

were in possession, or at all events if that heritable creditor were in actual receipt of the rents.

That assumption seems to me unfounded. The question turns on whether the words "include" and "apply to," in the interpretation clause of the different Acts, are words of extension or of exhaustive definition. Do they exclude the "proprietor" in the popular and also in the technical sense of that word, or, including him, do they enable the rating authority in suitable circumstances to enter, instead of him, one of the classes of persons enumerated in the particular interpretation clause? In this case the words in my opinion are words of extension. No special reason has been suggested to the contrary, and there is no context pointing to another conclusion. The rule, with its exception, is stated by Lord Watson in the case of *Dilworth*, [1899] A.C. 99. It appears to me that the present case falls under the general rule and not under the exception which, as Lord Watson explains, may be raised by the context. If it does, is there any ground for saying that the authority's right to rate the person in feft in the property is ousted where a heritable creditor is in possession and in receipt of the rents? The statute does not say so, and I see no reason for so deciding. Indeed I think there are cases where the authority's interests would be seriously prejudiced if we decided, as we are asked to do, that in no circumstances can a rating authority enter an owner and enforce payment from him if at the time there is a heritable creditor in possession and either entitled to receive or in actual receipt of the rents.

But even if that is not so, then arises the second point. On that point I agree with your Lordships in thinking that the rating authority did not observe timeously the statutory procedure, or any part of it, in relation to the respondent. The appellant's argument is inconsistent both with the letter and the spirit of the statutes, and their offer to provide equivalents for the rights of which their procedure has deprived the defenders even if adequate, which it is not, seems to me outwith their statutory powers.

But suppose this is not so, I think the defenders are right in saying that the procedure which the appellants have professed to go through was inept, as appears from the terms of the demand notes contained in the print.

The Court refused the appeal, sustained the first and second pleas-in-law for the defender, and dismissed the action.

Counsel for Pursuers (Appellants) — Wilson, K.C.—C. H. Brown. Agents—Ross Smith & Dykes, S.S.C.

Counsel for Defender (Respondent) — Fraser—W. T. Watson. Agent—Andrew Urquhart, S.S.C.

Thursday, October 26.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Alloa.

GALPERN v. THOMPSON.

Process—Appeal from Sheriff—Reponing—*Sheriff Courts (Scotland) Act 1907* (7 *Edw. VII*, cap. 51), *Schedule I, Rule 56*.

In an action of damages for slander in a sheriff court the Sheriff-Substitute granted decree in favour of the pursuer. The defender appealed to the Sheriff, who appointed parties to be heard on the appeal at the next sittings. The sittings were fixed for 8th September, and notice of this was given on the 1st to the local agents, but the defender's principal agent, who resided in Glasgow, had gone on holiday on that day. The Sheriff-Clerk refused to continue the appeal, and at the sittings the local agent explained the circumstances but did not argue the case. The pursuer appeared, and, in respect of no appearance for the defender, the Sheriff refused the appeal and adhered to the Sheriff-Substitute's interlocutor. The defender appealed to the Court of Session, and moved in the Single Bills to be reponed. The Court refused the motion. The pursuer then moved that the appeal be refused. The Court *allowed* the appeal to be heard on the merits, on condition that the defender paid to the pursuer the expenses incurred by him since the date of the Sheriff-Substitute's interlocutor.

The Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII*, cap. 51), enacts, *Schedule I, Rule 56*—" . . . Where in a defended action either party fails to appear by himself or his agent at any diet . . . the Sheriff may grant decree as craved or of absolver, or may dismiss the action, with expenses, but the Sheriff may upon cause shown prorogate the time for lodging any production or pleading. . . ."

Morris Galpern, cabinetmaker, Glasgow, *pursuer*, brought an action in the Sheriff Court at Alloa against John Thompson, furniture dealer, Alloa, *defender*, concluding for decree for £150 damages for slander.

On 14th August 1916 the Sheriff-Substitute (MOFFATT) pronounced an interlocutor granting decree against the defender for £10. Against that interlocutor the defender appealed to the Sheriff (LEES), who on 26th August 1916 appointed the parties to be heard on the appeal at the next sittings.

On 8th September 1916 the Sheriff pronounced the following interlocutor:—"The Sheriff, in respect of no appearance at today's sittings by the appellant personally or by his agents in support of his appeal, Refuses the same; and on the motion of the respondent's agent adheres to the interlocutor of the Sheriff-Substitute of 14th August complained of."

The defender appealed to the Court of Session, and moved in the Single Bills to be

reponed against the interlocutor of 8th September 1916.

The following narrative of the facts is taken from the opinion of the Lord President:—"In this case the appellant seeks to be reponed against an interlocutor pronounced by the Sheriff at Stirling on 8th September last by which he refused an appeal against the Sheriff-Substitute's interlocutor, and adhered to that interlocutor, in respect that there was no appearance made by the defender and appellant here or his agent. It appears that an appeal had been taken against the interlocutor of the Sheriff-Substitute on 24th August 1916, and on 26th August the Sheriff appointed parties to be heard at the next sittings. The next sittings were fixed for 8th September, and on 1st September intimation that the appeal would then be heard was made to the local agent of the defender and appellant in Alloa, and was communicated at the Glasgow office of the agent for the defender and appellant on 2nd September. On the previous day the defender's Glasgow agent had gone on holiday to Sutherland. An attempt was made to have the appeal continued by application to the Sheriff-Clerk. It failed. The case was called on 8th September, and after receiving full explanations from the local agent who appeared on behalf of the defender and appellant, the Sheriff pronounced the interlocutor which the appellant now seeks to be reponed against."

Argued for the pursuer (respondent)—This matter was ruled by authority—*M'Gibbon v. Thomson*, 1877, 4 R. 1085, 14 S.L.R. 648; *Stevenson v. Hutcheson & Anderson*, 1885, 12 R. 923, 22 S.L.R. 613. The Sheriff had exercised the discretion given him by the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, Rule 56, and his decision could not be interfered with.

Argued for the defender (appellant)—*M'Gibbon's* case (*cit.*) was distinguished, for the diet of proof was fixed by consent, and the decision proceeded upon the negligence of one of the consenters to appear. *Stevenson's* case (*cit.*) was upon the Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70), section 20, which was in different terms from Rule 56. *Morrison v. Smith*, 1877, 4 R. 9, 14 S.L.R. 17, was decided in the contrary sense. Further, the diet in this case was in vacation—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 25. Rule 56 did not apply to a case in which there was an appearance as there was here, but applied only where there was no appearance. *Brown's Trustees v. Milne*, 1897, 24 R. 1139, 34 S.L.R. 863; *M'Carthy v. Emery*, 1896, 24 R. 610, 34 S.L.R. 455; *Bainbridge v. Bainbridge*, 1879, 6 R. 541, 16 S.L.R. 284; *Vickers & Sons v. Nibloe*, 1877, 4 R. 729, 14 S.L.R. 473, were referred to. [The LORD PRESIDENT afterwards stated that he had also examined *Arthur v. Deuchar*, 1866, 4 Macph. 705; *Arthur v. Bell*, 1866, 4 Macph. 841, 2 S.L.R. 88; *Trustees of the Free Tron Church v. Morrison*, 1876, 13 S.L.R. 384; *Robertson v. Barclay*, 1877, 5 R. 257, 15 S.L.R. 160; *Yeaman v. Caledonian Building Society*, 1883,

20 S.L.R. 777; and *Lanarkshire County Council v. Motherwell Commissioners*, 1901, 4 F. 151, 39 S.L.R. 116.]

LORD PRESIDENT— . . . [After narrative quoted *supra*] . . . —I am of opinion that the Sheriff was right. It is difficult to see how he could have taken any other course than he actually did. But even if I had thought otherwise I should not have been disposed to interfere with his discretion. All the facts were before him, and it was for him to judge whether or no any adequate excuse was given. So far as we can see none was given, for the Glasgow agent simply failed to appear, and no arrangement was made by the local agent for the case to be heard on the date fixed.

The course which I recommend your Lordships to take is, I think, in accordance with the authorities. I have examined all the cases on this point from *Arthur v. Deuchar*, 1866, 4 Macph. 705, down to the case of *Lanarkshire County Council v. Commissioners of Motherwell*, 1901 4 F. 151, 39 S.L.R. 116, and this is the result to which all of them point. The cases which come nearest to the present, in my opinion, are those—*M'Gibbon v. Thomson*, 1877, 4 R. 1085, 14 S.L.R. 648; *Stevenson v. Hutcheson & Anderson*, 1885, 12 R. 923, 22 S.L.R. 613; and *Bain v. Lawson & Son*, 1899, 1 F. 576, 36 S.L.R. 417. I propose to your Lordships that we should refuse this motion.

LORD JOHNSTON—I, like your Lordship, would require very cogent reasons to induce me to interfere with the discretion of the Sheriff in a case of this sort. But, apart from that consideration, I am quite satisfied that the Sheriff of Stirlingshire was amply justified in the course which he took. There what I have to say might end, but I think it not inappropriate to draw attention to the true position of agents practising in chief in one Sheriff Court and appearing in another. The whole matter is provided for by the Law Agents Act 1873 (36 and 37 Vict. cap. 63), but I do not think the agents in this case have fully realised the position in which they relatively stand to the Court under that statute.

The 13th and following sections of the Law Agents Act 1873 provide (reading short) as follows:—That a roll shall be kept by the sheriff-clerk of all agents practising in the Sheriff Courts of each sheriffdom; and to secure admission to that roll all that is necessary is that the procurator shall be a duly qualified and registered law agent, and that he shall sign the roll of procurators practising in the particular Sheriff Court and pay a small fee to the sheriff-clerk. That entitles him to practise in that particular sheriffdom notwithstanding that his place of business may be elsewhere, but he is bound to specify his place of business and to notify every change in his place of business. He is not called on to do anything year by year to keep himself on the roll. All that is necessary is that he take out his attorney licence. But there is this difference, and this only, between the agent whose place of business is within the juris-

diction of the Sheriff and the agent whose place of business is without that area, viz., that the individual agent whose place of business is without that area is debarred from the privilege of borrowing a process or papers from a process depending before the Court in question. That is the privilege only of the agent who is within the jurisdiction of the sheriffdom, by reason of the locality of his place of business, and not by reason merely of having signed the roll. That therefore places, we will say, as in this case, a Glasgow agent at a disadvantage in respect that he cannot attend to the more formal matters of a process unless he either comes to Alloa himself or employs a correspondent there to attend to such matters for him.

That was necessarily what was done in this case. A local agent was employed as his representative in Alloa by the Glasgow agent. But the local agent's duties do not end with the charge of the process. He has duties to the Court as well as to his client and his Glasgow correspondent. When the case is in due course in the roll for any purpose he is bound to attend if his Glasgow constituent does not, and not only to attend but to take up and conduct the case at the particular stage or juncture as agent in the cause. If this were not so there would be no end to the delays in the Sheriff Court where two such agents are concerned for one of the parties. The local agent undertaking such duty may have any arrangement he pleases with his constituent in Glasgow, but he cannot shake himself clear of his duty to the Court. As a procurator in the Court he is locally in charge of the case. But the agent in Glasgow has undertaken to conduct, and has a right to conduct, the case in the Alloa Sheriff Court, and he also has a duty to the Sheriff. His duty is either to appear or to notify to his correspondent that he, his correspondent, must attend to the particular branch of the case or on the particular occasion.

Now apparently neither of the agents attended to their duties in this matter. The Glasgow agent was quite to be excused, particularly in the circumstances of the current year, when one knows that agents have had the greatest difficulty in getting necessary respite from their work, and no one can complain that he went for his holiday when this case was current. But, then, he was entitled to trust to his correspondent on the spot, to whom notification should have been sent—and I have no doubt was sent—from his office in Glasgow that he could not personally attend; and his local correspondent was bound to be prepared to take his Glasgow constituent's place. The two agents were very much in the position of senior and junior counsel, in this respect at least, that where the former is not present the latter must be in Court and undertake the sole conduct of the case. These two agents, then, have not recognised their proper relations to the case and their duty to the Sheriff, and between the two the client has fallen. In the circumstances the Sheriff was fully justified in refusing to accept the excuse offered.

LORD MACKENZIE—I think there is no sufficient ground for interfering with what the Sheriff did in the exercise of his discretion.

LORD SKERRINGTON—I agree.

The pursuer then moved that the appeal be refused.

Argued for the defender—The appeal was competent—*Duff v. Stewart*, 1882, 9 R. 424, 19 S.L.R. 343; *M'Carthy v. Emery (cit.)*. This was not a decree by default, *i.e.*, where there had been no appearance, and rule 56 of Schedule I of the Sheriff Courts (Scotland) Act 1907 did not apply, neither did section 20 of the Sheriff Courts (Scotland) Act 1876, which was the basis of the decision in *M'Gibbon v. Thomson (cit.)* and *Stevenson v. Hutcheson & Anderson (cit.)*. In these cases the Sheriff granted decree by default, whereas here he merely adhered.

Argued for the pursuer—The appeal should be refused—*M'Gibbon's case (cit.)* and *Stevenson's case (cit.)*, though in those cases the interlocutor was not appealable. This was an appeal against the interlocutor of the Sheriff, who had decided the case upon the very ground upon which refusal to repon was now based, and accordingly the Sheriff's interlocutor could not be reversed.

LORD PRESIDENT—We shall refuse the motion made by the appellant to be reponed, but on condition that he pays the expenses of process from the date of the Sheriff's interlocutor we shall hear his appeal.

The Court refused the motion to be reponed, and on condition that the defender made payment to the pursuer of the expenses incurred by him since the Sheriff-Substitute's interlocutor of 14th August 1916, allowed the appeal to be heard on the merits.

Counsel for the Pursuer (Respondent)—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender (Appellant)—MacRobert. Agents—Cowan & Stewart, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, October 31.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lords Dundas, Johnston, Salvesen, Mackenzie, and Skerrington.)

LORD ADVOCATE *v.* AIKMAN
AND MARTIN.

Justiciary Cases—Incest—Indictment—Relevancy—Uncle and Niece—Act 1567 (1 Jas. VI, cap. 14).

W. A. and M. M., being respectively the brother and daughter of E. A. or M., and thus being mutually related as uncle and niece, were charged with having on various occasions, contrary to the Act 1567, cap. 14, and the 18th chapter of Leviticus, had incestuous