

that a majority of the Judges are in favour of the view taken by the Second Division.

LORD DEAS—I agree so far with Lord Ardmillan that the case of the *Shotts Iron Company* is quite a case in point as to the question of the competency of this appeal. The circumstances of the two cases are very similar, in fact there is no substantial difference between them. Now, I am unable to see any good reason for holding that that case was badly decided; on the contrary, I think that all the authorities are in favour of it. I have no hesitation, therefore, in agreeing with the majority of the other Division.

LORD PRESIDENT—I have arrived at an opposite opinion from that of your Lordship, and agree with Lord Kinloch and Lord Ardmillan, and have nothing to add to what they have said. The authorities are, I consider, all on the other side, with the exception of the case of *Shotts Iron Company*. When that case was first mentioned to us, it was unreported, and it was difficult to ascertain what had passed before the Court. But undoubtedly the decision arrived at was contrary to my opinion. The question was, however, fully deserving of reconsideration, as we find one of the Judges of the Second Division, who decided the *Shotts'* case, changing his views. I regret that I cannot agree with the majority, but it is, at any rate, satisfactory to have a point of practice like this definitely decided.

Competency of appeal sustained.

Counsel for Appellant—J. D. Grant. Agent—James Barton, S.S.C.

Counsel for Respondent—Mair and Rhind. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Tuesday, July 16.

RIGBY AND BEARDMORE v. DOWNIE.

(*Ante*, p. 360.)

*Expenses—Taxation—A. S., 19th December 1835.*

The Court pronounced an interlocutor “finding the pursuers entitled to expenses, subject to a deduction of £25 from the taxed amount thereof, in respect of the proceedings in which they were unsuccessful between the 17th June and the end of November 1871. The Auditor taxed off the whole of the pursuers' expenses (amounting to about £49) during the period mentioned, and from the taxed amount deducted £25. The pursuers objected that the true meaning of the interlocutor was that they should be entitled to their whole expenses, less £25. Objection *repelled*.”

The LORD PRESIDENT said—There is an important Act of Sederunt, dated 19th December 1835, which provides, “that notwithstanding a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.” Keeping in view this general rule, we have to construe our interlocutor of March 8th. We found the pursuer en-

titled to expenses. If no more had been said, it was the duty of the Auditor to consider whether, in any part of the case, the pursuer, the successful party on the whole, had been unsuccessful. On this we have a very plain statement in the interlocutor. It was the Auditor's duty to strike off the part of the pursuers' account for the period between 17th June and 2d November 1871. But then we found the pursuers entitled to expenses, “subject to a deduction of £25, in respect of the proceedings, &c.” This is represented as a modification, a fixing, without any remit to the Auditor, of the amount to be deducted from the pursuers' account, as representing the amount of expenses for the period in which they were unsuccessful. It is not expressed as a modification. The true meaning is that we must first take the taxed account, and then deduct £25 from the taxed account. I am satisfied that it was the intention of the Court, as well as the proper meaning of the interlocutor, that the £25 should be paid to the defender for his expenses during the period in which the pursuers were unsuccessful.

The other Judges concurred.

Counsel for Pursuers — Solicitor-General and Lancaster. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Defender—Watson and J. A. Reid. Agent—P. S. Malloch, S.S.C.

Wednesday, July 17.

LINDSAY (TOD'S TRUSTEE), PETITIONER.

*Bankruptcy—Bankruptcy Act, 1856, § 90—Trustee—Examination relative to Bankrupt's Estate.*

*Held* that the only questions which can, in terms of the Bankruptcy Act 1856, be put to persons examined on oath under section 90, are such as relate to the bankrupt's estate or affairs.

Mr Lindsay, accountant, Edinburgh, trustee on the sequestrated estate of William James Tod, builder, Edinburgh, presented a petition to the Sheriff, praying him to grant warrant, under the 90th section of the Bankruptcy Act 1856, to the said trustee to examine upon oath certain persons who, he averred, were able to give information relative to the estate of the bankrupt, who had absconded, taking his books and papers with him.

The Sheriff (HAMILTON) granted the prayer of the petition, and the examination was accordingly proceeded with. In the course of the examination William Officer, S.S.C., formerly agent for the bankrupt, but not his agent in the sequestration, was asked—“When did you see the bankrupt last?—A. I saw him about the beginning of June current. Q. Where?—A. In London. Q. Do you know where he is now?—A. I decline to answer that question on the ground of confidentiality, unless directed to do so by the Sheriff.” The Sheriff-Substitute (HAMILTON) ruled that the witness was not bound to answer the question, in respect that it had no reference to the bankrupt's affairs. The witness was then asked—“Have you received any letters from the bankrupt since he left Edinburgh?” The witness stated that he had received no letters from the bankrupt relative to his affairs, and declined to make any further answer upon that ground, and also on the ground of confidentiality. The Sheriff-Substitute disallowed the question.

The trustee appealed against these deliverances. TRAYNER, for him, cited *Mackersy v. Mackenzie*, March 1, 1823, 2 S. 256, 21 F.C. 193; *Sawers v. Balmorie*, Dec. 17, 1858, 21 D. 153.

SCOTT, for the respondent, argued that all that was allowed by the statute was an examination relative to the estate of the bankrupt, and that the questions objected to had nothing whatever to do with the estate.

At advising—

LORD PRESIDENT—This is an appeal against the ruling of the Sheriff in an examination under the 90th section of the Bankruptcy Act. In the course of this examination a witness, Mr Officer, was asked—“When did you see the bankrupt last?—Depones, I saw him about the beginning of June current. Interrogated, Where?—Depones, In London. Interrogated, Do you know where he is now?—Depones, I decline to answer that question on the ground of confidentiality, unless directed to do so by the Sheriff.” Then the Sheriff-Substitute “sustains the declinature, in respect the question has no reference to the bankrupt’s affairs.” Now, I think that the Sheriff did quite right in sustaining the declinature, and that he assigned the true reason. The 90th section empowers the trustee to apply to the Sheriff to order an examination on oath of the bankrupt’s wife and family, clerks, servants, factors, and others, who can give information relative to his estate, and issue warrant requiring such persons to appear, and if they refuse to appear the Sheriff may issue a warrant to apprehend the person so failing to appear; then the 91st section enacts that the “bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt’s affairs, and cause the same, or copies thereof, to be delivered to the trustee.” Now, a very stringent scrutiny is here permitted, and persons are compelled to answer questions in which they have no interest, but the statute confines the subject of examination to the estate and affairs of the bankrupt, and a person who cannot give any information on these subjects cannot be questioned in reference to other matters. Here the question was, where is the bankrupt?—that is not a question about the estate, it is a question about the whereabouts of the bankrupt himself, and however important it might be to the trustee to get an answer to that question, he could not competently ask it under the 90th section of the statute, and the Sheriff was quite right in disallowing the question.

But the examination goes on—“Have you any letters from the bankrupt relative to his affairs?—Depones, No. Interrogated, Have you received any letters from the bankrupt since he left Edinburgh?—The witness stated that he had received no letters from the bankrupt relative to his affairs, and declined to answer the question upon that ground, and also on the ground of confidentiality.” Here again the Sheriff-Substitute sustained the objection. Now, if the witness had said that he had letters from the bankrupt, but that they contained nothing relative to the estate or affairs of the bankrupt, I do not think that he could be allowed to be sole judge whether the letters really contained matters about the affairs of the bankrupt or not, but that the Sheriff-Substitute would have a right to look at the letters and satisfy himself. But it was not alleged here that the witness had letters

containing any such information, so I think that the Sheriff was again right in sustaining the objection. I am therefore of opinion that the appeal should be dismissed.

The other Judges concurred.

Agents for Appellant—Lindsay, Paterson, & Hall, W.S.

Wednesday, July 17.

BRODIE *v.* DYCE.

*Proof—Competency—Filiation.*

Circumstances in which, after proof had been closed in the Sheriff-court, in an action of filiation and aliment, the Court allowed the pursuer, who was a married woman, to lead evidence—that of herself and her husband excepted—to prove that there had been no access, and to rebut the presumption *pater est quem nuptiæ demonstrant*.

*Question*, Whether the evidence of the pursuer and her husband could have been admitted?

Betsy Paterson or Brodie, Dundee Road, Forfar, raised an action of filiation and aliment in the Sheriff-court of Forfar against James Dyce, farmer, Spittalburn, near Forfar.

On 2d November 1871 the Sheriff-Substitute (ROBERTSON) pronounced the following interlocutor:—“The Sheriff-Substitute having heard parties’ procurators, and having made avizandum with the proof and whole process, finds, in point of fact, that the defender is the father of the pursuer’s illegitimate child, born in May 1871; finds, in point of law, that he is liable in inlying expenses and aliment, therefore decerns against him, conform to the conclusions of the summons; finds him liable in expenses; allows an account of these to be lodged by the pursuer, and remits the account, when lodged, to the Auditor to tax and report, and decerns.

“*Note*.—This is a somewhat obscure case. If the defender is not really the father of this child, he has at least, by his own imprudent conduct, placed himself in such suspicious circumstances as to warrant the Sheriff-Substitute in giving the presumption against him.

“The pursuer is a young woman of somewhat attractive appearance, and the defender is a middle-aged married man, with a grown-up family. The character of the pursuer is perhaps as bad, morally, as it could well be; she is married, and has already since her marriage had an illegitimate child to another married man, besides having had an illegitimate child before marriage. No doubt her bad moral character is against her speaking the truth, but it tells against the defender also. The Sheriff-Substitute cannot believe that the defender was wholly ignorant of the pursuer’s character and antecedents at the time he visited her lodgings and treated her to drink at public-houses, as comes out in evidence. She had been living for years apart from her husband; she had had a child by a married farmer in the defender’s neighbourhood—a circumstance that most likely would attract attention, because the case was made public by an action in Court. She was intimate with Robb and Rough, friends of the defender, who are said by him to have had improper dealings with her; and, above all, the defender never mentioned his acquaintance with the pursuer to his wife or family.