The Sheriff has decided the case in favour of the defenders, and has stated his views in a very carefully expressed note, in which I concur, and I would propose that we should find the facts as he has done and affirm his decision in law.

LORD YOUNG—I have had considerable difficulty in this case. As your Lordships all, I understand, concur with the Sheriff's judgment, I have not doubts which would induce me to dissent or to propose any alteration of the judgment.

LORD TRAYNER—I think that in this case there is considerable room for difference of opinion, and I am not surprised that the Sheriff differed from the Sheriff-Substitute. On a careful consideration of the proof and of the debate, I think that the Sheriff's judgment is right, and that it should be affirmed.

LORD MONCREIFF—This is a narrow case, but I think that the balance of considerations is in favour of the judgment of the Sheriff.

It is admitted that an obligation rested on the glaziers to supply the necessary materials for cleaning the windows, or to satisfy themselves that the materials accepted and used by them were proper and sufficient.

I think that the pursuer has failed to prove any conduct or representations on the part of the respondents to relieve the glaziers of that obligation.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's appeal against the interlocutor of the Sheriff of Renfrew, of 29th February 1898, Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor: And of new assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses in this Court, and remit," &c.

Counsel for the Pursuer—M'Lennan—P. J. Blair. Agent—John Baird, Solicitor.

Counsel for the Defenders—C. N. Johnston—Cullen. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, June 24.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

POLLOCK *v.* BREMNER AND OTHERS (GOODWIN'S TRUSTEES).

Reparation — Wrongous Use of Legal Proceedings — Decree in Absence—Legal Tender—Small Debt Decree.

Decree in absence was obtained in an action of sequestration and sale in the Small Debt Court at the instance of a landlord against his tenant, the decree including the principal sum sued for and expenses. The tenant's name consequently appeared in the "Black List" as a defaulter. In an action of damages by the tenant against the landlord, the pursuer averred that after the raising of the action, and before the decree was obtained, he had sent a cheque for the amount of the rent due, which the defender had retained.

Held (*aff.* judgment of Lord Kincairney, *dub.* Lord M'Laren) that these averments were irrelevant in respect that the payment was by cheque, and not in money, and that it did not cover the sum sued for as expenses.

Sheriff—Small Debt—Finality of Decree—Small Debt Act 1837 (1 *Vict. c.* 41), *sec.* 30.

Opinion (*per* Lord Kincairney) that an action of damages for wrongfully taking a decree in absence in the Small Debt Court is excluded by the finality of such decrees under sec. 30 of the Small Debt Act 1837.

Reparation — Wrongous Sequestration — Small Debt—Summons of Sequestration and Sale.

Sequestration for rent was used by a landlord upon the warrant contained in a summons of sequestration and sale in the Small Debt Court. *Held* (*per* Lord Kincairney) that no action lay at the tenant's instance for wrongous sequestration, in respect that there had been no previous demand for payment.

This was an action at the instance of William Pollock, contractor, Glasgow, against the trustees of the late Alexander Goodwin, Duntocher, concluding for payment of £1000, being damages in respect of the defenders having wrongously sequestrated the pursuer's effects and obtained decree against him for a debt which he averred he had previously paid.

The pursuer averred that he was the tenant of a stable and a piece of ground belonging to the defenders, which were let to him from Whitsunday 1896 to Whitsunday 1897 at a rent of £10, payable half-yearly at the usual legal terms; that at Martinmas 1896 no demand was made on him by the defenders or their factor for payment of the half-year's rent then due, and that, relying on the fact that the defenders were in the

habit of presenting to him a receipt for the rent and demanding payment, he had waited to make such payment till this should be done; that on November 19th, without making any communication to him, the defenders took out a summons of sequestration and sale, and that on 23rd November they caused his goods in the stable to be sequestrated, this being done as a means of gratifying their malice against the pursuer.

The pursuer further averred—"(Cond. 5) On the same day, 23rd November 1896, the pursuer wrote a cheque for £5 (being the amount of the said rent) in favour of the defenders' said factor, and despatched it to him along with a letter on 26th November 1896, which letter they are hereby called on to produce, and the said cheque was received by the said factor on the 27th November. The pursuer had previously paid his rent by cheques, which were accepted by the said factor without objection. Having thus satisfied the claim of the defenders, and relying upon it that no further proceedings would be taken by them, the pursuer did not attend the Court. There were ample funds at the pursuer's credit with the bank on which said cheque was drawn, and had it been presented it would have been at once paid. Notwithstanding the receipt of said cheque the defenders on 1st December 1896 (which was the diet of appearance on the said summons), without acknowledging receipt of said cheque or communicating with the pursuer, by their said factor attended the Court, and, in absence of the pursuer, moved for and maliciously and oppressively, and without probable cause, took warrant of sale and decree for payment against him for the £5 of principal with 17s. 8d. of expenses. As was foreseen by the defenders, the pursuer's name was published as a defaulter in public prints of the lists of persons against whom decrees in absence had been obtained. The principal sum for which decree was taken had been paid, and if decree for the expenses above had been taken, the name of the pursuer would not have been so published. On 4th December 1896 the said cheque for £5 which, as above condescended on, had been in the possession of the defender's factor since 27th November 1896, was cashed by him, and the said expenses were subsequently paid by the pursuer."

He alleged that his credit had been seriously shaken by the sequestration of his effects, and the publication of his name in the "Black List;" and pleaded—"(1) The defenders having wrongously and oppressively sequestrated the pursuer's effects as condescended on, are liable in compensation to him in respect of the injury which he has thereby sustained. (2) The pursuer haviug suffered loss, injury, and damage through the illegal, wrongful, and malicious conduct of the defenders in moving for and obtaining decree against him for the said rent which had been previously paid, they are liable in reparation therefor."

The defenders pleaded that the pursuer's averments were irrelevant; and also (5) the action being excluded by the Small Debt Act 1837, at least in so far as it founds on irregularities prior to decree, and these defenders not being responsible for the publication of said decree, they ought to be assoilzied.

The Lord Ordinary (KINCAIRNEY) on 28th October 1897 found that the pursuer's averments were irrelevant, assoilzied the defenders from the conclusions of the summons, and found them entitled to expenses.

Opinion.—"The defenders are the trustees of the deceased Alexander Goodwin, Duntocher, and the pursuer was from June 1895 until Whitsunday 1897 tenant of a stable belonging to them. This action relates to the rent of the stable for half-a-year, payable at Martinmas 1896, amounting to £5. The pursuer states that this rent was not paid at the term because it was not demanded, and he expected that a receipt would be presented to him as the defenders had previously done; that on 19th November the defenders took out a small-debt summons of sequestration and sale against him, and on 23rd November sequestrated certain of his effects; that on 27th November he, the pursuer, paid the rent by a cheque for £5 sent to the defenders' factor, but that notwithstanding the defenders on 1st December by their factor took decree in absence for £5, and 17s. 8d. of expenses, and that in consequence the name of the pursuer was published as a defaulter in the 'Black List.' The defenders afterwards cashed the pursuer's cheque, and the pursuer paid the expenses, and no diligence followed on the decree. The pursuer complains that in these proceedings the defenders acted wrongfully in two particulars—(1) in sequestrating the pursuer's effects on 23rd November, and (2) in taking the decree in absence. He avers that the sequestration was malicious, and that the decree in absence was taken oppressively, maliciously, and without probable cause, and he desires to lodge issues to try these two claims. No issues have been lodged, the debate having been taken in the procedure roll on the defenders' prejudicial pleas, but I suppose the pursuer would propose issues corresponding with his averments.

"The defenders are not all in the same position. All are Goodwin's trustees, but one of them, Alexander Johnston, is also factor for the trust. But this distinction is not drawn in the summons, and I do not see that, at least at this stage, I can make any distinction between the defenders, but must consider them all as responsible for what was done. There is a somewhat curious peculiarity in the summons, inasmuch as the defenders are called only as trustees, while the conclusions are directed against them not only as trustees but also as individuals. No authority has been quoted to the effect that the action is incompetent on that account, and I am not prepared to hold it so. Neither am I prepared to hold that malice is not competently and relevantly averred. I cannot read condescendence 3 as a special averment accounting

for the defenders' malice, but I consider that in cases of this kind a general averment of malice is sufficient. I have, however, come on consideration to be of opinion that the defenders' plea that the averments are irrelevant is well-founded, and that no issue can be granted.

"The first question is, whether the pursuer has stated a good claim for damages in respect of the sequestration of his effects. There is nothing averred about this sequestration except that the summons was taken out on the 19th of November 1896 (a Thursday), and that the effects were sequestrated on the 23rd (Monday). I assume that the summons was in the statutory form given in Schedule B in the Small Debt Act. It is not stated whether the pursuer was cited before the 23rd, but I assume that he was not. It is said that no demand had been made for payment before the effects were sequestrated. This is denied by the defenders, but must of course be assumed at this stage. But while it may have been a harsh step to raise a small-debt action for a debt without a previous demand for payment, I never understood that there was anything illegal in doing so. In taking a decree in absence for a debt actually due, a creditor only exercises his legal right, and it is of no consequence whether his motive be malicious or not. But the pursuer maintains that the sequestration was illegal and wrongful. A creditor has, however, the same right to use sequestrations as he has to take decree; and if the debt be due, and the value of the effects sequestrated be not largely in excess of the debt, it does not appear that the debtor has any ground of complaint. The pursuer's only ground for characterising the sequestration as wrongful, was that the summons bore that the pursuer had refused or delayed to pay. I have not the summons before me, but if it was in terms of Schedule B of the Small Debt Act, as I suppose it was, it would no doubt contain that averment. The pursuer's counsel maintained that these words implied an averment that there had been a demand for payment which had been refused, contrary to the fact, as there had been no demand, and that they amounted to a special statement on which the exceptional demand for sequestration was based. I cannot assent to this argument. The words in question do not constitute any special statement, bnt are words of style inserted in every summons. They were, besides, in this case not false but true, because whenever a debt is overdue it is the fact that there has been delay in the payment of it whether payment has been demanded or not. The remedy of sequestration, besides, in the case of a small-debt action for rent is not an extraordinary or excptional, but an ordinary remedy, the warrant for which is inserted in the statutory style. In that respect Schedule B, which is the statutory form of a summons by a landlord, corresponds to Schedule A, which is the statutory form of an ordinary summons. But in Schedule A the warrant is to arrest, and in Schedule B it is to sequestrate. There may no doubt be an action of damages for wrongful arrestment or wrongful sequestration, but not I think where the procedure is regular, the debt due, and the value of the effects arrested or sequestrated not excessive. The mere fact that there has been no previous demand for payment has never been held to be a sufficient ground for such an action.

"The cases of *Johnston* v. *Young*, October 27, 1890, and *Grey* v. *Weir*, October 28, 1891, 19 R. 25, quoted by the pursuer, were different. They regarded applications by a landlord for warrants to have furniture which tenants had removed brought back to the premises. In these cases it was held that the landlord was asking an exceptional remedy, and was bound to make good the averments on which he demanded it. But in this case the defenders are not said to have made any exceptional demand, but merely to have followed the ordinary course of law.

"I am therefore of opinion that there is no averment that the defenders in using sequestration exceeded their legal rights, or did anything but avail themselves of the ordinary remedies of the law. I think, therefore, that the defenders are not liable in damages on this ground.

"The pursuer referred to the case of *Watson* v. *M'Culloch*, June 1, 1878, 5 R. 843, but I do not think it applies. In that case it was held that in an action for wrongous sequestration it was not necessary to aver malice and want of probable cause, and an issue was adjusted putting only the question whether the sequestration was wrongful. If I understand that case rightly, the issue was granted because it was averred that the value of the effects sequestrated was grossly in excess of the rent sued for. Besides, in that case it was found that the sum sued for was not due.

"The question whether the pursuer has a good claim in respect of the defenders having taken decree in absence after they or the trustee, who was also factor, had received the pursuer's cheque, is perhaps more difficult.

"The pursuer relied chiefly on the cases of *Davies* v. *Brown & Lyall*, June 8, 1867, 5 Macph. 842, and *Rhind* v. *Kemp & Co.*, December 13, 1893, 21 R. 275. In *Davies* v. *Brown* it appeared that after a summons was raised in the Sheriff's Ordinary Court, the defender (pursuer of the action of damage) had paid the sum sued for with expenses, and that the action had been settled, but that decree in absence had been taken when the defenders were ignorant of the settlement. But the present case differs from that case in material particulars. There the decree complained of was a decree in the Sheriff's ordinary Court, not in the Small Debt Court, which is an important difference, and the creditor's full claim had been paid and the action settled. That was not so in this case. The debtor had no doubt sent his cheque, but that was not equivalent to payment in cash, and the creditor was not bound to accept it as payment. But what is of more importance, the debtor had not paid

the expenses of the action and sequestration, although they knew they had been incurred. The pursuer would not have been bound to accept the £5 in full of his claim, and so far as appears it was tendered as full payment. The debtor knew that the creditor had a further claim, and if he objected to a decree going out against him for expenses, he should have attended the Court and either pleaded that he was not liable for expenses or paid them. But the present defenders seem to have acted within their rights, although it may be harshly and unreasonably, when not being offered payment in full, they, instead of accepting partial payment, took decree for the whole debt. It is said that they should have taken decree for the expenses only, and it it is averred—whether correctly or not I cannot say—that in that case the decree would not have appeared in the black list. But I do not see that the defenders were either entitled to do that or bound to do it; because it does not appear that the £5 was tendered as a payment in part or to account and not as a payment in full.

"*Rhind* v. *Kemp & Co.* was a case of a very special kind. There, it is true, the decree complained of was a decree in the Sheriff's Debts Recovery Court, and it is true that in section 17 of the Debts Recovery Act of 1887 there is an imperative exclusion of review when the sum sued for is so small as it was in that case. But the action was raised not against the creditor, but against the creditor's agent, and the allegation was not only that the debt and expenses had been paid, but that the agent had been instructed to stop proceedings, and that in taking decree he maliciously violated the instructions of his client.

"I consider that these cases differ materially from the present, and do not determine the point in pursuer's favour.

"On the other hand, reference was made to *Ormiston* v. *Redpath*, February 24, 1866, 4 Macph. 488, where an action of damages for raising an action and taking decree for a debt which had been paid was held irrelevant, partly on the ground that the pursuer ought himself to have attended the Court, produced his discharge, and so prevented the decree.

"In *Sturrock & Walch* v. *Ferguson*, November 14, 1890, 18 R. 109, where it was averred by the pursuer that in an action by the defender against him, decree in absence had been taken notwithstanding an arrangement to withdraw all personal claim against the pursuer, an issue was adjusted whether the defender had taken decree wrongfully and in breach of agreement,

"So in *Gibson & Co.* v. *Anderson & Co.*, February 23, 1897, 24 R. 556, the issue adjusted was whether a decree in absence in the Debts Recovery Court was taken wrongfully and in breach of agreement. The judgment in adjusting the issues is reported in the Scottish Law Reporter, vol. 34, p. 632. Breach of agreement was the ground of action in each of these cases.

"In *M'Robbie* v. *M'Lelland's Trustees*, January 31, 1891, 18 R. 470, a pursuer alleged that decree had been taken against him for expenses without notice in an action in the Sheriff Court, where expenses were asked against him only if he opposed the action, which he had not done; and that he had been charged on the decree, and there an issue was adjusted in the Outer House both in respect of the alleged wrongful decree and of the wrongful charge. But in the Inner House the issue was allowed only in respect of the alleged wrongful charge and not of the decree, for which (although it was undoubtedly wrongful) yet it was held that no action would lie. In that case Lord M'Laren observed 'that there can be no action of damages at the instance of a person against whom a decree has been regularly obtained on the ground that the decree was wrongful, or that the debt was not due, because no such decree can be obtained against a defender who has knowledge of the action and takes the proper steps to contest it.'

"These dicta touch the case of *Davies* somewhat nearly, and appear to show that it cannot safely be followed except where the circumstances are substantially the same, and that an action of damages for taking a decree for a debt not due will not be sustained unless the whole debt has been paid and the case has been settled, or unless the action of damages is founded on breach of contract.

"The defenders further plead (plea 5) that the action is excluded by the Small Debt Act so far as it founds on circumstances prior to the decree, and as the defenders took no steps after they obtained decree, this is a plea to exclude the action altogether. The reference is to section 30 of the Small Debt Act, which excludes review of small-debt decrees except on the ground and in the manner stated.

"In support of this plea the defenders refer to *Bell* v. *Gunn*, June 21, 1859, 21 D. 1008; *Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333; and *Gray* v. *Stewart*, March 18, 1892, 19 R. 692, in which the plea received effect. The pursuer maintained that where actions of damages in respect of a small-debt decree had been disallowed, that had always been on the ground of informalities in procedure. That may have been so in the cases quoted, but the plea does not seem confined to such cases, and I am of opinion that it is well founded, and that on that ground also both the claims in this action are excluded.

"On these grounds I am of opinion that the defenders are entitled to absolvitor."

The pursuer reclaimed.

In the course of the argument upon the reclaiming-note the reclaimer abandoned his claim of damages for wrongous sequestration.

The arguments of the parties upon his claim in respect of the decree appear fully in the Lord Ordinary's opinion, *supra*.

At advising—

LORD PRESIDENT—The reclaimer gave up in argument his claim of damages for wrongous sequestration.

To the relevancy of his claim of damages

for the decree there is, I think, a short and conclusive answer. The claim of the present defenders was for £5 and the expenses of the small-debt summons. The present pursuer met that claim by sending not money but a cheque, and that cheque not for the £5 and expenses, but for £5 only. Now, the only tender that could have legally disentitled the present defenders to proceed to take decree was a legal tender for all they claimed—that is to say, a tender in money of the full amount sued for. As we are here in an action of damages, the question is, not whether the conduct of the defenders was commendable, but whether it was illegal, and in my opinion it was not illegal. It is impossible to build up on the mere fact that the cheque was not returned, any agreement not to take decree or any bar against taking it.

This being a sufficient ground of judgment, I do not proceed at all on the series of cases about the finality of small-debt decrees referred to in the Lord Ordinary's note, and I have no occasion to consider whether their principle would exclude an action of damages for breach of an agreement not to take decree. I am for adhering.

LORD M'LAREN—As to the first head of damage I have no doubt. I have felt the second question to be one of difficulty, because while it is very true that a cheque is not a legal tender, yet if a cheque is sent in payment of a debt, and the creditor does not mean to accept it, good faith prescribes that he should return the cheque before proceeding with legal measures for the enforcement of his claim. I should not wish to be understood as saying that in no circumstances would a creditor who retains a cheque sent to him, be barred from taking decree. But in the present case the tender (such as it was) did not include expenses; there was not much time for ascertaining whether the cheque would be honoured, and no special damage is alleged. And so my doubts on this subject are not so strong as to induce me to dissent from the Lord Ordinary's judgment, which I understand is approved by the majority of the Court.

LORD KINNEAR and LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—Horne. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders — Jameson, Q.C.—Crabb Watt. Agents—Clark & Macdonald, S.S.C.

Friday, June 24.

SECOND DIVISION.

[Lord Pearson, Ordinary.

SHARP *v.* SHARP.

Husband and Wife—Separation and Aliment — Defence that Marriage Null — Husband of Previous Marriage not Proved to be Dead—Presumption of Life —Exception—Onus.

In 1868 a woman entered into a regular marriage with A, who was then 25 years of age. A deserted her in 1871, and she had not heard of him since that date. In 1875 she went through the form of a regular marriage with B. In 1897 she brought an action of separation and aliment on the ground of cruelty against B, who pleaded in defence that he was not her husband. The pursuer admitted the facts above stated as to her marriage with A, and a certificate of that marriage was produced. There was nothing apart from the lapse of time to indicate that A was dead even at the date when the action was raised. *Held* (*diss.* Lord Moncreiff) that A must be presumed, in the absence of evidence to the contrary, to have been alive in 1875, that it lay upon the pursuer to prove that he was then dead, that apart from evidence to this effect her marriage with B was not proved, and that consequently she had no title to sue the present action. Action accordingly *dismissed.*

The facts of this case sufficiently appear from the opinion of the Lord Ordinary (PEARSON), which was as follows:—"This is an action of separation and aliment. The pursuer's case is that she and the defender were regularly married on 14th May 1875, and that after a long course of cruelty and maltreatment on his part she was obliged to leave him in January 1897. During those 22 years they lived together as man and wife in and near Kirkcaldy. There are no children of the marriage.

"The cruelty is clearly proved. I can give no weight to the defender's denials, as against the evidence adduced by the pursuer, which (as I think) is entirely trustworthy on this head.

"The defender, however, pleads that the pursuer had been previously married to a man named Scott, who was alive in 1880 and may still be alive, and that the marriage now founded on is null. The facts on this part of the case are these:—The pursuer was regularly married to Thomas Scott, banksman at a coal pit, on 18th December 1868, their ages at that time being 25 and 26. Scott left her in February 1871, and she has not heard of him since. If he is still alive, his age is 55. Apart from the lapse of time, there are no circumstances proved which tend to show that he is dead.

"After waiting four years and three months, the pursuer went through the form of a regular marriage with the defen-