Thursday, July 8.

SECOND DIVISION.

ALDER *v.* CLARK AND OTHERS.

Process—Appeal—No Appearance for Respondent.

Where no appearance is made for the respondent in an appeal from a Sheriff Court, the appellant is not entitled to have the appeal sustained without showing cause why the existing judgment should be disturbed.

William Dacre Alder, Solicitor, Dumfries, appealed against an interlocutor of the Sheriff of Dumfries and Galloway adhering to an interlocutor of his Substitute in an action of multiplepoinding raised by him against Thomas Clark, innkeeper in Dumfries, and certain creditors of Clark's. The principal copy of the record in appeal had noted upon it an intimation by the Sheriff-Clerk-Depute that notice of the appeal had been sent to the agent for the respondents. When the case was called in the Second Division no appearance was made for any of the respondents, and a letter was produced from one of them to the pursuer stating that on consideration he had "decided not to follow you to the Court of Session."

The appellant moved that the appeal be sustained in respect of no appearance for the respondents. The Court continued the case that inquiry might be made into the practice. When the case was called the next day the appellant repeated his motion to have the appeal sustained.

He argued—Had this been an appeal from the Sheriff-Substitute to the Sheriff it must have been sustained — 39 and 40 Vict. cap. 70 (Sheriff Court Act 1876), sec. 20. It was also a rule of this Court that an appellant was entitled to have his appeal sustained if the respondent was wilfully absent. *Stewart* v. *Stewart*, May 16, 1871, 9 Macph. 740, was a conclusive authority. He also referred to *Macdonald* v. *Malcolm*, Jan. 18, 1870, 8 Macph. 419; *Chisholm* v. *Marshall*, Jan. 17, 1874, 1 R. 388; *Malcolm* v. *Monro*, Feb. 1, 1877, 4 R. 434.

At advising—

Lord Ormidale—Mr Rhind has raised a very important question in this case. It is a point of practice, but if we take his view that he is entitled to have a standing judgment of the Sheriff and Sheriff-Substitute of Dumfriesshire reversed, and a judgment given in his favour, not on the merits, but simply because the respondent has not followed him to this Court, that is a very serious matter; because I quite understand that many cases must occur where the respondent holding a judgment does not think it necessary to be at the expense of coming to this Court in support of his judgment because he is satisfied that the Court will have no hesitation in affirming the judgment. Such cases may often occur, and I am not sure that it is not reasonable to encourage that view instead of asking poor people to come here in a case which has already been heard by two judges; for this reason this Court will always scrupulously consider and examine such a case before reversing these judgments. There is nothing unreasonable in leaving a judgment to defend itself, and we know that the highest tribunal in the realm—the House of Lords—follows that course. An appellant would not be listened to there who asked for judgment in his favour because the respondent had not followed him thither. That House has established that an appellant must show cause why the existing judgment should be disturbed, and that will be required more completely before the judgment is touched, just because there is nobody on the other side. It seems reasonable that we should do the same. It would be monstrous that because a respondent is satisfied with the judgment he has obtained, and does not come here to defend it, we should sustain the appeal and leave him to go to the House of Lords to get redress. The case of *Stewart* certainly seems an authority for Mr Rhind's contention, but singularly enough in the report of that case, which is very short, the circumstances are not explained, and it was not stated by any judge that in the decision the Court were following any rule of practice or were laying down any rule for the future. The case may very likely have been disposed of in special circumstances, and special cause may have been shown. I do not think we should hold it to be a rule of this Court to be universally applied. I am more than confirmed in the view I have expressed by the opinion of the Lord President, under whose notice I have brought this matter. His view was that in a case where there is no appearance for a respondent the Court will not give the appellant what he wants simply in respect of non-appearance on the other side, but will make him show cause why the judgment should be altered. I have therefore no hesitation in over-ruling this preliminary objection.

Lord Gifford—I should have had considerable difficulty in refusing Mr Rhind's request if there had been shown to be any practice, supported by a series of decisions, in favour of his contention, or if in any of the cases cited it had been stated that there was any such practice. But no such practice has been proved, and I can only say that I entirely concur in the views expressed by your Lordship. The case of *Stewart* is no doubt an authority on the subject, but if it was intended there to lay down any general rule the report nowhere says so. It is argued that there is a general rule that an appellant can ask and obtain anything he pleases if he has no contradictor appearing by counsel and agent. I think that the section of the Sheriff Court Act of 1876 which Mr Rhind quoted in support of that rule tells rather against him. We know that is certainly not the rule in the House of Lords, and it seems to me to be a startling proposition to say that we are to act more rigidly than they act in the Superior Court. Nor can I see on principle why any such rule should exist. The judgments appealed from are good standing judgments, and must remain so until cause is shown for reversing them. I do not see that we are bound to put a man who holds a good judgment, or two good judgments as in this case, to the penalty of losing his case unless he employ counsel. I think we can only reverse judgments such as these on cause shown.

Lord Rutherfurd Clark—I must confess that I rather understood the practice to be as Mr Rhind has stated it. For the last few years, how-

ever, I have had no opportunity of seeing the practice of the Court as to appeals. I have never thought the practice, if practice there was, a reasonable one. I think it a most proper rule to introduce that a party to a suit who holds a judgment should not lose it simply because he does not follow the appellant to this Court. An appellant must, before he can succeed, show cause why the interlocutors appealed from should be altered.

The LORD JUSTICE-CLERK and LORD YOUNG were absent.

The Court then heard the appellant on the merits, and in the result recalled *hoc statu* the interlocutors complained of.

Counsel for Appellant — Rhind. Agent—W. Officer, S.S.C.

Thursday, July 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HERITABLE SECURITIES INVESTMENT ASSOCIATION (LIMITED) *v.* WINGATE & COMPANY.

Right in Security—Ex facie *Absolute Disposition*—*Lease to Disponers*—*Hypothec*—*Excessive Rent.*

W. & Co., shipbuilders, borrowed from a Heritable Securities Association (Limited) a sum of money, in security of which there were executed *unico contextu* (1) an *ex facie* absolute disposition of their shipbuilding yard and heritable machinery therein; (2) a personal bond for repayment of the sum by instalments running over ten years; (3) a lease by which the yard was again let to them by the Heritable Securities Association for a rent which was much larger than the rent stated in the county valuation roll; and (4) a deed of agreement, which after explaining that the lease had been granted with the view of more effectually securing the lenders in payment of the sum due under the deeds, provided "that it was agreed that the borrowers should receive credit for all sums paid in name of rent under the said lease as payments made to account of the sums due under" the above deeds. W. & Co. remained in possession of the yard. On their insolvency the Heritable Securities Association presented a petition for sequestration of the *invecta et illata* in the shipbuilding yard for the amount of the rent contained in the lease. The trustee on W. & Co.'s sequestrated estate resisted the action. *Held* (*diss.* Lord Young) that no true relation of landlord and tenant had been established, and that the various deeds embodied no more than an arrangement to give the pursuers a preferential security over the general creditors of the defenders, which was not maintainable at law.

Thomas Wingate & Company were engineers, shipbuilders, and founders at Whiteinch, near Glasgow. In December 1875, being in difficulties, they borrowed from the Heritable Securities Investment Association (Limited) the sum of £55,000, for which they granted their personal bond dated 14th December, and payable partly by instalments running over a period of ten years, and in security of which they also granted an *ex facie* absolute disposition of their shipbuilding yard and heritable machinery, &c., and furnishings as per inventory therein, dated the 14th and recorded 15th December 1875. On the same day, viz., 14th December 1875, a lease was drawn up by which the Heritable Securities Company let the subjects again to Wingate & Company at a rent of £4800 a-year, payment to be made at two terms in the year, for a period of ten years, viz., £2400 on the first Monday of December and June respectively. The rent of the subjects as it appeared on the valuation roll for the county of Lanark was only £1800. Further, on the 14th December 1875 the parties (lenders and borrowers) executed an agreement, which after alluding to the loan of £55,000, and the *ex facie* absolute disposition granted to the Heritable Securities Association, bore that the subjects therein conveyed should be held "by them in security of said advance, and interest and penalties thereon, as well as for premiums of insurance and other disbursement after mentioned; and the said first parties (the Association) shall be entitled to retain possession of said subjects till the whole sums due or to become due to them by the said second parties in respect of said advance of £55,000 are wholly paid, and the whole obligations undertaken by the said second parties to the said Association in connection therewith are fulfilled: (*Second*) The heritable subjects, machinery, and others before referred to are and shall be redeemable by the said second parties (except in the case of a sale or sales as after mentioned), on payment being made to the said Association, not only of all sums of money that shall be due to the said Association at the time of redemption under the foresaid loan of £55,000, but also of all other sums of money that shall be due to the said association at the time of redemption, in any manner of way, and the interest thereof, including all costs, charges, expenses, and disbursements of every kind incurred or to be incurred by the said Association in relation to the premises, with the interest thereof, which sums shall be sufficiently vouched and ascertained by a statement under the hand of the manager of the said Heritable Securities Investment Association (Limited). . . . . (*Eighth*) With regard to the said lease of the said several subjects and machinery and others, granted by the first parties to the second parties, in respect that the same has been granted with the view of more effectually securing the first parties in the payment of the sums due under the said personal bond and these presents, it is agreed and hereby declared that it is not the intention of the parties hereto that the first parties shall, in addition to the sums due under the said personal bond, be entitled to demand payment from the second parties also of the rents stipulated under the said lease to be paid to the first parties, and accordingly the second parties shall be entitled to receive credit for all sums paid in name of rent, under the said lease, as payments made to account or in satisfaction of the sums due under the said personal bond and these presents: (*Lastly*) The said second