered the debt and reasonable expenses, and when consequently her warrant was exhausted; (2) she had sold the piano before she had exhausted the effects belonging to the tenant. A warrant to sell must be used in a reasonable manner, and knowingly and unnecessarily to sell the property of a third party was not a reasonable use—*Robertson* v. *Galbraith*, July 16, 1857, 19 D. 1016.

Argued for the defender and respondent—The warrant was not as a matter of fact exhausted when the piano was exposed, the roup roll showing that the amount of the debt and expenses of sale and taxes with a reasonable margin had not been recovered at the time. As to the order in which the articles had been exposed for sale, the defender was entitled to expose them as she pleased, as the pursuer had made no application to the Sheriff or the judge of the roup to have the piano reserved until the end of the sale. Upon this branch of his case the pursuer was barred *personali exceptione*.

LORD JUSTICE-CLERK—In moving your Lordships to adhere to the interlocutor of the Sheriff-Substitute, which is the course I propose, I do not desire to be held as agreeing with all that he has said. The case seems simple enough. It is not disputed that this piano fell within the sequestration, and it is not disputed that it did not matter whether it was the first, or tenth, or any other number in the list of articles sold, if it was put up as a lot for sale, when what had been already knocked down had not produced enough money to make up the amount due to the landlord. The case that is made is this—that the roup roll having been made up, and the sale being in progress at the time the piano was reached, it was a question whether the creditor would be cleared before it was knocked down. In my opinion it is not shewn that the creditor was so clear as to make it his duty to have stopped the sale going on. There was a slight margin above the debt due to him and expenses, without taking into account the taxes due, but it is evident that these are matters which the Sheriff-Clerk deals with in such cases. The creditor was entitled to go on selling until he was safely covered as regards his debt, and it is a matter of accident that the last article sold is one which provides a sum considerably in excess over what he is entitled to get. There was therefore no oppression as far as the selling of the piano is concerned. As to the order in which it was sold, it might have been different if the owner of the piano had taken means to prevent it being sold when there were sufficient goods to sell belonging to the tenant. He might have gone to the judge of the roup and asked that this should not be put up till the other articles had been sold. If the judge of the roup had resisted this appeal, or if the creditor had opposed the postponement, it may be that a case of oppression might have been made out. But nothing of this sort took place, and in the circumstances which occurred there is no such case.

LORD KYLLACHY—I agree. The pursuer put his case upon two grounds—first, that it was sufficiently clear that this piano had been put up for sale after enough had been realised to pay the whole debt due to the landlord with all expenses and charges which fell to be added. To this it is a good answer that on the figures the pursuer's statement is not correct—that is to say, not correct unless we discard the taxes, and a very large part of the expenses of the sale. Therefore the first ground fails.

As regards the second ground, that it was oppressive, and therefore unlawful, to put the piano up otherwise than at the end of the sale, it is, I think, enough to point out that the pursuer could, if he chose, have applied to the Sheriff and asked that the warrant to sell should be granted, subject to the condition that the piano should be kept to the last; or could have attended the sale, and asked the sheriff-clerk, who was the judge of the roup, that the piano should not be put up till the goods truly belonging to the debtor had first been sold. He did not take either course, and I therefore am not prepared to differ from the conclusion of the Sheriff-Substitute that the pursuer's statements are not relevant.

LORD KINCAIRNEY concurred.

LORD STORMONTH DARLING—I agree. I only desire to add that the judgment we are pronouncing being one on relevancy, we are bound to take the averments of the

pursuer as explained by Mr Morison. But taking it so, it is clear that the margin of money recovered at the time when the piano was sold, over and above the debt and expenses, was too small to admit of an action of damages on the ground of oppression or illegality. It would be necessary for that purpose to shew that the creditor had gone on with the sale after the amount of his debt has been materially and considerably exceeded. As regards the pursuer's complaint that the piano need not have been sold at all, the pursuer had a clear and easy means of preventing the result by going to the Sheriff or the judge of the roup, and this course he failed to take.

The Court dismissed the appeal.

Counsel for Pursuer and Appellant—T. B. Morison—Chree. Agents—P. Morison & Son, S.S.C.

Counsel for Defender and Respondent—Campbell, K.C.—J. H. Henderson. Agent—William Considine, S.S.C.

Thursday, June 1.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MUIRHEAD & TURNBULL *v.* DICKSON.

Contract—Sale or Hire—Purchase of Piano—Question whether Contract Sale on Credit or Hire-Purchase—Words Used by Party Maintaining Hire-Purchase Consistent with the Contract being Understood by the Other as Sale on Credit—Failure to Pay Monthly Instalment—Claim for Delivery.

A firm of piano merchants brought an action in the Sheriff Court setting forth that they had hired a piano to the defender at the rate of 15s. a-month, and concluding for delivery of the piano in respect that the defender had failed to pay the monthly payments. The defender maintained that the piano was his property in virtue of a verbal contract of sale between the pursuers and himself, in which payment was conditioned to be made by instalments. On a proof it appeared that the pursuers, in contracting with the defender, had in their mind to let out the piano to him on the hire-purchase system, but the words used by them were consistent with the contract being understood by the defender as a sale of the piano at a price payable by monthly instalments, and they were so understood by the defender. It also appeared that though the pursuers had printed forms for signature by parties making hire-purchase contracts, the defender had not signed one, though on several subsequent occasions he had been asked to do so. *Held* that the contract proved was one of sale with deferred payment and not a hire-purchase agreement, and that the pursuers in these circumstances had no claim for the delivery of the piano, their proper remedy being an action for the instalments of the price so far as not paid, and defender assoilzied.

Observations on hire-purchase contracts. *Helby* v. *Matthews*, [1895] A.C. 471, *commented on.*

This was an action in the Sheriff Court at Glasgow at the instance of Muirhead & Turnbull, piano merchants, Glasgow, pursuers, against James Dickson, Westmuir Street, Glasgow, defender, in which they craved the Court to ordain the defender to deliver to them a piano "hired by the pursuers to the defender," and presently in his possession.

The pursuers averred—"(Cond. 1) On or about 26th November 1902 the pursuers agreed to hire to the defender an M. & T. piano at a rent or hire of 15s. per month. A month's trial or approval was allowed. (Cond. 2) The first month's rent or hire of the said piano became due and payable on the 26th day of December 1902, and was paid by the defender upon 29th December 1902. The second month's rent became due on 16th January 1903, and was paid by defender on 16th February 1903. The third month's rent became due on 26th February 1903, and was paid on 30th March 1903. The fourth month's rent became due on 26th April 1903, and was paid upon 27th April 1903. Since that date the defender has made no payments towards the said rent, with the exception of 3s. paid upon 18th January 1904. (Cond. 3) The pursuers delivered to the defender a book containing the receipts for the said rents or hire, which bears that the said piano is on hire at 15s. per month, as per hire contract. The defender is called on to produce this receipt-book. (Cond. 4) The defender has been repeatedly requested either to pay up the arrears of rent of the said piano or to deliver it up to the pursuers, but he declines to do either the one or the other, which makes the present application necessary."

The defender denied the pursuers' averments under reference to a statement of facts, in which he averred as follows:—"(Stat. 1) On or about 26th November 1902 the defender purchased from the pursuers for his daughter an M. & T. piano at the price of £26. No written contract was entered into between the parties, nor was one then suggested by the pursuers, but it was arranged that payment of the price was to be made by instalments extending over a period of years, the purchaser to pay as often and by as large sums as he possibly could—15s. per month being talked about as a sum that would be acceptable. The piano was duly delivered by the pursuers and accepted by the defender on that understanding. At the time of purchase the defender had in contemplation early payment of the price, and but for unavoidable circumstances, as after mentioned, there would have been no cause for complaint as to his failure in that respect,"