reclaimer, has not been discharged. The evidence therefore is the same as when sequestration was granted by the Sheriff, and to my mind it is conclusive. But we have in addition the statement by the Sheriff which has been read to us, that the bankrupt did not allege that he was solvent, nor is there any averment to that effect upon record even now. Then, further, as to the manner in which the reclaimer was constituted notour bankrupt, I have no doubt upon the matter. The requirements of the Act of 1880 all concur, and they consist of "insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment." Now, notour bankruptcy being so constituted cannot be affected by a subsequent appeal to the House of Lords.

As to the nature of the petitioning creditor's debt, I agree with the Lord Ordinary in the view which he has taken of it. No doubt the agreement bore that the loan of £1000 should not be called up for a period of five years, but no stipulation of this kind in an agreement such as the one now before us would prevent the creditor when insolvency supervened from putting in a claim for his debt. The I O U's could not of course by the common law, and apart altogether from the terms of the agreement, be used for any separate or direct diligence for enforcing payment of the sums contained in them, but they form items in the agreement, and the terms of the agreement offer no obstacle whatever to the creditor claiming in the sequestration, nor do they prevent him in any way from petitioning for sequestration.

I therefore agree with the Lord Ordinary that the diligence contemplated by the agreement was not sequestration, but that what was intended by the letter of agreement was that no separate diligence should be done on the I O U's. On the whole matter, therefore, I think that the Lord-Ordinary was right.

Lords Deas and Mure concurred.

Lord Shand—I am of the opinion expressed by your Lordship. I think that notour bankruptcy was established in the Sheriff Court when the order for sequestration was pronounced, for there was "insolvency along with a duly executed charge, followed by the expiry of the days of charge without payment." It is now argued that because after the days of charge had elapsed without payment an appeal was taken to the House of Lords, that that would control the terms of the statute, but as the days of charge had expired before any steps were taken in the appeal I cannot see how anything that was done in it can affect the present question. Insolvency was proved, and it is not even now averred on record that there was solvency, and yet in spite of the absence of any averment to that effect we are now asked to allow the reclaimer a proof of his solvency as at the date of his sequestration—a course of procedure which it is hardly necessary to say could not for a moment be entertained. The arrangement for the continuing loan was no doubt to exist for five years, but when the reclaimer became bankrupt the agreement fell to the ground, and the creditor was entitled to use diligence to recover his debt. I agree with your Lordships that he could not sue upon the I O U's separately, but I think with the Lord Ordinary that they may competently be used as vouchers on one side of the account. On the whole matter I see no grounds for interfering with the interlocutor reclaimed against.

The Court adhered.

Counsel for Petitioner — Pearson — Kennedy. Agent—William Officer, S.S.C.

Counsel for Respondent — Gloag — Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Saturday, December 1.

SECOND DIVISION.

[Sheriff of the Lothians.

MANSON'S TRUSTEES *v.* FORSYTH.

Process—Sheriff—Appeal—Competency of Appeal—Sheriff Courts (Scotland) Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24—*Court of Session Act* 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 53—*Sheriff Courts (Scotland) Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 27.

A petition to interdict a sale by a creditor under a poinding having been presented in a Sheriff Court by the trustees under a postnuptial contract of marriage entered into by the debtor, on the ground that the articles poinded belonged to the petitioners as trustees, the Sheriff-Substitute granted interim interdict on condition of the petitioners finding caution for the debt and expenses. They appealed to the Court of Session. *Held* that the appeal was incompetent.

George Thomson, James Storm Fraser, and Mrs Mary Miller or Manson, presented a petition in the Sheriff Court at Edinburgh to interdict David Forsyth, S.S.C., "from carrying out a sale under a debts recovery decree obtained by him in the Sheriff Court of the Lothians and Peebles at Edinburgh against Joseph Manson, leather merchant, of certain articles of furniture and other effects situated within the dwelling-house in No. 3 Cochran Terrace, Edinburgh, occupied by the said Joseph Manson, and which furniture and effects belong to the pursuers in trust under a postnuptial contract of marriage executed by Joseph Manson and Mrs Mary Miller or Manson, his spouse, and of which the pursuers duly and validly got possession and delivery, and in the meantime to grant interim interdict." They averred that they as trustees were proprietors of the furniture, and had obtained possession of it by virtue of the marriage-contract, and of an instrument of possession thereon; that the defender having obtained decree in the Debts Recovery Court at Edinburgh on 22d October 1883 against Joseph Manson for the sum of £13, 5s. 6d. sterling of principal, with £2, 15s. 9d. of expenses, had executed a poinding of the furniture or other effects within No. 3 Cochran Terrace, of which they were proprietors. They pleaded that the articles of furniture being their property they were entitled to interdict, and in the meantime to interim interdict.

The Sheriff-Substitute (Hamilton), after hearing parties' procurators, pronounced this interlocutor:— "On the pursuers finding good and sufficient caution acted in the Sheriff Court Books

of Mid-Lothian, to the extent of forty pounds sterling, within six days from this date, for the debt and expenses, as these may be ascertained, that may be due to the defender in the event of the pursuers being ultimately found to be in the wrong in the present proceedings, grants interim interdict as craved until the further orders of the Court."

The pursuers appealed to the Court of Session against the order to find caution, on the ground that they as trustees were not the defender's debtors, and were not bound to find caution.

The defender objected to the appeal as incompetent in respect that it was not a final judgment disposing of the merits of the cause. It was appealable to the Sheriff-Principal, but not to the Court of Session—Sheriff Courts Act 1853, sec. 24; Court of Session Act 1868, sec. 53; Sheriff Courts Act 1876, sec. 27.

The pursuers replied—The judgment was one imposing on them a condition which they could not fulfil, and which was improperly imposed on them. It was a judgment disposing of the merits of the cause as far as they were concerned, and therefore appealable.

The Court dismissed the appeal as incompetent, and found the pursuers liable in expenses, and modified the same to £2, 2s.

Counsel for Pursuers (Appellants)—Campbell Smith. Agent—A. Nivison, Solicitor.

Counsel for Defender (Respondent)—Rhind. Agent—Party.

Saturday, December 1.

OUTER HOUSE.

[Lord Kinnear.

M'NEILL AND OTHERS (LOCHHEAD'S TRUSTEES), PETITIONERS.

Trust—Administration—Application for Power to Borrow—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3.

A truster directed his trustees to pay the income of his heritage to his four daughters in equal shares in liferent, and hold and divide the fee into four equal shares, and convey one share to the family of each daughter, the shares to be payable to the children on the death of their mothers respectively, and on their attaining a certain age. He declared it to be his wish that the heritage should not be sold for the purpose of this division, and therefore authorised the trustees on the death of any daughter to have it valued, and then allocate and divide it and convey a share to each family as before provided. He gave the trustees power from time to time to sell such part of the estate as they saw fit, and convert the price into feu-duties or ground-annuals, or to retain the whole of it till a fit time come for its disposal. No power to borrow was given by the deed. On the death of one of the truster's daughters a valuation was made, and her children agreed with the trustees to accept a certain sum in full of their claims on the trust. The time was, in the judgment of the trustees, unfavourable for selling any part of the heritage, and it was not, in their opinion, capable of division for the purposes of the settlement. Authority *granted* to borrow a sum sufficient to meet the claim of the children of the daughter who had died.

By the 3d section of the Trusts (Scotland) Act 1867 it is provided that "It shall be competent to the Court of Session, on the petition of the trustees under the trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications, and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application—(1) To sell the trust-estate, or any part of it; (2) to grant feus or long leases of the heritable estate, or any part of it; (3) to borrow money on the security of the trust-estate, or any part of it; (4) to excamb any part of the trust-estate which is heritable."

William Lochhead died on 24th January 1875 survived by four daughters. He left a trust-disposition and settlement dated 16th May 1871, with codicils thereto. By this disposition and settlement he directed his trustees to pay over the whole income of the residue of his estate to and equally among his four daughters, who were all married, during their lifetime, for their liferent use allenarly. He also directed his trustees to hold and divide the fee and capital of the residue into four equal shares, and to pay and convey the same to the children of his daughters, one fourth to the children of each, "payable said shares on my daughters respectively dying, and on their children respectively attaining to the ages of twenty-five years complete." The issue of a child dying before division or payment was to take the parent's share, and if there were no issue the brothers and sisters of such child were to take such share. A daughter dying without leaving lawful issue was declared to be entitled to provide one-half the liferent of her share to her surviving husband during his lifetime, and in such case the fee or capital of such daughter's share should be held by the trustees undivided until the decease of such husband. Special power was also given to the trustees, if they should see fit, to advance to the child or children of any of his said daughters who had predeceased, but not before they had attained to the age of twenty-one years complete, such portion, not exceeding one-half, of the share of the residue of the truster's means and estate prospectively falling to them as to the trustees might seem expedient, and that for the purpose of enabling them to commence business, or of advancing their prospects in life, the trustees in all cases being the sole judges of the propriety and extent of such advances. With regard to the way in which the division of the residue should be carried out the truster directed—"And as it is my wish that my heritable properties should not be sold for the purposes of the said division, I hereby authorise and empower my trustees, with all convenient speed after the