letter of 24th May, requiring that they should be dipped, an intimation that they were affected. If the certificate had been duly intimated to him, as the Order contemplated, he would have been obliged to comply; but the certificate was not in existence when the notices were issued, and was obtained by the fiscal only two days before the complaint was served. The respondent had thus been deprived of evidence.

LORD JUSTICE-CLERK—The objection to the relevancy of the complaint cannot be maintained. It is no doubt necessary, in the case of a statutory offence, to libel the Act and section of it which is founded on. But in the case of orders or regulations which have statutory authority, these regulations become part of the statute, and it is therefore sufficient to set forth the regulations which are said to be contravened and the Act which authorises them, and when this has been done there is quite sufficient statement of the grounds of the complaint.

I do not think that the respondent's second objection to the complaint is stateable. The Order of the Board of Agriculture authorises the inspector of the local authority, if he sees fit, to require owners or persons in charge of sheep, to whom notice in the form sent to the respondent in this case has been given, to cause their sheep to be treated in his presence and to his satisfaction with some remedy for sheep-scab. This the respondent refused to do, and the Act and regulation have been contravened. By the Diseases of Animals Act, and the relative Sheep-scab Order of the Board of Agriculture, inspectors are appointed and power given to them and to the Board to give notices to have done what the respondent here has failed to do. The inspector may be wrong, or it may be doubtful whether he is right, but the object of the Legislature is to prevent risks. If the inspector proves to be a person who makes mistakes in giving such notices unnecessarily he may be removed by the Board. But by statute it rests with him to say whether precautions against sheep-scab shall or shall not be taken, and where he says they shall, it is no relevant defence to say that there is no need for them; the offence is constituted by failure to obey the Order.

LORD TRAYNER—I agree on both points. On the question of relevancy I agree with your Lordship that if a statutory offence is libelled it is necessary to set forth not only the statute but the section which is said to have been contravened. Here the respondent is charged with a contravention of an Order issued by the Board of Agriculture which is distinctly specified, and he is referred to the statute by which the Board is authorised to make such orders. In my opinion that is sufficient.

With regard to the result of the trial, I think that the Justices were wrong in acquitting the respondent on the ground on which they did.

There is some difficulty in answering the first question from the form in which it is put. Section 44 (5) of the Act makes the inspector's certificate conclusive evidence of what is therein stated; but that does not exclude any competent evidence under section 52, by which the respondent seeks to establish that he acted with lawful authority or excuse. The two sections are not inconsistent.

LORD MONCREIFF—I agree with your Lordships on both points. I think the first question put before us is awkwardly framed. The meaning of it seems to be this, that the respondent undertook to prove what he maintained to be a reasonable excuse, and the only excuse in the sense of section 52, viz., that his sheep were in fact not suffering from scab. I think he was not entitled to prove that in face of the inspector's certificate; but it might be well to make our meaning clear in our answer to the question put, because the inspector's certificate would have been no bar to proof of a reasonable excuse which did not depend on that fact.

The Court found in answer to the first question "that the certificate of the veterinary surgeon ought to have been held by the Inferior Court as conclusive evidence of the matters certified therein," answered the second question in the negative, and sustained the appeal.

Counsel for the Appellant — Solicitor-General (Dickson, Q.C.)—Craigie. Agents —J. & J. Galletly, S.S.C.

Counsel for the Respondents—Graham Stewart. Agents—Carmichael & Miller, W.S.

COURT OF SESSION.

Wednesday, December 20.

FIRST DIVISION.

[Sheriff Court of Forfarshire.

MACGREGOR *v.* BALFOUR.

Acquiescence—Servitude—Aqueduct—Principal and Agent—Factor—Verbal Consent of Factor to Laying of Drain without Knowledge of Proprietor—Singular Successor.

The proprietors of the estate of A wrote a letter to G, the factor for the neighbouring proprietor D, asking if there would be any objection on the part of D to their carrying a drain, "on proper conditions," through part of his land in order to form an outfall for the drainage of part of their land. No written consent was given by G, but on the following day he stated verbally that it was "all right," and that they might go on with the work, and the drain was accordingly laid. Four years thereafter the property belonging to D was acquired by Q, a singular successor. He was not at that time aware of the

existence of the drain, and on learning of it seven years later raised objections to its presence, and finally threatened to remove it.

In an action raised by the proprietors of A for the purpose of interdicting the singular successor from removing the drain, it was not proved that D was aware of the laying of the drain, or had acquiesced in it, or that his factor had authority from him to sanction it, or that he had such general authority as to entitle him to grant a servitude or other permanent right to make and maintain the drain.

The Court *held* (1) that no servitude of aqueduct or other permanent right to maintain the drain had been established; (2) that the acquiescence of the factor did not affect D nor the defender as singular successor so as to bar the latter from removing the drain, and *refused* to grant interdict.

An action was raised in the Sheriff Court of Forfarshire by Miss Macgregor, proprietrix of the estate of Abbethune, Forfarshire, against Alexander Balfour, proprietor of the adjoining estate of Inchock, craving the Court to interdict the defender from removing a "drain-pipe which runs through old lands of Old Chance Inn or Little Inchock," part of the defender's lands, and which receives the surface or drainage water of part of the pursuer's estate of Abbethune, lying along the Keilor Burn, and from disturbing the outfall of said drain into the said Keilor Burn."

The pursuer averred that on 13th October 1882 her predecessors sent, through their agent Mr Macdonald, the following letter to Colonel Guthrie, factor for the Earl of Dalhousie, the defender's predecessor:—"The Abbethune trustees have been considering about getting a piece of their land adjoining the Keilor Burn drained. The ground is very flat, and when the burn is swollen by rain, as it is more or less during a great part of the winter months, it rises above the mouth of the outfall, and the drainage water is dammed back in the drains. It has been suggested to the trustees that the only effectual way of remedying the mischief is to place the outfall lower down the Keilor Burn, and get a leading drain brought up to the Abbethune land through Old Chance Inn (Mr D. Meffan's farm). It is possible the expense of doing this might be found too great, but should it not be so, would there be any objection on the part of Lord Dalhousie to allow the drain to be carried through his lands on proper conditions? The enclosed sketch will show you roughly what I mean."

The pursuer further averred that the consent of the Earl of Dalhousie was given verbally through his factor to Mr Macdonald to the outfall being improved by carrying the drain through the lands of Little Inchock; that the pursuer's predecessors accordingly proceeded to drain this portion of their estate at an expense of £206, and in the course of the operations laid down the pipe in question, and that it had remained untouched since 1883. She further averred that the defender, who acquired the property of Inchock in 1886, had acquiesced in the maintenance of the drainage work for a period of ten years, but had now threatened to remove the pipe without providing any outfall in lieu thereof.

The pursuer maintained that at the time the consent was given her predecessors might, in the event of objection, have put in force the provisions of the Drainage of Lands Act 1847 (10 and 11 Vict. c. 113), and applied to the Sheriff for authority to effect the drainage.

The pursuer pleaded—"(1) The said faucet drain-pipe having been laid through the lands of Old Chance Inn or Little Inchock with the consent of the proprietor of the said lands at the time, and in order to facilitate and promote the drainage of lands now belonging to the pursuer for providing for the improvement of the outfall, the defender is not entitled to lift or remove the said faucet drain-pipe or to disturb the said outfall. (2) The defender having acquiesced in the existence of the said main drain and outfall for a period of ten years or thereby is barred by acquiescence and *mora* from challenging the pursuer's right thereto. (3) The defender being proprietor of the inferior tenement, and having suffered no loss or damage from the said main drain and outfall is not entitled to remove the same without making other provision for the carrying off of the surface and drainage water from the pursuer's lands. (5) The said consent or agreement having been followed and validated by *rei interventus*, the same was binding on the said Earl and his successors. (6) The pursuer and her predecessors having acquired a servitude right of aqueduct through the lands now belonging to the defender, he cannot object to the maintenance of said drain-pipe and outfall. (7) The defender having acquired his lands subject to the rights vested in the pursuer and her predecessors, he is not entitled to remove said pipe and outfall."

The defender averred that he only became aware of the existence of the drain when he took the lands in question into his own hands at the termination of a lease at Martinmas 1893, and that in January 1894 he wrote and objected to its presence and had only allowed it to remain thereafter as a matter of convenience to himself, his lands being under crop.

He pleaded—"(2) The action is irrelevant, the pursuer not having averred that Colonel Guthrie had any authority from Lord Dalhousie to consent to the making of the said drain. (3) The pretended consent said to have been given by Colonel Guthrie having been given, if given at all, *a non habente potestatem*, is of no effect in a question with the defender. (4) Such consent can only be proved *scripto*."

The Sheriff-Substitute (LEE) allowed the parties a proof, the result of which is fully set out in the opinions and interlocutor of the Court *infra*.

The Sheriff-Substitute on 15th March 1899 pronounced the following interlocutor—

"Finds in fact that the pursuer's predecessors as proprietors of the estate of Abbethune, by letter of 13th October 1882, applied to Colonel Guthrie for consent to take a leading drain through Lord Dalhousie's estate of Little Inchock, that at that time Colonel Guthrie, though not proved to have any commission from Lord Dalhousie, was allowed by him to act as, and was regarded as being, his factor; that Colonel Guthrie gave verbal consent on behalf of Lord Dalhousie to the making of the said drain; that the said drain was thereafter made at considerable expense and has since been used for the drainage of the Abbethune estate: Finds in law that Colonel Guthrie, having been allowed to act with Lord Dalhousie's authority the pursuer's predecessors were entitled to recognise him as Lord Dalhousie's factor, and that his consent was therefore equivalent to Lord Dalhousie's: That Lord Dalhousie's verbal consent, followed within his knowledge by the operations stated on record, constitutes such acquiescence as to bar challenge of the pursuer's right: Finds further in law that the pursuer, having continuously exercised the right obtained from Lord Dalhousie, the said right cannot now be challenged by the defender as Lord Dalhousie's singular successor: Therefore repels the pleas-in-law for the defender, and finds and decerns in terms of the conclusions of the petition: Finds the pursuer entitled to expenses according to Scale II.," &c.

The defender appealed to the Sheriff (H. JOHNSTON), who on 3rd May 1899 pronounced the following interlocutor—"Recals the interlocutor appealed against so far as it finds 'that Lord Dalhousie's verbal consent, followed within his knowledge by the operations stated on record, constitutes such acquiescence as to bar challenge of the pursuer's right,' and to that extent and effect sustains the appeal: Finds in lieu thereof that the verbal consent of Colonel Guthrie as Lord Dalhousie's factor, followed within his (Colonel Guthrie's) knowledge by the operations stated on record, constitutes such acquiescence as to bar challenge on the part of Lord Dalhousie or those in his right of what was done on the faith of said consent: *Quoad ultra* affirms said interlocutor, and refuses the appeal, with additional expenses to the pursuer," &c.

The defender appealed, and argued—The pursuer's case was based upon either a grant of servitude of laying a drain or acquiescence in laying it. So far as a servitude could be founded upon a grant, it either required the writ of the granter, or if it were based upon an informal consent followed by *rei interventus*, it was necessary to show by writ or oath that the informal parole consent was given—*Kirkpatrick* v. *Allanshaw Coal Co.*, December 17, 1880, 8 R. 327; *Walker* v. *Flint*, February 20, 1863, 1 Macph. 417; *Gowan's Trustees* v. *Carstairs*, July 18, 1862, 24 D. 1382. Moreover, the acts constituting *rei interventus* must be of such a nature that they could not be undone, and involving considerable expense—Bell's Principles, section 946; *Cowan* v. *Kinnaird* (1865), 4 Macph. 236. Here the drain in question only cost £20, and was not of the nature of a thing that could not be undone. The effect of the judgment in *Wark* v. *Bargaddie Coal Co.*, March 15, 1859, 3 Macq. 467, only amounted to this, that if one of the parties to a written contract had consented to repeated breaches of it in the past, he had thereafter no claim to damages for such acts. Such implied acquiescence would not apply to future acts to which he did not give his consent—*Carron Company* v. *Henderson's Trustees*, July 15, 1896, 23 R. 1042. But in any case such implied acquiescence would not be binding on the defender as a singular successor. In order for it to be binding the facts from which acquiescence was inferred must be patent. Here there was nothing to call the defender's attention to the existence of the drain. It was not visible and obvious to an intending purchaser, and accordingly this case was distinguishable from cases such as *Muirhead* v. *Glasgow Highland Society*, January 15, 1864, 2 Macph. 420. But, further, it could not be inferred that Colonel Guthrie's acquiescence was that of Lord Dalhousie. It did not lie within a factor's ordinary powers to gratuitously alienate part of the estate or grant a permanent right of servitude, and in the absence of any proof of Lord Dalhousie's express authority or knowledge any right that Colonel Guthrie gave could only have been in the nature of neighbourly accommodation revocable at will. As regards the application of the Drainage Act, there was nothing in the letter to Colonel Guthrie to show that it was within the contemplation of the parties at that time, and it clearly was not intended or accepted as a notice in terms of the Act.

Argued for respondent — (1) Colonel Guthrie's consent to the terms of the letter constituted a grant of servitude. It was not necessary that such consent should be given in writing, for where there was the writ of one party containing the terms of an arrangement and the parties proceeded to act upon it the effect was the same as if it were the writ of both parties—*Ballantine* v. *Stevenson*, July 15, 1881, 8 R. 959. It was not an act of an extraordinary character on Colonel Guthrie's part to grant this right, nor outside the scope of his factorship, for if he had refused consent it would have been competent for the other parties to apply to the Sheriff under the Drainage Act for authority to lay down the drain. His consent, therefore, was merely one of the ordinary acts of administration, the only question being how this operation should be carried out. If the pursuer had not a right of servitude her legal right was that of bar, founded on acquiescence followed by *rei interventus*. Colonel Guthrie's knowledge and acquiescence were clearly those of Lord Dalhousie, the operations having been carried out under the latter's eye—*Forbes* v. *Wilson*, February 22, 1873 11 Macph. 454. Then the acts that followed on the agreement were unequivocally referable to it and were of sufficient importance to constitute *rei interventus*. It was not fair to point to the cost of the particular drain,

and say it was only £20, for it formed part of the entire drainage scheme which was undertaken on the faith of the agreement —Bell's Prin., sec. 946; *Wark* v. *Bargaddie Coal Co.*, *supra*. Nor was the pursuer's right affected by the fact that the defender was a singular successor, the plea of bar being equally good against such a successor. It was not necessary to show knowledge on his part, but it was enough that he might have found out all this on acquiring the property. Such a right as this would be quite valueless if it did not pass with the property—*Sanderson* v. *Geddes*, July 17, 1874, 1 R. 1198; *Muirhead* v. *Glasgow Highland Society*, *supra*. Even if the Court held that there was not a valid plea of absolute bar it would grant to the pursuer an equitable remedy to prevent interference with the drain—*Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H.L.) 91.

At advising—

LORD PRESIDENT—The respondent asks for interdict against the appellant interfering with, lifting, or removing, a faucet drain-pipe which runs through part of his lands of Inchock, and receives the surface or drainage water of part of the respondents estate of Abbethune lying along the Keilor Burn, and discharges that water into the burn, as also against the appellant disturbing the outfall of the drain into the burn. As proprietor infeft in the lands of Inchock, the appellant is *prima facie* entitled to lift or remove the drain-pipe in question, and the respondent can only prevail in obtaining the interdict which she seeks by establishing that she has a right to have the drain-pipe continued for the purpose above mentioned in the appellant's lands. This onus she maintains that she has discharged by proving (1) a grant by the late Lord Dalhousie, the proprietor of Inchock, when the pipe was laid, of a permanent right to the then proprietors of Abbethune to lay and maintain the pipe, in the nature of a servitude *aquæductus* or perhaps rather *aquæ educendæ*; (2) or at all events, a grant of a right to lay and use the pipe so long as it shall remain fit for the purpose of providing an outfall for the drainage of her lands; and (3) that the appellant is barred from removing the pipe by the acquiescence of Lord Dalhousie in its being laid for the purpose already mentioned.

The respondent has not alleged or proved that any personal assent to the laying of the pipe was given by Lord Dalhousie, but she maintains that she has established that such an assent was given by Colonel Guthrie, his Lordship's factor, acting either with his Lordship's authority in that matter, or at all events within the scope of his general authority, and she also relies strongly upon the fact that at the time when the consent is alleged to have been given, the proprietors of Abbethune were in a position to put in force the provisions of the Drainage of Lands (Scotland) Act 10 and 11 Vict. c. 113).

Where, as in the present case, there has not been prescriptive possession, the proper evidence of the grant of a prædial servitude is the writ of the owner of the servient tenement, or of some-one duly authorised by him to make the grant, but the respondent does not produce any such writ, nor does she allege that any such writ was ever given either by Lord Dalhousie or anyone on his behalf.

The first piece of evidence upon which she relies is Mr Macdonald's letter to Colonel Guthrie of 13th October 1882. That letter mentions the desire of the then proprietors of Abbethune, to obtain an outfall below their own lands, and to get a leading drain brought up to Abbethune lands through Old Chance Inn, part of the lands of Inchock. The letter then continues:—"It is possible the expense of doing this might be found too great, but should it not be so, would there be any objection on the part of Lord Dalhousie to allow the drain to be carried through his lands on proper conditions?" This letter was not answered in writing, but Mr Macdonald states in his evidence that Colonel Guthrie gave a verbal consent on the following day. There is no proof *scripto* of that verbal consent, but the work was duly executed, and the drain has been in operation since 1883.

Upon Colonel Guthrie's letter it is to be observed that it does not ask authority to carry the drain through the lands of Inchock unconditionally, but that it contemplates "proper conditions" being arranged. There is no written, and indeed no parole, evidence that any conditions were arranged, and as Lord Dalhousie, Colonel Guthrie, and Mr Cowe, the subfactor, are all dead, it is not possible to obtain the evidence of any of them. It does not appear to me that the letter constitutes proof *scripto* of a grant of a permanent right in the nature of a servitude *aquæductus* or *aquæ educendæ*, because (1) it is not in fact the writ of Lord Dalhousie or of anyone representing him; (2) it is not in legal estimation his Lordship's writ, as a writ addressed by one person to another may under certain circumstances be held to be the writ of the latter if retained and founded on by him; (3) it is not unconditional, but contemplated the arrangement of conditions, and it does not appear that any conditions were arranged, or that the arrangement of conditions was waived. For similar reasons, it appears to me that there is no competent or sufficient evidence of the grant of an innominate right to lay the pipe and maintain it *in situ* until it is worn out. And even if it was competent to prove the grant of such a servitude, or of such an innominate right, by parole evidence, I do not think that the parole evidence adduced is sufficient to do so.

A servitude may, however, under certain conditions be established or proved by acquiescence inferring a grant and creating a bar against its exercise being challenged by the person or persons who have acquiesced in it, or even in some cases by their singular successors in the lands, and if it

was proved that Lord Dalhousie was aware that the pipe in question was being laid in reliance upon his assent, and the proper inference from the facts was that the assent was to a permanent right, and not merely to an accommodation revocable at pleasure, I think there might have been strong ground for contending that he could not lift or remove the pipe. It does not, however, appear to me that Colonel Guthrie's acquiescence would, in the absence of proof of the express authority of Lord Dalhousie *ad hoc*, have barred his Lordship from removing the pipe, on the view that Colonel Guthrie's acquiescence had created a permanent right. Colonel Guthrie's general authority might have warranted him in granting a revocable accommodation to a neighbour, but I do not think it would have entitled him to grant a proper servitude or other permanent right, this not being an ordinary act of factorial administration.

The Sheriff and Sheriff-Substitute concur in thinking that the appellant has done nothing to bar himself from removing the pipe, and it appears to me that in this they are right. He bought Inchock in 1886, and he states that he was not aware of the existence of the pipe till 1893, shortly after which he challenged it. There was nothing to call his attention to its existence, and even if he had seen it at the place where it entered the Keilor Burn, there was nothing in its position, size, or character to show that it might not be part of the drainage system of the lands of Inchock.

The question, however, remains whether the appellant is barred by Lord Dalhousie's acquiescence in the laying of the pipe, assuming his Lordship to have acquiesced in it. There are cases in which acquiescence has been held to affect singular successors, *e.g.*, where the thing acquiesced in is visible and obvious (*vide Colville* v. *Middleton*, May 27, 1817, F.C.; and *Muirhead*, 2 Macph. 420), especially where it is of such a character or cost as to be inconsistent with its having been allowed merely during pleasure, but the reasons upon which such cases have been decided do not seem to me to apply to the present case. I have already pointed out that the existence of the pipe as an outfall for the drainage from Abbethune lands was not obvious to an intending purchaser, and it does not appear to me that its character or cost were such as necessarily to imply that a permanent right, as distinguished from a tolerance during pleasure, had been granted or acquiesced in.

It only remains to consider the effect of the Drainage Act of 1847, upon which the judgments of the Sheriffs, and especially of the Sheriff-Principal, appear to have to a large extent proceeded. Mr Macdonald states that he had that Act in his mind when he communicated with Colonel Guthrie, but his letter makes no reference to it, and he does not say that it was ever mentioned in his verbal communications with Colonel Guthrie. It is therefore impossible now to ascertain whether Lord Dalhousie or Colonel Guthrie had that Act in their minds, and if they had not, I do not think that they can be taken to have accepted Mr Macdonald's letter of 13th October 1882 as equivalent to a notice under the Act, and to have waived their right to have its requirements duly complied with.

For these reasons I think that the interlocutor of the Sheriff and Sheriff-Substitute should be recalled, and that the prayer for interdict should be refused.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Find (1) that Mr W. K. Macdonald, acting on behalf of the trustees of Miss Rolland, the then proprietors of Abbethune, on 13th October 1882 sent to Colonel Guthrie, factor for Lord Dalhousie, the then proprietor of the estate of Little Inchock, a letter inquiring whether there would be any objection on the part of Lord Dalhousie to allow a leading drain to be carried through the farm of Old Chance Inn, part of the said estate of Little Inchock, to the Keilor Burn, to form an outfall for the drainage of part of Abbethune 'on proper conditions'; (2) that no written answer to that letter was sent by Colonel Guthrie, but that he on the following day stated to Mr W. K. Macdonald that it was all right, and that Miss Rolland's trustees might go on with the work; (3) That the drain in question was laid by Miss Rolland's trustees during the winter of 1882-83, and connected with other drainage works then executed by them on part of Abbethune, for which it was intended to form and did form an outfall; (4) That no written consent was given by Lord Dalhousie, or by anyone having his authority, to the making or use of the said outfall drain, and no written grant of servitude of aqueduct or outfall, or any other right with respect to the said outfall drain was made by his Lordship or by anyone having his authority to do so; (5) That it is not proved that Lord Dalhousie was aware that the said drain had been laid through his said lands, and was being used as an outfall for part of the drainage of Abbethune, or that he ever acquiesced in the said drain being made or used by the proprietors of Abbethune; (6) That it is not proved that Colonel Guthrie had the authority of Lord Dalhousie to sanction the making or use of the said drain by the proprietors of Abbethune, or that Colonel Guthrie had any such general authority as to entitle him to grant to the proprietors of Abbethune a servitude or other permanent right to make and maintain the said drain through the estate of Little Inchock as an outfall for part of the drainage of Abbethune; (7) That Colonel Guthrie was aware that the said drain was made through the said estate of Little Inchock by the proprietors of Abbethune as

an outfall for part of the drainage of that estate, and was used by them as such outfall, and that he did not object thereto, but that this knowledge and acquiescence on his part did not affect Lord Dalhousie or the appellant as a singular successor in the estate of Little Inchock; (8) That the appellant purchased the estate of Little Inchock in 1886, and that he has since been in possession of it as proprietor; (9) that when the appellant purchased the estate of Little Inchock he had no knowledge and no notice of the existence of the said drain, or of its being used as an outfall for drainage from Abbethune, as also that he did not acquire such knowledge until 1893, and that he objected to the drain shortly after; (10) that the appellant has done nothing to bar himself from challenging the respondents' claim of right to maintain the said drain in his land, and that he is entitled to remove it: Therefore refuse the prayer of the petition for interdict, and decern: Find the respondent liable to the appellant in the expenses of process in the Sheriff Court and in this Court," &c.

Counsel for Pursuers—W. Campbell, Q.C. —Macphail. Agents — Webster, Will, & Co., S.S.C.

Counsel for Defenders—Solicitor-General (Dickson, Q.C.)—Clyde. Agents — Lindsay, Howe, & Co., W.S.

Thursday December 21.

FIRST DIVISION.

(Without the Lord President.)

STEEL *v.* FINDLAY AND OTHERS.

Process—Appeal from Sheriff—Competency —Whole Subject-matter of the Cause—Court of Session Act 1868 (31 *and* 32 *cap.* 100), *sec.* 53—*Sheriff Court Act* 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24.

Held that the interlocutor of a sheriff in an action of sequestration for rent, which repelled all the pleas-in-law for the defender, granted warrant of sale, found the pursuer entitled to expenses, and *quoad ultra* continued the cause, was an interlocutor which disposed of the whole subject-matter of the cause within the meaning of section 53 of the Court of Session Act 1868, and section 24 of the Sheriff Court Act 1853, and was therefore appealable.

Observed (*per* Lord M'Laren and Lord Kinnear) that section 24 of the Sheriff Court Act 1853 is not directly or impliedly repealed by the Court of Session Act 1868.

The trustees of the late John Turner, proprietor of the subjects 61 High Street, Edinburgh, brought an action in the Sheriff Court, Edinburgh, against Mary Scott Steel, their tenant, concluding for sequestration of her effects under their hypothec, and for payment to them of £23, 15s., being the rent due and payable at 28th February 1898 for the quarter preceding, and "(2) the sum of £23, 15s. sterling, being the quarter year's rent due and payable by the defenders to the pursuers, as trustees foresaid, for said premises upon 15th May 1899 for the quarter year preceding that date, with interest on each of said sums at the rate of 5 per centum per annum from the said respective terms of payment, and with expenses, and also in security to the pursuers, as trustees foresaid, for payment of (1) the sum of £23, 15s. sterling, being the quarter year's rent of the said premises to become due at 28th August 1899 for the quarter year preceding that date, with the interest as aforesaid from that date, and with expenses; (2) the sum of £23, 15s. sterling, being the quarter's rent of the said premises to become due at 28th November 1899 for the quarter year preceding that date, with interest as aforesaid from that date, and with expenses; (3) the sum of £23, 15s. sterling, being the quarter's rent of the said premises to become due at 28th February 1900 for the quarter year preceding that date, with interest as aforesaid from that date and with expenses; and (4) the sum of £23, 15s. sterling, being the quarter's rent of the said premises to become due at 15th May 1900 for the quarter year preceding that date."

The defender pleaded — "(1) *Lis alibi pendens* as regards the two first items mentioned in the prayer of the petition. (2) By raising the action in the Debts Recovery Court the pursuers abandoned any right of hypothec they had for said two first items. (3) No relevant or sufficient statement to support the application for sequestration for the current year's rent. (4) In respect of the foregoing pleas, the deliverance granted in absence of defender, sequestrating and granting warrant to inventory and secure, ought to be recalled, and the action dismissed, with expenses. (5) The defender having been deprived of the occupancy of the attic part of the house through the roof being in a state of disrepair, and having suffered damage through the fault of the pursuers, is entitled to have an abatement of the rent equivalent to said loss."

On 1st August 1899 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor—"Repels the defences and grants warrant to licensed auctioneers, at the sight of the Clerk of Court or one of his assistants, to sell by public roup, after due advertisement, so much of the sequestrated effects as will pay to the pursuers, as trustees mentioned in the petition, (1) the sum of £23, 15s., being the quarter's rent of the premises in question due at 28th February 1899, and (2) the like sum of £23, 15s., being the quarter's rent of said premises due at 15th May 1899, with interest on said sums, and expenses of sale and of process as these shall be ascertained; appoints the free proceeds of said sale to be consigned with the Clerk of Court; grants warrant to open doors if necessary;