D. 687, *per* Lord Cunninghame, and *Alison*, February 3, 1886, 23 S.L.R. 362 — [LORD PRESIDENT—This application is made, is it not, on the distinct understanding that the legacy of 100 guineas is repaid?]

Counsel having answered in the affirmative, the Court granted the prayer of the petition without hearing further argument.

Counsel for the Petitioner — Cook. Agents—Strathern & Blair, W.S.

Friday, May 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SMITH *v.* KIRKWOOD AND ANOTHER

Process — Suspension — Suspension as a Mode of Bringing under Review the Judgments of Inferior Courts — Competency.

Where a party, charged upon a decree in the Sheriff Court, presented a note of suspension of the charge and its warrant, on the plea that the decree had been fraudulently obtained, *held* that he was not entitled to have the decree suspended in respect that the grounds of suspension being extrinsic to the Sheriff Court process, the note of suspension did not truly bring the Sheriff's judgment under review upon its merits.

Opinion reserved whether in view of the changes introduced by the Court of Session Act 1868 in dealing with the judgments of inferior courts, suspension is still a competent mode of bringing these under review.

In 1894 decree was pronounced of consent against the defender in an action of affiliation and aliment raised in the Sheriff Court of the Lothians and Peebles by Grace Stirling Kirkwood against Andrew Smith. The sum decerned for was £2, 2s. of inlying expenses and £7 per annum of aliment.

On 26th July 1894 Kirkwood charged Smith to make payment of a sum of money in terms of said decree, and after a petition for warrant to imprison had been presented against him, Smith was on 18th September 1894 ordained, on pain of imprisonment, to pay a sum down, and to make certain payments weekly thereafter, which payments he duly satisfied as they became due.

On 21st October 1896 Smith presented a note of suspension in the Bill Chamber craving the Court to suspend the abovementioned charge and warrant to imprison, with the whole grounds and warrants thereof.

The complainer recited the proceedings against him in the Sheriff Court, and made certain averments on which he founded the following plea-in-law:—"(1) The decree in said affiliation action having been obtained by means of the fraudulent representations and actings of the respondents, the charge and warrant to imprison following thereon are inept and ought to be suspended."

The respondents, Kirkwood and her father, as her curator-at-law, denied the averments of fraud and pleaded, *inter alia* — "(1) The complainer's statements are not relevant or sufficient to support the prayer of the note, and it ought to be dismissed."

The charge and petition for warrant to imprison following thereon duly proceeded upon the Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 4, and the Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. cap. 42), sec. 4.

The sections of the Court of Session Act 1868 (31 and 32 Vict. cap. 100) regulating the review of decisions of inferior courts are secs. 64 to 78.

On 29th January 1897 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds that the first plea-in-law for the complainer cannot be entertained in the action: Therefore repels said plea: Finds that it appears from the statement of parties that the sum charged for has been paid: Therefore suspends said charge and warrant for imprisonment: Finds the respondents entitled to expenses."

The complainer reclaimed, and argued—The note of suspension was directed not against the charge but against the decree upon which the charge was given. The time for appealing the Sheriff's judgment had long since elapsed, but suspension was a competent mode of bringing the Sheriff's judgment under review in such circumstances—Mackay's Practice, ii. 474; Ersk. iv. 3, 8; and the Court of Session Act 1868, while abolishing advocation, had not touched suspension.

The respondents' argument may be gathered from the opinions of the Judges.

LORD ADAM—[*After stating the facts his Lordship proceeded*] — The only averment I find in the suspension is that the respondents on a petition following on the said charge obtained warrant, and that the sums referred to in the warrant have been paid, and accordingly that the warrant is entirely exhausted.

Now, that is not the warrant the suspender complains of.

As I understand, the complainer does not so much object to the Lord Ordinary's interlocutor suspending that warrant, but what he says goes further, and is—I want also in this suspension the original decree against me in the Sheriff Court set aside. That is the only plea which he puts forward.

That means that the original decree is to be set aside on the ground of fraud. I have always understood that to upset a decree on the ground of fraud is to introduce extrinsic matter, and is only obtained by way of reduction. Accordingly, the Lord Ordinary seems to me to be quite

right when he says that that plea cannot be entertained, and I think we should adhere.

LORD M'LAREN — I concur with Lord Adam, and have little to add.

The first proposition maintained by Mr Anderson is that suspension of a charge with its warrant is a legal and competent mode of obtaining review of a decree upon its merits.

There was, no doubt, a period in the history of our process law when that proposition might have been affirmed. I think it is laid down in the institutional writers that decrees both of inferior courts and of the Lords Ordinary might be reviewed by way of suspension.

I should desire to reserve my opinion upon the question how far such procedure would be still competent in view of the radical changes introduced by the Court of Session Act 1868, in the mode of dealing with judgments of inferior courts. But supposing the proposition to be well founded it does not appear to me that any proper application of the kind is before us. We are not asked to review a judgment finding the defender liable for aliment on his own admission (which was the only matter before the Sheriff), but we are asked to set aside the decree upon grounds which were not before the Sheriff, and I fail to see how an application of the kind can be regarded as a mode of reviewing the decision of the Sheriff.

While the Lord Ordinary was no doubt quite entitled to suspend, no one opposing, he was I think also right in rejecting the complainer's first plea-in-law and the argument founded upon it.

LORD KINNEAR — I am of the same opinion. I quite agree with Lord M'Laren that it is unnecessary for the purpose of this case to consider how far the process of suspension of a final decree of an inferior court is now available as a process of review. Assuming it to be so, I confess I should be disposed to recal the note of suspension now before us as presenting to the Court, not an appeal against a judgment of the Sheriff on its merits, but a note of suspension of a charge for the purpose of staying diligence. However that may be, I think the true and sufficient ground of judgment is that which has been already stated. The charge and warrant of imprisonment complained of is a charge proceeding upon a warrant granted upon a petition to the Sheriff under the special provisions of the statute. The sum which the complainer has been charged to pay has now been paid, and therefore the warrant is exhausted because it has been satisfied, and that seems to me a perfectly sufficient ground for suspending a charge and warrant for imprisonment. But that being done, the only ground on which we are asked to consider anything further upon the complainer's application is that the decree which was obtained against him was obtained by fraud of the pursuer of the action. That is not a ground of review of the Sheriff's judgment on its merits, but a reason for setting aside the judgment on grounds altogether extrinsic to the process. I agree that that is not a competent process for raising any such question, and therefore that the Lord Ordinary's judgment must be adhered to.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Complainer — A. M. Anderson. Agent — Mungo Headrick, Solicitor.

Counsel for the Respondents—J. C. Watt. Agent—George Jack, S.S.C.

Saturday, May 29.

SECOND DIVISION.

[Sheriff of Roxburghshire.

HALL *v.* HUBNER.

Reparation—Landlord and Tenant—Defective Premises — Latent Defect — Decayed Stair in House.

The wife of a tenant of a house raised an action against the landlord to recover damages for injuries sustained by falling through a wooden stair into a cellar below. She averred that her husband had been tenant of the house for thirty years, that the wood of the stair was after the accident discovered to be in a decayed, rotten, and ruinous condition, that the defender was well aware of the dangerous state of the stair, that the pursuer's husband had frequently complained to the defender's factor and asked him to have the stair repaired or renewed, and that about a month before the accident it had been inspected by the factor's clerk.

The Court *allowed* an issue.

Webster v. *Brown*, May 12, 1892, 19 R. 765, *distinguished.*

Mrs Agnes Logan or Hall, wife of and residing with James Hall, poulterer, 22 Roxburgh Street, Kelso, with consent and concurrence of her husband, raised in the Sheriff Court at Jedburgh an action of damages for £500 against Mrs Jane Humble or Hubner, 13 Strathearn Road, Edinburgh.

The pursuer averred—"(Cond. 2) In the month of September 1895, and for thirty years or thereby previous thereto, the said James Hall was one of the female defender's tenants in said property. He occupied a dwelling-house in one part of it, which is No. 22, and also a shop, which is No. 24, both Roxburgh Street, Kelso. There is internal communication between the said house and shop. The defender is the proprietrix of both places, and received the rents for them from the said James Hall. The entrance to the dwelling-house was by means of a lobby entering from the street