Saturday, November 30.

SECOND DIVISION.

A. M. LAWSON'S TRUSTEES *v.* C. LAWSON AND OTHERS.

Petition for Leave to Appeal—48 *Geo. III. c.* 151, *sec.* 15.

Circumstances in which leave to appeal against a unanimous judgment *refused.*

The Statute of Geo. III. enacts—"That hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments; or except in cases where there is a difference of opinion among the Judges of the said Division." Here an application was presented for leave to appeal against a unanimous Judgment of the Second Division. The main question in the suit was Whether at the date of the death of A. M. Lawson, he was a partner in the firm of Lawson & Co. or had concluded an agreement with the firm and had retired for a consideration? Their Lordships held there was no concluded agreement, and ordered production of certain balance sheets of the firm and accounts of A. Lawson with the firm.

In support of the application the Solicitor-General stated that it would cause great risk to the Company if all its affairs were revealed. Against the application it was urged, that the whole merits had not been decided, and it was expedient to exhaust the case in the interests of the minor sons of A. Lawson.

LORD COWAN—I am clear the application should be refused, on the ground that our Judgment was not pronounced on the whole merits of the case. We have not ordered a general accounting, and exposure to the public is not to be presumed.

LORD BENHOLME—I am of a different opinion. It appears to me that if our judgment is reversed there will be an end of this litigation, and a settlement between the parties on a different basis than if our order stands. Because in that case there will be a quick mode of ascertaining the rights of parties independently of any investigation.

It has been suggested by Lord Cowan that we do not do much harm by ordering these partial productions, but it seems to me they are only introductory to a more full examination, which will be shut out as being unnecessary in case this alleged agreement is held good.

Now, in regard to the respective dangers or embarrassment to the parties respectively, according as the appeal is admitted or refused, there is no equality. On the one hand these children are to receive the £300 a-year pending the appeal, while, if the defenders are once compelled to produce their books, any danger or damage they may sustain are irremediable. I am always tender of the rights of companies where they state a plea which if well founded would supersede the necessity of minute and detailed investigation into accounts.

I think we ought to grant leave to appeal.

LORD NEAVES—I am clear for refusing. There is no general ground for granting this application, and the practice is the other way; neither can I find any special ground considering the relations of the parties and the position of the case.

LORD JUSTICE-CLERK—I think we should refuse. The judgment is interlocutory, and there is no special reason for departing from the usual practice.

Application refused.

Friday, November 29.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.

MACKNIGHT *v.* PATERSON (OMAN'S TRUSTEE).

Trustee—Assessment—Personal Liability.

Trustee on a sequestrated estate *held* to be "owner," under The Edinburgh and Leith Sewerage Act, 1864, sec. 47, and as such personally liable for assessments under that Act.

The summons in this action concludes for payment of £103, 12s. 11d., from Andrew Paterson, the trustee on the sequestrated estates of John Oman, builder, for assessment under the Leith Sewerage Act 1864. The pursuer is clerk to the Leith Sewerage Commissioners, and represents them under section 74 of the General Police and Improvement (Scotland) Act 1862, incorporated with the Edinburgh and Leith Sewerage Act 1864.

By section 47 of "The Edinburgh and Leith Sewerage Act 1864," it is enacted that "the owners of all lands, houses, or other property, any sewer, outfall, or drain from which shall, after construction of the said main and branch sewers and works, be connected with the same, shall be liable in payment to the Commissioners of a reasonable sum of money for the use of the said main or branch sewers and works, which the Commissioners are hereby authorised and required to fix and exact in respect of all such lands, houses, or other property; provided always that such lands, houses, or other property shall not have been assessed for the expense of making such main or branch sewers or works; but if such lands, houses, or other property shall have been so assessed, and shall have been built upon, enlarged, or altered after the assessment for making such main or branch sewers and works was imposed and levied, the owners thereof shall be liable in payment to the Commissioners of such reasonable sum of money as aforesaid."

By section 3 of said General Police and Improvement (Scotland) Act 1862, incorporated with the said Sewerage Act as aforesaid, it is enacted that the word "owner" shall "include joint owner, fiar, liferenter, feuar, or other person in the actual possession or receipt of the rents of tenements, lands, and heritages, of every tenure or description, and the factor, agent, or commissioner of such persons, or any of them, or any other person who shall intromit with or draw the rents." And by section 42 of the Valuation of Lands (Scotland) Act, 17 and 18 Vict., c. 91, also incorporated with the said Sewerage Act, it is enacted that "the word 'proprietor' shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages."

The Commissioners, by resolutions, the latest in date of which was October 24, 1871, fixed 2s. 6d. per pound of rental as the reasonable sum to be

paid by owners liable under the 47th section for the use of the main or branch sewers and works; but the three last of said resolutions were passed under the proviso that where such owners were liable in respect of new buildings, they should be entitled to deduct from the above sum the proportion of the original assessment for the expense of making the said main and branch sewers and works which they could instruct as having been paid from the ground before it was built upon. The said original assessments imposed by the Corporations of Edinburgh and Leith, upon owners of lands and heritages liable under section 68 of the said Act, for the expense of making the said main and branch sewers and works, amounted in whole to the like sum of 2s. 6d. per pound of rental; and assessments to this amount were levied from all such owners.

The action was raised under the following state of facts:—

The said John Oman was, prior to and at the date of his sequestration after mentioned, proprietor (first) of premises situated at Drumdryan Street, Edinburgh, the rental of which, as entered in the valuation-roll of the city of Edinburgh for the year 1868–9, amounted to £307. 10s.; (second) of premises situated at Nos. 25, 27, 29, and 33 Brougham Street, Edinburgh, the aggregate rental of which, as entered in the said valuation-roll for the year 1869–70, amounted to £128; and (third) of premises situated at Nos. 7 and 9 West-End Place, Edinburgh, the aggregate rental of which, as entered in the said valuation-roll for the year 1870–1, amounted to £74.

Each of the said sets of premises contain sewers, outfalls, or drains, which have, since the construction of the main and branch sewers and works authorised by the Act, been connected with the same. The said premises were not assessed for the expense of making the said works, having been erected after the assessments for that purpose had been imposed and levied, but the portions of ground forming the stances on which the said premises are built were so assessed as agricultural subjects, under section 72 of the said Act.

The sums payable in respect of the said premises, in terms of the above-mentioned resolutions of the said Commissioners, under deduction of the proportion of the original assessments paid from the ground as aforesaid, are the following:—(First) in respect of the premises first above specified £35, 19s. 3d., conform to notice to the said John Oman, dated and served 16th June 1869; (second) in respect of the premises second above specified £15, 19s. 8d., conform to notice to the said John Oman, dated 7th and served 8th December 1870; and (third) in respect of the premises third above specified £7, 15s., conform to notice to the said John Oman, dated 26th and served 27th January 1871.

The pursuer, as representing the said Commissioners, raised an action in the Court of Session against the said John Oman for payment of the said sums, with interest thereon at the rate of 5 per cent. per annum, from 8th July 1869, 30th December 1870, and 16th February 1871 respectively, until payment, and on November 24, 1871 obtained decree in terms of the conclusions of the libel, with expenses.

On 9th November 1871 the estates of the said John Oman were sequestrated. Prior to, and at the date of his sequestration, the said John Oman was also proprietor of premises situated at No. 34 Gillespie Crescent, and Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, and 13 West-End Place, Edinburgh, the aggregate rental of which, as entered in the valuation-roll of the city of Edinburgh for the year 1871–2, amounted to £352 sterling. The said premises contain sewers, outfalls, or drains, which have, since the construction of the main and branch sewers and works authorised by the Act, been connected with the same. The said premises were not assessed for the expense of making the said works, having been erected after the assessments for that purpose had been imposed and levied; but the portions of ground forming the stances upon which the said premises are built were so assessed as agricultural subjects, under section 72 of the said Act.

On 23d November 1871, the defender was appointed trustee on the sequestrated estates of the said John Oman, conform to act and warrant in his favour by the Sheriff of Edinburgh, and has since been and is now in possession thereof.

On 9th December 1871 the pursuer served a notice on the defender with reference to the premises situated at No. 34 Gillespie Crescent and Nos. 1 to 13 West-End Place, that the Commissioners had fixed the reasonable sum to be paid by the defender in respect of the said premises at £44 sterling, being at the foresaid rate of 2s. 6d. per pound of rental, but intimating that from said sum would be deducted, if required, any portion of the original assessment which the defender could instruct as having been paid from the stance or stances on which the said premises were built, and that the Commissioners estimated the same at 1s. as aforesaid. The sum payable by the defender in respect of the said premises was thus fixed at £43, 19s.

The defender having been called on to make payment to the pursuer of the above-mentioned sums of £35, 19s. 3d., £15, 19s. 8d., £7, 15s., and £43, 19s., amounting in all to £103, 12s. 11d., and having refused to do so, the present action was raised.

The pleas in law for the pursuer were that—"(1) The defender, as trustee on the sequestrated estates of John Oman, being owner and proprietor, within the meaning of 'The Edinburgh and Leith Sewerage Act, 1864,' of the properties and premises mentioned in the summons, is liable, under section 47 of the said Act, in payment of a reasonable sum in respect of the said premises, for the use of the main or branch sewers and works belonging to the Commissioners. (2) The reasonable sum so payable by the defender having been fixed by the Commissioners in terms of the said Act, the pursuer is entitled to decree, with expenses."

The defender pleaded—"(1) The action being for payment of a debt due by the bankrupt, is incompetent. *Separatim*, the pursuer cannot proceed by way of action to recover from the defender any sum for which he has already obtained decree. (2) The defender, as trustee in the sequestration, being entitled, in the first instance, to adjudicate upon and rank the claims of all the creditors, cannot, in the circumstances, be sued, personally or otherwise, for payment of the pursuer's claims. (3) The defender being merely trustee on Mr Oman's sequestrated estate, is not liable to be sued, personally or otherwise, for any assessments imposed upon the bankrupt or his estate in terms of 'The Edinburgh and Leith Sewerage Act, 1864;' and the pursuer was bound to have lodged and

proved his claim in the sequestration, in terms of the Bankruptcy (Scotland) Act, 1856. (4) Mr Oman's said properties not being liable for the assessments sued for, the defender is, in the circumstances, entitled to absolvitor, with expenses. (5) The Court has no jurisdiction over the defender, at least in the first instance, as such trustee, in reference to any matter forming claims upon the bankrupt estate."

On 12th and 21st June 1872, the Lord Ordinary pronounced the following interlocutors:—

"*Edinburgh 12th June* 1872.—The Lord Ordinary having heard counsel, and made avizandum, and having considered the debate, productions, and whole process, Finds that, under a sound construction of the terms of 'The Edinburgh and Leith Sewerage Act, 1864,' founded on by the pursuer, the assessments imposed by virtue of said Act, in respect of the heritable subjects which belonged to John Oman, the bankrupt, and which now form part of his sequestrated estate, are, in so far as properly imposed, preferable debts affecting the said subjects themselves, as well as the owner or proprietor thereof, or other intromitter with the rents of the same: Further, finds that the defender, as trustee on said sequestrated estate, is owner and proprietor of the said subjects within the meaning of the said Act, and while it is not alleged by him that the heritable creditors have entered upon possession of the said subjects, or any of them, he is, as such owner and proprietor, the party entitled to intromit with the said rents: Therefore sustains the first plea in law for the pursuer, and appoints the cause to be enrolled with a view to further procedure, and particularly as regards the ascertainment of the matters of fact not admitted by the defender on record, reserving meanwhile all questions of expenses."

On 21st June 1872, the Lord Ordinary, after allowing a minute to be put in by the defender admitting the disputed matters of fact, "Finds that the pursuer was not bound to have lodged a claim with the trustee on Oman's sequestrated estate; Decerns against the defender, in terms of the conclusions of the libel: Finds him liable to the pursuer in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The defender reclaimed.

Cases cited—*Macknight* v. *Currie*, 10 Macph. 289; *Currie* v. *Macgregor*, 9 Scot. Law Rep. 86.

At advising—

Lord Justice-Clerk—On the whole matter, I do not concur in the view that these assessments are preferable debts, but that the trustee is liable as primary debtor, being owner in the sense of the 47th section of The Leith Sewerage Act. This view does not depend on the provisions in the clauses from 67 to 85 of the Act. These clauses, though they may illustrate the meaning of the 47th clause, stand entirely apart from it. This is not an annual payment, but it is made once for all for the benefit of whoever draws the rents and enjoys the benefits of the drainage.

Lord Benholme—I substantially agree, but I think that the 73d section of the Act applies not only to any assessments for making the drains, but also to subsequent assessments supplemental to the general assessment. The word burden is used in a special and not a feudal sense. The assessment is made to run with the land. The owner, in the sense of the Act, takes the land under condition of paying the assessment, which exempts it from being made a claim in the sequestration, as a condition precedent to the entry of the trustee on the subject.

Lord Neaves—I think the pursuer's case is well founded, whether the 73d section applies to the assessment or not. The nature of the claim is for a price to be paid once for all for the continuance and perpetuity of the drainage works originally executed. It is not, like the poor rate or police assessment, an annual assessment for the exigencies of a particular year, when the proprietor for that year is liable. This is prospective and perpetual, and if not continuous, it is almost impossible to discover the *punctum temporis* when liability commences. It is reasonable that the proprietor at the time when the Commissioners ascertained the exact sum should be held owner in the sense of the Act, and should be held liable, provided there is no *mora* on the part of the Commissioners. The trustee here is liable *in virtute tenuræ*; and this is not a preferable debt to be claimed in the sequestration.

The Court altered the first finding in the Lord Ordinary's interlocutor of 12th June, to the effect that the assessments were debts due and exigible from the owner or other intromitter with the rents of the subjects, and adhered otherwise to his interlocutor.

Counsel for Pursuer—Watson and Hall. Agent—J. Macknight, W.S.

Counsel for Defender—Solicitor-General (Clark) and M'Kechnie. Agent—T. M'Laren S.S.C.

Saturday, November 30.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

MILLER *v.* KEITH.

Bankrupt—Bankruptcy (Scotland) Act 1856, § 141—*Trustee—Account—Composition.*

Circumstances in which it was *held* that the provisions of the 141st section of Bankruptcy (Scotland) Act 1856 had not been complied with. *Held* that not only the existing trustee, but any former trustee, is entitled to the benefit of the provisions of the 141st section of the Bankruptcy (Scotland) Act 1856.

This was an appeal from the Sheriff-court of Edinburgh at the instance of Mr Hugh Miller, C.A. Edinburgh, who was sometime trustee on the sequestrated estate of William Taylor Keith. Mr Miller had been appointed trustee by the creditors on the bankrupt estate, and in the course of his transactions as trustee all the available funds were swallowed up. Keith had been committed to prison by the Sheriff-Substitute (Hamilton) for failing to give a satisfactory explanation as to a certain sum of money at his examination, and as legal proceedings had been instituted thereafter in the Court of Session, at the instance of the bankrupt, to effect his liberation, Miller, having no funds in his hands belonging to the estate, had resigned his office. J. D. Ferrie was therefore appointed trustee in his room. A meeting of creditors was held on 21st August for the purpose of deciding on