

The respondents, though pursuers in the action, were defenders in the appeal. The provision of section 69 that the judge might "stay proceedings" showed conclusively that the condition of finding caution was to be imposed only on the pursuers of the issue before the Court.

LORD JUSTICE-CLERK—I think this motion must be refused. The company is, in their appeal, in the position of defending itself. I do not think there is anything in the statute requiring a company in such circumstances to find caution.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court refused the motion.

Counsel for the Pursuers and Respondents—Graham Stewart. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders and Appellants—Macfarlane. Agents—Tawse & Bonar, W.S.

Thursday, July 3.

SECOND DIVISION.

[Lord Kincairney,
Ordinary.

SUTHERLAND v. STANDARD LIFE ASSURANCE COMPANY.

Title to Heritage—Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. c. 44), secs. 8 and 10—Irregularity in Sheriff Court Proceedings—Objection to Citation of Proprietor—Purchaser from Creditor—Citation.

A petition presented in the Sheriff Court at the instance of heritable creditors under section 8 of the Heritable Securities (Scotland) Act 1894, for the purpose of converting their security right into an absolute title, was served on the proprietor by a messenger-at-arms who was not a sheriff-officer. Decree having been granted under the Act, the creditors sold the estates to certain purchasers. The original proprietor thereafter brought an action of reduction of the dispositions in favour of the purchasers, on the ground, *inter alia*, that as the petition had not been properly served, the decree with all that followed thereon was inept.

Held (aff. the judgment of Lord Kincairney, Ordinary) that assuming the objection to the citation to be valid, this was an irregularity in the Sheriff Court proceedings within the meaning of section 10 of the Heritable Securities Act 1894, and that consequently it could not affect the title of the purchasers.

Question whether the objection to the citation was well founded.

Opinion by Lord Kincairney, Ordinary, that it was not.

This was an action of reduction at the instance of Evan Charles Sutherland, formerly proprietor of Skibo, in the county of Sutherland, and of Aberarder, in the county of Inverness, against Spencer Campbell Thomson, as manager of and as representing the Standard Life Assurance Company, Edinburgh, the Royal Bank of Scotland, Andrew Carnegie of Skibo as an individual, and as curator and administrator-in-law of his wife Mrs Carnegie, and Beckwith Smith, proprietor of Aberarder.

The question in the case was whether the dispositions of Skibo in favour of Mr and Mrs Carnegie, and of Aberarder in favour of Mr Beckwith Smith, were reducible upon the ground that the petition in Sheriff Court proceedings under the Heritable Securities (Scotland) Act 1894 at the instance of heritable creditors, who had subsequently granted the dispositions in question, had been served upon the original proprietor by a messenger-at-arms who was not a sheriff officer.

In 1876 Mr Sutherland, the proprietor of Skibo and Aberarder, granted various bonds and dispositions in security over these estates. One of these bonds was granted in favour of the defenders the Standard Life Assurance Company, and the others were acquired by the defenders the Royal Bank of Scotland conform to assignations in their favour duly recorded.

In 1889 Mr Sutherland granted a trust-deed for behoof of his creditors in favour of George Auldjo Jamieson, chartered accountant, Edinburgh, and disposed to him his whole estates, including Skibo and Aberarder, for the purposes therein mentioned.

Thereafter the estates of Skibo and Aberarder were exposed for sale under articles and conditions of roup signed by the heritable creditors and by Mr Jamieson, but no offers were received.

The Standard Life Assurance Company and the Royal Bank of Scotland, Limited, as heritable creditors, then resolved to adopt proceedings under the Heritable Securities Act 1894 for the purpose of converting their right in security into an absolute title.

A petition was accordingly presented by them in the Sheriff Court at Dornoch, praying for decree as provided for in the Act, and on 18th October 1895 the Sheriff-Substitute pronounced decree in conformity with Schedule D of the Act, whereby the estates of Skibo and Aberarder passed to the heritable creditors subject to the burdens affecting them.

The estates were possessed under that title by the heritable creditors till 1898, when the estate of Skibo was sold by them to Mr and Mrs Carnegie. In 1900 the estate of Aberarder was sold to Mr Beckwith Smith. Dispositions were granted in favour of these purchasers, which were duly recorded in the Register of Sasines.

The pursuer now sought reduction (1) of the citation and execution of service upon him of the petition under the Heritable Securities (Scotland) Act 1894, (2) of the decree pronounced upon that petition, and

(3) and (4) of the dispositions in favour of Mr and Mrs Carnegie and of Mr Beckwith Smith respectively, on the ground that the initial proceedings in the Sheriff Court were inept under the Heritable Securities Act, in respect that the original petition had been served by a messenger-at-arms and not by a sheriff-officer.

He averred, *inter alia*, that no legal service of the petition had been made upon him; that on 19th August 1895 a copy of the petition, having endorsed upon it a copy of the warrant to cite and a pretended schedule of citation bearing to be signed by a man named Macdonald, was left for the pursuer at the house of his wife, who was also called as a respondent in the action, and that Macdonald was not at the time he made the pretended service an officer of the Sheriff Court of Ross, Cromarty, and Sutherland, and was not a person qualified to serve the petition, and that he had paid no attention to this pretended citation, and did not enter appearance or defend the action.

He averred further that the decree, which was a decree in absence, had been granted without due inquiry, contrary to the provisions of section 8 of the Heritable Securities Act 1894, which requires the Sheriff to make inquiry before granting decree.

The defenders admitted that Macdonald, by whom service had been made, was not a sheriff-officer, but explained that he was a messenger-at-arms.

The pursuer pleaded, *inter alia*—“(1) The said pretended citation and execution of service being illegal and inept, as condescended on, ought to be reduced in terms of the conclusion thereanent. (2) The pursuer and the pursuer's wife not having been lawfully cited to the said Sheriff Court at Dornoch, the aforesaid decree is inept, and the same, with all that has followed thereon, should be reduced as craved. (6) The said decree and extract thereof being inept, the said pretended disposition in favour of the defenders Andrew Carnegie and spouse following thereupon is reducible, and ought to be reduced. (7) The said decree and extract thereof being inept, the said pretended disposition in favour of the defender Beckwith Smith following thereupon is reducible, and ought to be reduced.”

The defenders pleaded, *inter alia*—“(3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (5) The defenders Mr and Mrs Carnegie and Mr Beckwith Smith not being affected by any irregularity in the proceedings whereby the other defenders acquired right to the estates, are entitled to absolvitor with expenses. (6) The defender Mr Beckwith Smith having acquired an indefeasible title to Aberarder in virtue of the conveyance by Mr Auld, Jo Jamieson, is entitled to absolvitor from the conclusions relating to said estate.”

The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. c. 44) enacts as follows:—Section 8—“Any creditor who has exposed for sale under his security the lands held in security . . . and has failed to find a pur-

chaser, may apply to the sheriff for decree in terms of Schedule (D) hereto annexed; and the sheriff may, after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. . . . On such decree being pronounced, and an extract thereof, in which said lands shall be described at length or by reference, recorded in the appropriate register of sasines, the right of redemption reserved to the debtor shall be extinguished, and the creditors shall have right to the lands disposed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree.” Schedule D is expressed in accordance with this provision. Section 10—“No purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor.”

On 31st December 1901 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor—“Repels the pleas-in-law for the pursuer: Sustains the third, fifth, and sixth pleas-in-law for the defenders: Assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses,” &c.

Opinion.—“This is an action of reduction raised by Evan Charles Sutherland, formerly proprietor of the estates of Skibo and Aberarder, of the titles made up of these estates under the Heritable Securities Act 1894; and the chief question is whether the procedure followed by the heritable creditors has been in compliance with the provisions in that Act.

“The writs sought to be reduced are (1) a citation and execution of service of the petition in the Sheriff Court at Dornoch, with which the proceedings were initiated; (2) the decree by the Sheriff-Substitute following on that petition, dated 1st October, and extracted 3rd November 1895; (3) a disposition by the manager of the Standard Life Assurance Company, with the consents therein mentioned, in favour of Mr and Mrs Carnegie, of the estate of Skibo, dated the 1st and 3rd, and recorded in the General Register of Sasines the 24th November 1898; and (4) a disposition by the manager of the Standard Life Assurance Company and the cashier of the Royal Bank, with the consents mentioned, in favour of the defender Beckwith Smith, of the lands of Aberarder, dated 5th, 8th, 14th, and recorded in the General Register of Sasines the 16th May 1900.

“Of course the only writs which the pursuer has any interest to reduce are the two dispositions, but no objection is taken to them in themselves. They are not objected to if the granters had a title to grant them. The only objections stated

are to the citation and the decree, but the pursuer contends that if these are set aside the dispositions are necessarily invalid.

"The action has at first sight an appearance of complexity, and it involves questions of novelty. But when the record is carefully considered, the case does not appear to be of much difficulty, and I have come to be of opinion that the action is irrelevant.

"The case depends on the provisions in the Heritable Securities Act, enabling security-holders to become proprietors of the lands which they hold in security. These provisions are contained chiefly in the eighth section, which provides—[*His Lordship quoted the section ut supra*].

"In this case a petition, being No. 15 of process, was presented in the Sheriff Court at Dornoch by the manager of the Standard Life Assurance Company and by the Royal Bank, as heritable creditors holding securities over the lands of Skibo and Aberarder, and praying for decree as provided for in the Heritable Securities Act, and on 1st October 1895 the Sheriff pronounced a decree purporting to be in terms of Schedule D of the Act, and to declare that the manager of the Standard Life Assurance Company and the Royal Bank had right to and were vested in the lands described in their bonds. It has not, I think, been maintained that this decree is not in conformity with Schedule D.

"The lands were possessed under that title by the creditors for some time, until in November 1898 the estate of Skibo was sold by them to Mr and Mrs Carnegie, and in 1900 the estate of Aberarder was sold to Mr Beckwith Smith.

"It is necessary to attend to certain deeds which were executed before the procedure in question and to their dates.

"The pursuer succeeded to Aberarder in 1847, and he purchased Skibo in 1872. The securities in question were constituted over both estates by bonds and dispositions in security executed in 1876, which are narrated in the condescendence.

"On 29th January 1884 the pursuer granted a trust-deed in favour of himself and such persons as might be assumed into the trust called the Aberarder Trust. The precise object of this trust-deed is not apparent, but as Mr Auldjo Jamieson was assumed into the trust and became sole trustee by the pursuer's resignation, it is not wholly without importance.

"On the same date the pursuer, as he avers, granted a deed of entail of the estate of Skibo in favour of himself, whom failing, of his son William Tudor Sutherland, and the heirs-male of his body. This deed is set forth in the condescendence, but it has not been produced, and it was not maintained that it affected the case, seeing that it is dated long after the bonds.

"On 1st April 1889 the pursuer granted a trust-deed in favour of George Auldjo Jamieson and such person as might be appointed to act in the trust, whereby he conveyed all his effects in Scotland, and in particular the estate of Skibo (under a declaration to the effect that the deed of

entail should not be thereby affected) and the estate of Aberarder, the provisions in which deed need not at present be further detailed.

"By deed of assumption and conveyance, dated 1st and 11th April, and recorded in the General Register of Sasines 16th May 1889, the pursuer assumed George Auldjo Jamieson as a trustee under the Aberarder Trust, and he himself resigned his trust as from 15th April 1889.

"Thereafter the estates were exposed for sale under articles and conditions of roup, dated in 1895, signed by the heritable creditors and by Mr Jamieson, but no offers were received, and thereafter the heritable creditors adopted proceedings under the Act of 1894 for the purpose of converting their right in security into an absolute title; and having obtained the decree, they sold the estates to the defenders as already mentioned, and granted the dispositions 21 and 22 of process.

"These are the dispositions of which the pursuer now seeks reduction, and the grounds of reduction set forth and pleaded are entirely alleged errors or irregularities in the proceedings, whereby it is said that the decree by the Sheriff was rendered inept and the dispositions were reducible.

"There is no doubt that, if the proceedings before the Sheriff were reduced, it would necessarily follow that the heritable creditors had no title to grant the dispositions. On the other hand, if these proceedings do not fall to be set aside, there is no ground for reducing the dispositions.

"The whole question regards the Sheriff Court procedure. [*His Lordship then proceeded to deal with a question as to the pursuer's title to sue.*]

"It appears to me that, admitting the pursuer's title, his case must fail. His chief objection to the Sheriff Court procedure, at least that which was most elaborately argued, was that the service was inept, because it was made by a messenger-at-arms, and not by a sheriff-officer. I am not prepared to affirm that proposition. It is not, I think, a clearly decided point. It was raised in *Cheyne v. M'Gough*, May 19, 1860, 22 D. 1490, but was not decided.

"The pursuer referred to various Sheriff Court Acts, in every one of which the schedules giving the forms of executions uniformly bear at the end 'I. J. sheriff officer,' and in the Small Debt Act of 1837 and the Sheriff Court Act of 1863 the form of summons scheduled in the Acts bears to be addressed by the sheriff to 'officers of court,' which undoubtedly a messenger-at-arms is not. Perhaps the most important reference by the pursuer was to the 23rd and 25th sections of the Sheriff Court Act (1 and 2 Vict. cap. 119), and to the contrast between these two sections. There is no doubt that the usual practice in Sheriff Courts is that the service of writs is made by a sheriff officer, over whom the Court has a control, which he cannot have over a messenger-at-arms. But I do not think they amount to an imperative requirement that in all cases

in the Sheriff Court service must of necessity be by a sheriff officer.

"The pursuer referred also to the case of *Hamilton v. Bayne*, decided in 1857 in the Sheriff Court at Paisley, which must carry weight, because it was decided by Sheriff Macfarlane (Lord Ormidale); in that case he held the service inept (Guthrie's Sheriff Court Cases, i. 105). But in that case the warrant was addressed to officers of the Court, and the Sheriff seems to have proceeded on the ground that a messenger-at-arms could not come under that designation, and that the service was therefore without any authority.

"On the other hand, I find that in the sixth schedule of the Personal Diligence Act (1 and 2 Vict. cap. 114), to which section 9 of the Act refers, the words are—'I, the said sheriff, grant warrant to messenger-at-arms and messengers of court,' seeming to imply a recognition of service by a messenger-at-arms.

"In the case of *Finlayson v. Innes*, 4 Paton's Appeals, 443, it appears that this objection was taken to a service in a Sheriff Court by a messenger-at-arms, and it must have been repelled. I am informed that it appears that the sheriff had specially authorised the messenger-at-arms to make the charge. But supposing that to be so, it shows that a messenger-at-arms might be empowered by a sheriff to make a service in the Sheriff Court, which he could not be if the pursuer's argument is well founded. I have not been able to get access to the appeal papers.

"I was furnished with a copy of an interlocutor by Sheriff Crichton, pronounced in the Sheriff Court at Edinburgh on 7th September 1888, in which he repelled this plea.

"The writers who treat of this subject leave this point doubtful, and seeing that that state of divided opinion existed, it is surprising that it was not set at rest when the Citation Act of 1882 (45 and 46 Vict. cap. 77) was passed, which however, it was not. (See section 3.)

"In regard to this case I have to observe that the Heritable Securities Act 1894 does not expressly provide by whom service is to be made, and that the warrant for service granted in this case is not addressed to officers of court, but is general. The case of *Finlayson* would seem to shew that it would have been a valid warrant if addressed to messengers-at-arms, and I do not see sufficient ground for limiting its application.

"I am therefore not prepared to sustain this objection. But further, I think that the 10th section affords a complete defence even if the objection were well founded. That section provides that no purchaser 'from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein, or be affected by any irregularity therein, without prejudice to any competent claim of damages against such creditor.'

"The pursuer, quite erroneously as I think, denominated this clause a finality clause, and he cited various cases which I do not think it necessary to quote here, to the effect that finality clauses did not protect from review or reduction acts which were not done in compliance with the statute in which the finality clause occurs. There have been many such cases, and they have been often perplexing from the difficulty of distinguishing between acts or deeds which were mere deviations from the statute and formal blunders, and acts or deeds done or granted in total disregard of the statute, in which latter cases it has been held that the finality clause did not protect from review or reduction. Finality clauses have been very common in recent statutes, but I take it they have referred to parties who have been litigating in the proceedings in question. But the 10th section of this statute is not a clause of that nature. Section 12 is the finality clause in this Act, such as it is. Section 10 relates to persons who have had no connection whatever with the procedure authorised and directed by the Act, and it provides unambiguously and very naturally that they shall in no way be affected by any irregularities in the procedure. It was maintained that a defect in the service of the primary writ could not be held to be an irregularity, but was a radical defect vitiating the whole proceedings. But I cannot take that view. I think this unusual citation is perfectly well described as an irregularity. There are frequently irregularities which might vitiate a whole procedure if that consequence were not provided against; and it is clear that in this case it is not slight irregularities only which are contemplated, but such as might found a claim of damages. The reservation of damages seems to define the remedy of the party complaining in a case of this kind.

"This objection would be as good against the singular successors of Mr Carnegie or Mr Smith if they had disposed their lands. But it would defeat the whole purpose of the Act if such an objection were allowed.

"I am therefore unable to sustain this objection, and if I had thought it well founded I should have regarded it as an irregularity by which *bona fide* purchasers from the heritable creditors and the singular successors of such purchaser could not be affected.

"If the pursuer could show that he was not aware of this proceeding by the heritable creditors he might have had more to say. But he does not show that. Apparently he took his chance of the sufficiency of a purely technical objection." . . .

The pursuer appealed, and argued—A Sheriff Court writ must be served by a sheriff officer, and could not validly be served by a messenger-at-arms—*Hamilton v. Bain*, February 10, 1857, Guthrie's Sheriff Court Cases, vol. i. p. 405; *Bankton*, iv. 6, 17. The case of *Finlayson v. Innes*, February 28, 1803, 4 Paton's App. 443, was not in point, for there (as appeared from the House of Lords papers in the case) a special com-

mission to serve had been given. The warrant must also be signed by a proper officer of Court—Darling on Messengers-at-Arms, p. 16. Citation was an *actus legitimus*, and therefore if it were inept all the subsequent procedure would be ineffectual. In regard to clause 10 of the Heritable Securities Act, relied on by the defenders, “irregularity” implied proceedings, but here there were no proceedings at all. The Act applied to “irregularities” only and not to fundamental nullities—*Lindsay v. Magistrates of Leith*, May 22, 1897, 24 R. 867. 34 S.L.R. 648.

Counsel for the defenders were not called upon.

At advising—

LORD JUSTICE-CLERK—Whatever may have been the history of the proceedings in this case, it may, I think, be disposed of on a very simple ground. The pursuer's case is this—that in proceedings a good many years ago to have it declared that the present pursuer had forfeited his right of redemption of his estates of Aberarder and Skibo, the petition was served on him by a messenger-at-arms and not by a sheriff officer. Now it may be a question whether citation by a messenger-at-arms is a good citation in a sheriff-court process unless the messenger-at-arms is specially authorised by the sheriff. But I do not think that we need to determine that question in the present case. The question here is whether the defender's title can be attacked on the ground that it proceeds on a decree in an action in which the citation was by a messenger-at-arms. It seems to me that the 10th section of the Heritable Securities Act 1894 covers exactly such a case as the present. The section is quite clear in its terms, which are these.—[*His Lordship quoted the section.*] I think that these words plainly apply to the irregularity here, if it was an irregularity. I think it is plainly the object of the section to make purchasers from a creditor safe, and to relieve the purchaser from the necessity of inquiring in detail into the history of the proceedings on which his title is based. It is said that this was not a case of irregularity in any “proceedings,” because, it was argued, you cannot have “proceedings” until you have a regular and valid citation. In a sense that is true, but the serving of a petition which requires the warrant of the sheriff seems to me clearly to be a proceeding to which section 10 of the statute is applicable. I have no doubt that the statute protects purchasers against irregularities such as we have here in citation. I am clearly of opinion that we should adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I think it clear that the clause of the statute applies. I also think it clear that there was a citation here in point of fact, given no doubt by a messenger-at-arms and not by a sheriff officer. Now I am not prepared to say that a messenger-at-arms may not effectually give a citation of a sheriff-court writ, even although he has not the special authority of the sheriff. I am not prepared to say that a citation so

given is in law of no effect whatever, but assuming, without affirming, that there was an irregularity in such a citation, it nevertheless was a citation in point of fact, and that being so I have no doubt that the statute applies. The irregularity, assuming that there was any irregularity, seems to me a typical case of the sort of irregularity to which the statute applies.

LORD TRAYNER—I agree. I think that section 10 of the Heritable Securities Act 1894 exactly covers such a case as we have here. Assuming, but without admitting, that there was an irregularity in the proceedings in connection with the service of the petition against the present pursuer, I think section 10 covers such an irregularity and protects purchasers against the consequences thereof. I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Hunter—W. Mitchell. Agent—Alexander Bowie, S.S.C.

Counsel for the Defenders and Respondents—Dundas, K.C.—Chree. Agents—Dundas & Wilson, C.S.

Wednesday, July 9.

SECOND DIVISION.

[Sheriff Court of Fife and Kinross
at Dunfermline.]

CRAIG'S TRUSTEE *v.* MACDONALD,
FRASER, & COMPANY.

Bankruptcy — Illegal Preference — Statute 1696, c. 5 — Right in Security — Retention — General Lien — Auctioneers.

The tenant of a farm arranged with a firm of auctioneers to conduct a displenishing sale of the stock and cropping of the farm on October 26th 1900. The tenant, who had been insolvent for some time prior to the date of the sale, was made notour bankrupt on November 29th 1900, and was sequestered on January 11th 1901. At the date of the sale, as the result of a series of transactions between the auctioneers and the tenant, the tenant was due to the auctioneers a balance of £244—part of the balance being alleged to be an advance of £200 made by the auctioneers to the tenant on September 26th 1900. On October 19th 1900, a receipt, which was ante-dated September 26th 1900, had been granted by the tenant to the auctioneers in these terms—“Received from ‘M., F., & Co.’ the sum of £200 to account of my displenishing sale.” In a question with the tenant's trustee in bankruptcy, the auctioneers claimed to retain the sum of £244, being part of the proceeds of the dis-