the sale is effected by a common agent in a process of judicial sale, who is virtually a trustee for all concerned, and has been so treated in questions as to powers and disability. The surplus being heritable, it was rightly held that the *jus crediti* could not be attached by arrestment, which is the point actually decided by the case of *Gardiner*.

The principle that succession is not affected by the act of a trustee or administrator is an exception to what is, I think, the otherwise universal rule, that rights of succession depend on the quality of the estate at the ancestor's death. Now, in the present case the sale was not the act of the judicial factor. He did not institute the process of division; he was purely passive. The fact that the estate was under the management of a factor had no influence whatever on the result of the process of division, and the estate was in fact moveable at the time when the succession opened.

If authority be needed in such a question, the case of *Graham* v. *The Earl of Hopetoun*, which is considered in the Lord Ordinary's opinion, appears to be very much in point. In an accounting between the heir and the executors of a deceased proprietor, whose estates were under curatory, it was held that the price of teinds (being the proceeds of a compulsory sale under the authority of the Court of Teinds) belonged to the executors. The *ratio* of the decision is very distinctly stated in the sentence quoted by the Lord Ordinary from the report—"The subject in question was rendered moveable by the operation of a general law, from which the estates of pupils or fatuous persons are not exempt." In the same case the principle that the act of the curator cannot affect the succession was recognised, because it was held that the curator (who was also the heir-at-law of his ward) was not entitled to take credit for money lent out on heritable bonds, unless he should convey such bonds to the next-of-kin. Another important point decided in this case was the question whether the curator and heir was entitled to take credit for payments of heritable debt made out of the rents. Opinions may differ as to whether the principle was rightly applied on this question. But it would be out of place to discuss the question here; because the decision on the matter of the price of the teinds is directly in point, and is, I venture to think, demonstrably sound.

Before concluding I wish merely to mention the case of *Garland* v. *Stewart*. I agree with the Lord Ordinary that this case was decided on the terms of the Act of Parliament authorising the compulsory acquisition of the lands in question. The Act of Parliament was brought under our notice by counsel, and it was found to contain a direction that the proceeds of sale should be applied towards the redemption of heritable debt, or in the purchase of other lands. Thus it appears that the price was by Act of Parliament impressed with a trust for reconversion into heritable estate, and in such circumstances the Court, proceeding doubtless on the analogy of testamentary estates impressed with a trust for conversion, held that the price was heritable. It is obvious that the case of *Garland* lends no support to the argument of the reclaimer on the present question. I am, accordingly, for adhering to the interlocutor under review.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Reclaimer, the Heir-at-law—Ure—J. B. Young. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondents, the Next-of-kin—Burnet—Cook. Agents—Simpson & Marwick, W.S.

Saturday, March 2.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

NIDDRIE AND BENHAR COAL COMPANY *v.* YOUNG.

Process—Appeal—Competency—Consignation—Notice of Appeal to Respondent—Summary Prosecutions Appeals (Scotland) Act 1875 (38 *and* 39 *Vict. c.* 62), *sec.* 3, *sub-secs.* 1 *and* 5.

Objections were taken to the competency of an appeal under the Summary Prosecutions Appeals Act of 1875, on the ground that the appellants had failed to comply with the provisions of section 3 of the Act, in respect (1) that they had not consigned a sum to cover the costs of the appeal within three days after the Sheriff's decision, and (2) that notice of the appeal had not been given to the respondent.

The appellants explained (1) that they had lodged a minute within the statutory period craving the Sheriff to fix the amount to be consigned, but that owing to the illness of the Sheriff the amount had not been fixed and consigned until the day after the statutory period had elapsed; and (2) that notice of the appeal had been given to the respondent's agent.

The Court *dismissed* the appeal as incompetent, on the ground that intimation to the respondent's agent was not a sufficient compliance with the Act, which provides that notice shall be given "to the respondent."

Observed by Lord M'Laren that, the appellants having done all in their power to carry out the statutory requirements with regard to timeous consignation, he would not have been prepared to sustain the first objection had it been necessary to consider it.

Opinion on this point reserved by Lord Adam and Lord Kinnear.

The Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62) pro-

vides, section 3 — "On an inferior judge hearing and determining any cause, either party in the cause may, if dissatisfied with the judge's determination as erroneous in point of law, appeal thereagainst, notwithstanding any provision contained in the Act under which such cause shall have been brought excluding appeals against or review in any manner of way of any determination, judgment, or conviction, or complaint under such Act, by himself or his agent applying in writing within three days after such determination to the inferior judge to state and sign a case, setting forth the facts, and the grounds of such determination, for the opinion thereon of a superior court of law as hereinafter, provided; and on any such application being made the following provisions shall have effect:— 1. The appellant shall not be entitled to have a case stated and delivered to him unless within the said three days he shall (1) lodge in the hands of the clerk of court a bond with sufficient cautioner for answering and abiding by the judgment of the superior court in the appeal, and paying the costs should any be awarded by that court, or otherwise, in the discretion of the inferior judge, shall consign in the hands of the clerk of court such sum as may be fixed by the inferior judge to meet the penalty awarded, if any, and the said costs of the superior court. 5. The appellant shall within three days after receiving the case give notice of appeal in writing, together with a copy of the case, to the respondent, and shall within the same time transmit the case by post to, or cause it to be lodged with, one of the clerks of the superior court, together with a certificate under the hand of himself or of his law-agent of intimation, as herein required, having been made to the respondent."

A complaint was presented in the Sheriff Court of Edinburgh under the Summary Jurisdiction (Scotland) Acts of 1864 and 1881 by the Niddrie and Benhar Coal Company, Edinburgh, stating that Joseph Young, checkweigher at the complainers' mine, had contravened the Act 50 and 51 Vict. cap. 58, sec. 13, and craving the Sheriff to make a summary order for his removal from the office of checkweigher at said mine.

On 4th February 1895 the Sheriff-Substitute (RUTHERFURD) dismissed the complaint.

On 6th February the complainers lodged a minute requiring the Sheriff-Substitute to state and sign a case for appeal to the Court of Session, and to fix the sum to be lodged by the complainers in terms of the Act of 1875. On 8th February the sum of £10, 10s., as fixed by the Sheriff-Substitute, was consigned by the complainers.

A case in appeal was stated by the Sheriff-Substitute, as required by the appellants' minute of February 6th.

Within the statutory period a letter containing intimation of the appeal was sent to the respondent's agent, but not to the respondent himself.

The respondent objected to the competency of the appeal on the ground that the appellants had not satisfied the requirements of the Statute of 1875, section 3, sub-sections 1 and 5, and argued—(1) Consignation had only been made on the fourth day after the decision of the Sheriff-Substitute, and, as it was one of the conditions on which a party was entitled to have a case stated, that he should find caution or make consignation, as fixed by the inferior judge, within three days, the appeal must be dismissed—*Hutton* v. *Garland*, June 13, 1883, 10 R. (Just. Cas.) 60; *M'Gregor* v. *Rose*, November 3, 1887, 15 R. (Just. Cas.) 10. In *Thom* v. *Caledonian Railway Company*, November 12, 1886, 10 R. (Just. Cas.) 5, the objection to competency had not been taken till after the discussion on relevancy, and that was the reason why it was not sustained. (2) The intimation of appeal required by sub-section 5 must be made to the party himself, and it was not enough to give notice to his agent as had been done here—*Gairns* v. *Main*, November 10, 1887, 1 White, 521. Up to sub-section 5 the statute allowed an alternative, "the party or his agent," but here it gave no alternative, but said the notice must be given to the "respondent."

Argued for the appellants—(1) They had done their best to comply with the requirements of the statute, and it was through no fault of theirs, but owing to the illness of the Sheriff, that they had failed to do so. It had been laid down by Lord Young in *Thom* v. *Caledonian Railway Company*, that in such a case the Court might give relief against the mishap. (2) As notice had been given to the agent in charge of the case, it had to all intents and purposes been given to the respondent, who had suffered no prejudice thereby. The process was alive till the appeal was settled, and so the agent represented the party, and notice to him was sufficient.

At advising—

LORD ADAM—This is an appeal in a case stated under the Summary Prosecutions Appeals Act of 1875. Objections have been taken to the competency of the appeal on account of alleged neglect of the conditions prescribed by that Act. What is required by the Act is—[*His Lordship here read the terms of sub-sections* 1 *and* 5 *of section* 3 *of the Act.*]

The facts of the case raising the questions before us are as follows—On the 4th February 1895 the Inferior Judge determined the cause, and thereupon the agent for the appellant made application to him to fix the amount to be consigned by him as a condition of having a case stated in terms of sub-section 1 of section 3 of the Act. This application was therefore made within the statutory three days, and a further application was made by the appellant's agent within that period to see if the amount had been fixed. It was not, however, till the 8th of February, or the 4th day after the Sheriff's judgment had been pronounced, that the amount to be consigned was ascertained and duly consigned.

The answer made by the appellant to this objection is, that it was through no

fault of his that this occurred, and that he did all in his power to comply with the requisitions of the statute.

The second objection taken is, that no notice or intimation of the appeal was given to the respondent, as required by sub-section 5 of section 3 of the Act, the fact being that notice was given to the respondent's agent, and not to the respondent himself.

I think that this second objection is well founded. The fifth sub-section specifies clearly that the notice must be given to the respondent, and not to his agent, and I would point out that in many of the cases contemplated by the Act an alternative choice is given, *e.g.*, this very sub-section speaks of "a certificate under the hand of himself or his agent." Again, in sub-section 2 the Clerk of Court is required to submit the case in draft "to the parties or their agents." I think it is not hard to see why the Act requires the intimation of appeal to be made to the party personally, the reason being that after the preparation of the case all the proceedings in the Inferior Court are at an end. There is now a different tribunal, and therefore any intimation to the agent is dispensed with, and, there being now a new litigation, intimation must be made to the respondent himself, who, if he wishes to do so, may instruct an agent in the Supreme Court to carry on his case.

As regards the first objection, I am not clear about it, and prefer to reserve my opinion.

I am therefore of opinion that the objection should be sustained, and that the appeal is incompetent.

LORD M'LAREN—Two objections have been taken to the competency of this appeal. The first is that, while the statute provides that the appellant shall not be entitled to have a case delivered to him unless he finds caution or makes consignation within three days after the determination of the judge of the Inferior Court, consignation was in this case offered by the appellant within three days, but, the sum not having been fixed by the inferior judge, consignation was not in fact made until after the expiry of the three days.

If we are agreed in maintaining the second objection it is not necessary, perhaps, to give a definite opinion on the first, but as the point has been argued I think it is right to say that, as at present advised, I should not be able to sustain the first objection. The statute does not attach any nullity as a condition to finding consignation within three days, but merely provides that the penalty for failure to do so is that the appellant shall not be entitled to have a case delivered to him. If I were sitting as a judge in the Inferior Court, and consignation were offered but not made because of unavoidable delay on my part in not fixing the amount, I should certainly deliver a case, and then, as a judge sitting in the Court of Appeal, I should hold that the inferior judge had followed a perfectly correct course, and that the Court was not entitled to refuse the appeal as incompetent.

The party has done all that it was possible for him to do to satisfy the requirement of the statute, and the requirement of the statute is matter of regulation only, and does not affect the merits of the appeal.

On the second objection I agree with Lord Adam. There may be cases where it is sufficient to give notice to the agent and not to the party, especially where the matter in hand affects only the conduct of a going case. But it is impossible to take that view here where the statute has itself drawn the distinction, for the certificate, it is provided, may be in the hand of the party himself or of his law agent. I can see a reason why the notice or intimation should be made to the party himself, when the notice refers to the commencement of an entirely new process or appeal, and I need hardly point out that there can be no decree in absence, as in an ordinary action, in an appeal under the Summary Jurisdiction Act of 1875, and therefore it is quite right that the respondent should himself get notice in order that he may consider whether he should support the judgment by counsel, or whether he should leave his case in the hands of the Court. Now, in the present case, as personal intimation was not given, although in the circumstances that omission may be of little moment, I think that the objection, critical as it is, is a good objection and should be sustained.

LORD KINNEAR—I do not wish to indicate any dissent with Lord M'Laren's opinion as to the first objection, but prefer to reserve my opinion on it, as I agree with Lord Adam that it is not necessary to consider it, seeing that we hold the second objection to be good.

LORD PRESIDENT was absent.

The Court dismissed the appeal as incompetent.

Counsel for the Appellants — Craigie — Trotter. Agent—C. K. Harris, Solicitor.

Counsel for the Respondent — Wilton. Agents—Gray & Handyside, S.S.C.

Friday, February 22.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

STRACHEY'S TRUSTEES *v.* JOHNSTONE'S TRUSTEES.

Succession—Marriage-Contract Provision—Legacy—Cumulative Provisions.

A testator by his trust-disposition and settlement directed his trustees to pay to Mrs S, to whom he stood in *loco parentis*, out of funds invested in his business, a legacy of £4000, with interest at the rate of 5 per cent. if she allowed the money to remain in the business.

In an indenture of settlement made three years previously in contemplation