be unfortunate if, through adhering to what may be regarded as the strict letter of the law, we were to prevent them—for no good reason as far as I can see—from carrying out what was clearly and distinctly stated by the truster as the purpose which he most of all desired to have carried out.

Accordingly, while I quite recognise the delicacy of the position, I think, on the whole matter, the circumstances are such that we should be well advised in granting and have power to grant the prayer of this petition.

LORD DUNDAS — I agree. I think this petition is one which the Court would be disposed and indeed anxious to grant if it can properly and competently do so. The whole circumstances stated in the excellent report by Mr Whitelaw seem to point all in one direction. It was plainly the wish and indeed the leading wish of the testator that this nephew of his should have the farm and the special shorthorn stock upon it. The young man is desirous of owning the farm. He is in minority and his curator also desires it. The skilled reporter tells us that the price proposed is a reasonable and proper one.

I think that we may grant the prayer of the petition without trenching in any way upon previous authority. The petition is not one where trustees come to ask the advice of the Court as to the precise extent of their powers in regard to some contemplated act of administration or management. It is one where the trustees desire powers to carry out what was plainly the wish of the testator in the way best calculated to reach that end, though not strictly in accordance with his directions owing to the absence of an express power to buy. I agree with your Lordship that this seems to be a case in which we can properly supply the want of machinery, and I think that the observations of Lord Johnston and Lord Skerrington in *Hall's* case (1918 S.C. 646) point in that direction. If we may grant the power to purchase, I think there is no difficulty in our also granting the ancillary power to facilitate that end by borrowing. Whatever difficulty there might have been seems to have been removed, as regards the procedure in that matter, by the very recent case in the First Division of the *Prime Gilt Box*.

Upon the whole, therefore, I am for granting the prayer.

LORD ORMIDALE—The leading purpose of the truster's settlement here is clear that the farm with the shorthorn stock should be preserved for his nephew. The nephew is still in minority. The truster made anxious provision for due effect being given to his settlement in the circumstances which existed when he himself was alive and which he assumed would continue to endure after his decease. As a matter of fact a *casus improvisus* has happened, to wit, the purchase of the farm by a new proprietor who proposes to sell it. In these circumstances it is obvious that the very clearly expressed object of the truster will be defeated unless the power sought is granted, because the trustees are not provided under the settlement with machinery which will enable them to give effect to the truster's desires. The circumstances appear to me, as your Lordship has stated, exceptional; but I think that the Court is warranted in the excerise of its *nobile officium* in granting the trustees the power that they crave.

On the other point, as to the power to borrow, I think we are warranted in granting that power by the case of the *Prime Gilt Box*.

The Court pronounced this interlocutor:—

"Approve of the report; grant warrant to, authorise, and empower the petitioners to purchase from Charles William Dyson Perrins or his successors at the price of £5640, with entry at Whitsunday 1921, all and whole the farm and lands of Nonikiln mentioned in the petition: Further authorise the petitioners to borrow money to an amount not exceeding the sum of £2000 on the security of the said subjects, and to grant a bond and disposition in security or bonds and dispositions in security over said subjects for a sum or sums not exceeding in all the said amount of £2000 in favour of the lender or lenders: Authorise the expenses of and incident to this application, and of the conveyance and bond and disposition or bonds and dispositions in security and whole consequents thereof, including the discharge or discharges thereof, to be charged against the trust estate of the deceased Thomas Alexander Anderson; and decern."

Counsel for the Petitioners—Chree, K.C. — Scott. Agents — Aitken, Methuen, & Aikman, W.S.

Tuesday, February 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DAVISON *v.* ANDERSON AND ANOTHER.

Process—Appeal—Competency—Interlocutor Recalling Decree in Absence—"Any Action Pending in Any Sheriff Court at the Commencement of this Act"—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 27, *and First Schedule, Rule* 33—*Sheriff Courts (Scotland) Act* 1913 (2 *and* 3 *Geo. V, cap.* 28), *sec.* 5.

The Sheriff Courts (Scotland) Act 1907, as amended by the Sheriff Courts (Scotland) Act 1913, enacts — Section 27—"Subject to the provisions of this Act an appeal to the Sheriff shall be competent against all final judgments of the Sheriff-Substitute, and also against interlocutors—(E) *refusing a reponing note.*" [*The words printed in italics were added by the Act of* 1913.] The First Schedule provides, Rule 33—"Any interlocutor or order recalling, or incidental to the recal, of a decree

in absence shall be final and not subject to review."

The Sheriff Courts (Scotland) Act 1913 enacts—Section 5—"Nothing in this Act contained shall apply to any action pending in any Sheriff Court at the commencement of this Act."

Decree in absence was pronounced in an action which was raised in the Sheriff Court in 1908. In October 1920 the defenders presented a reponing note which was refused by the Sheriff-Substitute. The defender appealed to the Sheriff, who sustained the appeal and recalled the decree in absence. The pursuer thereupon asked leave to appeal to the Court of Session, which the Sheriff refused on the ground that by Rule 33 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 his interlocutor was final. The pursuer having appealed to the Court of Session without leave on the ground that the Sheriff in recalling the decree in absence had acted in excess of his jurisdiction, in respect that the action was a pending one at the commencement of the Sheriff Courts (Scotland) Act 1913, and that the provision of that Act rendering appeals from a judgment of the Sheriff-Substitute refusing a reponing note to the Sheriff competent did not apply, the defender objected to the competency of the appeal. *Held* that the action was not a pending one in the sense of section 5 of the Sheriff Courts (Scotland) Act 1913; that accordingly the appeal from the Sheriff-Substitute to the Sheriff was competent; and that, the Sheriff's judgment being final, in terms of Rule 33 of the First Schedule of the Sheriff Courts (Scotland) Act 1907, the appeal to the Court of Session was incompetent.

The Sheriff Courts (Scotland) Act 1907, section 27, and First Schedule, Rule 33, and the Sheriff Courts (Scotland) Act 1913, section 5, are quoted *supra in rubric.*

John Usher Davison, wholesale provision merchant, London, *pursuer*, brought an action in the Sheriff Court of Lanarkshire at Glasgow against Mrs Emily Lamb Anderson, wife of Stewart Anderson, Glasgow, as principal, and her husband Stewart Anderson as guarantor, jointly and severally or severally *defenders*, for payment of two sums of principal contained in an indenture of mortgage between the parties, and the interest thereon.

On 19th June 1908, in respect that no appearance had been entered by the defenders, decree was pronounced against them jointly and severally as craved.

In October 1920 the defender Stewart Anderson presented a reponing note, which on 29th October 1920 the Sheriff-Substitute (A. S. D. THOMSON) refused.

The defenders appealed to the Sheriff (A. O. M. MACKENZIE), who on 14th December 1920 recalled the interlocutor of the Sheriff-Substitute, dated 29th October 1920, complained of, recalled the decree in absence of date 19th June 1908, and remitted the cause to the Sheriff-Substitute to proceed.

The pursuer thereupon asked leave to appeal, and on 20th December 1920 the Sheriff refused the motion.

Note.—"Rule 33 of the Sheriff Courts Act 1907, provides that any interlocutor or order recalling a decree in absence shall be final and not subject to review. In view of the terms of that rule, I doubt whether I could, by granting leave to appeal, make an appeal against my interlocutor reponing the defender competent, but in any case the rule appears to me to afford a very clear indication against the propriety of granting leave to appeal in such a case."

On 31st December 1920 the pursuer appealed to the Court of Session.

The defender having objected to the competency of the appeal the pursuer argued—The present appeal was competent because there had been an excess of jurisdiction on the part of an inferior judge—*Allen & Sons Billposting, Limited* v. *Corporation of Edinburgh*, 1909 S.C. 70, 46 S.L.R. 65; *Smith* v. *Rennie*, 1919 S.C. 705, 56 S.L.R. 606; *Brooke* v. *Marchioness of Huntly*, 1911, 49 S.L.R. 71 *per* Lord President (Dunedin) at p. 72. The appeal from the Sheriff-Substitute to the Sheriff was incompetent. The present action was a pending action at the time that the Sheriff Courts (Scotland) Act 1913 (2 and 3 Geo. V, cap. 28) came into operation. By section 5 of that Act it was therefore excepted from the operation of that Act. It fell therefore under section 27 and Rule 33 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) according to which the Sheriff-Substitute's judgment on the reponing note was final. The provision for an appeal to the Sheriff from a judgment of the Sheriff-Substitute refusing a reponing note was only made by the Act of 1913. The Sheriff had therefore no jurisdiction to deal with that question, and having acted in excess of his jurisdiction the present appeal to the Court of Session was competent. No doubt a reduction on suspension would also have been competent but the pursuer was not limited to these methods of review. Even if the Sheriff had jurisdiction his judgment was wrong, because he had recalled the decree in absence *in toto*, whereas all the statute allowed him to do was to recall it so far as not implemented.

Argued for the defender—The appeal was incompetent. The present action was not a pending action at the commencement of the Sheriff Courts (Scotland) Act 1913—Mackay's Manual p. 226; *Allan* v. *Wormser, Harris, & Company*, 1894, 21 R. 866, *per* Lord Rutherford Clark at p. 874, 31 S.L.R. 698; *Cropper* v. *Smith*, 1884, 54 L.J., (Ch.) 287. It was therefore not excluded by section 5 of that Act from its operation. The amendments introduced by that Act therefore applied, and accordingly under section 27 of the Sheriff Courts (Scotland) Act 1907, as amended by the Sheriff Courts (Scotland) Act 1913, the appeal to the Sheriff from the interlocutor of the Sheriff-Substitute refusing the reponing note was competent. But if it was competent, then the Sheriff had acted within his jurisdiction and Rule 33 of the Sheriff Courts (Scotland)

Act 1907, on which the Sheriff founded in refusing leave to appeal to the Court of Session, applied. Section 28 as amended by the Act of 1913 only allowed such appeals to the Court of Session where the reponing note was refused. Even, however, if the Sheriff had exceeded his jurisdiction the provisions of the Court of Session Act 1810 (50 Geo. III, cap. 112) section 36, allowing appeals on the ground of defect of jurisdiction, were repealed by the Second Schedule of the Sheriff Courts (Scotland) Act 1907 so far as these provisions related to the Sheriff Court. *Smith* v. *Rennie, cit. sup.*, where it was held that such an appeal was competent, was based on the ground that *quoad* Dean of Guild Court proceedings section 36 was still in force. There was no inherent power at common law to sustain such appeals. In *Allen & Sons Billposting, Limited* v. *Corporation of Edinburgh, cit. sup.*, the point was conceded, and in that case the Sheriff was not exercising his ordinary jurisdiction. Again, in *Harper* v. *Inspector of Rutherglen*, 1903, 6 F. 23, 41 S.L.R. 16, a special statutory jurisdiction was involved. Further, even assuming that the Act of 1907 applied and the Act of 1913 did not, an appeal from the Sheriff-Substitute to the Sheriff was competent. An interlocutor refusing a reponing note was a final interlocutor as defined by the Sheriff Courts (Scotland) Act 1907 section 3 (*h*) and being final, was appealable.

LORD JUSTICE-CLERK—This case raises what I have found to be very troublesome questions as to the meaning of the Sheriff Court Acts of 1907 and 1913. But the Act of 1907 need not be considered if a certain interpretation is placed upon section 5 of the Act of 1913, which provides—"Nothing in this Act contained shall apply to any action pending in any Sheriff Court at the commencement of this Act." We have to interpret the words "any action pending in any Sheriff Court at the commencement of this Act." The action in which this decree in absence was pronounced was raised in 1908, and the defender was cited to appear. He did not appear. The result was that the pursuer enrolled the case for decree in absence, which was pronounced on 19th June 1908, and the decree was extracted. In my opinion the original action then ceased to be pending in the Sheriff Court. In October 1920 the defender presented this reponing note when the action in question was no longer pending in the Sheriff Court. Accordingly the present proceedings were not withdrawn from the operation of the Act of 1913 by section 5 thereof, so that if and when the original proceedings of 1908 came to be resurrected the Act of 1913 applied to them. Rule 33 of the Act of 1907 as amended by the Act of 1913 provides that "Any interlocutor or order recalling or incidental to the recal of a decree in absence shall be final and not subject to review." The interlocutor against which the present appeal is taken falls exactly within that definition. It is an interlocutor recalling a decree in absence. It seems to me that that interlocutor is final and is not subject to review.

[*His Lordship then dealt with a matter which is not reported*].

As regards the objection to the competency of the appeal from the Sheriff-Substitute to the Sheriff I think that too fails in respect of the provisions of section 27 of the amended Act as it now stands, because it expressly allows an appeal to the Sheriff from an interlocutor of the Sheriff-Substitute refusing a reponing note.

The result, therefore, in my opinion is that the objection to the competency of the appeal is good, and that the Sheriff's judgment should stand.

LORD DUNDAS — I think this appeal is incompetent. Rule 33 of the Sheriff Courts Act 1907 provides that any interlocutor or order upon a reponing note, or recalling or incidental to the recal of a decree in absence, shall be final and not subject to review. That would seem to end the matter. But Mr Taylor argued with some subtlety that we must go further back, and that if we did so we should find that the appeal from the Sheriff-Substitute to the Sheriff was incompetent, and therefore the Sheriff's interlocutor should be set aside and could be set aside in this appeal. His reasoning was that the proceedings were brought under the Act of 1907, under which no appeal lay from the Sheriff-Substitute to the Sheriff against an order upon a reponing note. But the Act of 1913 has altered that. I do not think that section 5 of the Act of 1913 can be prayed in aid by the appellant, because I do not think that there was here an action pending in the Sheriff Court when the Act of 1913 came into operation. In my opinion the action was not pending, a final decree had been pronounced and it had been extracted and acted upon. In my judgment this appeal is incompetent and must be dismissed.

LORD ORMIDALE — I have come to the same conclusion. I confess I had some difficulty at first in understanding how it could be said that the reponing note was not presented in a pending action in the Sheriff Court, but after the argument we have heard I feel I must come to the conclusion that there was no such action, and that Mr Fenton was right in saying that by some process the action had ceased to be pending in 1908 but had been resurrected so as to become an action pending in 1920 when reponing took place. I think there is no answer to the argument that there was no action pending in the Sheriff Court until this decree reponing the respondent was pronounced. If that is so, then clearly upon the terms of the Act of 1913 the respondent is right in his contention that the appeal is incompetent.

LORD SALVESEN was absent.

The Court refused the appeal as incompetent.

Counsel for the Pursuer and Appellant—Orr Taylor. Agents — Balfour & Manson, S.S.C.

Counsel for the Defender and Reclaimer—Fenton. Agents—Hossack & Hamilton, W.S.