

of the spouses, become in some degree scattered before the necessity for administering the trust arises; and it would be mischievous in the extreme if it were necessary to take separate action against the different members of the trust in the various parts of Her Majesty's dominions or elsewhere in which they might be resident for the time. The obligation of trustees to account for their administration is one and indivisible, and is in general to be enforced by an appeal to the Courts of the country in which that obligation is to be fulfilled, and where the trust is to be executed. I do not say that an action for individual fault will not lie against a trustee wherever he may be found. But no such action has been instituted against the present defender, and the case does not raise any question of conflicting jurisdiction. The defender will accordingly be ordered to give in an account, which will enable the question of propriety and sufficiency of the investment to be raised, and if necessary inquired into."

Counsel for Pursuer—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—Jameson. Agents—Dove & Lockhart, S.S.C.

Wednesday, January 9, 1884.

FIRST DIVISION.

[Sheriff of Caithness.

BAIKIE v. SINCLAIR

Process—*Sheriff—Appeal—Competency—Sheriff Court (Scotland) Act 1853 (16 and 17 Vict. c. 80), sec. 24.*

In an action in a Sheriff Court for £123, 4s. 9d., the defender admitted liability for £113, 16s. 9d., which he consigned in bank. An interlocutor was then pronounced finding the pursuer entitled to decree for the sum sued for, under deduction of the amount consigned, granting authority to the pursuer to uplift this sum, appointing him to lodge a state showing the interest due, reserving the question of expenses, and decerning *ad interim*. Held that this was an interim decree for payment of money within the meaning of section 24 of the Sheriff Court (Scotland) Act 1853, and that an appeal to the Court of Session was competent to the effect of enabling the Court to determine whether the warrant for payment should have been granted *in hoc statu*.

This was an action in the Sheriff Court of Caithness at Wick, at the instance of John Baikie, mason, Watten, against Alexander Sinclair, auctioneer and commission agent, Wick, for payment of the sum of £123, 4s. 9d. The defender consigned in bank £113, 16s. 9d., for which he admitted liability.

The Sheriff, on appeal, pronounced this interlocutor:—"Finds the pursuer entitled to decree against the defender for £123, 4s. 9d., with interest at 5 per cent. thereon from the date of citation, under deduction of £113, 16s. 9d., and any amount of interest the bank may allow thereon: Grants authority to the pursuer to uplift said

last-mentioned sum and interest: Appoints him thereafter to lodge a state, embracing interest, showing the sum due him, and for which he asks decree: Reserves all questions of expenses, including the expense of stamping the document No. 54 of process, and decerns *ad interim*."

The defender appealed to the Court of Session, to the competency of which appeal the pursuer objected, on the ground that the interlocutor appealed against was not a final interlocutor under section 53 of the Court of Session Act 1868, nor an interim decree for payment of money under section 24 of the Sheriff Court Act 1853.

Section 53 of the Court of Session Act 1868 provides—"It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided, that expenses, if found due, have not been taxed, modified, or decerned for: And for the purpose of determining the competency of appeals to the Court of Session, this provision shall be applicable to the causes in the Sheriff and other inferior courts, the name of the Sheriff or other inferior judge or court being read instead of the words 'the Lord Ordinary,' and the name of the Sheriff Court or other inferior court being read instead of the words 'Outer House.'"

Section 24 of the Sheriff Courts (Scotland) Act 1853 provides—"It shall be competent, in any cause exceeding the value of twenty-five pounds, to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses, or although the expenses, if such have been found due, have not been modified or decerned for; but it shall not be competent to take to review any interlocutor, judgment, or decree of a Sheriff, not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause as aforesaid."

The respondent argued—This was not an interim decree for payment of money, because it disposed of the whole question in dispute, and granted warrant to uplift the money consigned. What remains was merely executorial—*Malcolm v. M'Intyre*, October 19, 1877, 5 R. 22. It was not a final interlocutor, because the question of expenses had been reserved—*Baird v. Barton*, June 22, 1882, 9 R. 970.

The appellant replied—This was an interim decree for payment of money—*Baird v. Glendinning*, October 16, 1874, 2 R. 25.

At advising—

LORD PRESIDENT—In this case the Sheriff "Finds the pursuer entitled to decree against the defender for £123, 4s. 9d., with interest at 5 per cent. thereon from the date of citation, under deduction of £113, 16s. 9d., and any amount of interest the bank may allow thereon: Grants authority to

the pursuer to uplift said last-mentioned sum and interest: Appoints him thereafter to lodge a state, embracing interest, showing the sum due him, and for which he asks decree: Reserves all questions of expenses, including the expense of stamping the document No 54 of process, and decerns *ad interim*."

Now, it is quite plain that this is not a competent appeal against a final judgment, for this is not in any sense a final judgment; the conclusions of the action are not exhausted; the precise amount due by the defender to the pursuer has not been ascertained, and cannot be ascertained until the state has been lodged which was ordered by the Sheriff; and further, the question of expenses has not been disposed of. It is said, however, that the defender is entitled to appeal, because this is equivalent to an interim decree for payment, and the appellant founds on the case of *Baird v. Barton*, in which it was held that a warrant on a judicial factor to pay rent to a landlord was equivalent to an interim decree in a question as to the competency of the appeal. This case is not precisely similar to the case of *Baird*, but still there would be difficulty in sustaining the respondent's objection to the competency.

On the one hand, if the appeal is refused as incompetent, the pursuer would get into his own hands the sum of £113, 16s. 9d. without the defender having any opportunity of bringing under review the interlocutor by which he was enabled to get it. This, I think, would be inconsistent with the right of appeal from the Sheriff which always exists when the question involved is of a certain amount.

On the other hand, if the question of the payment of this £113, 16s. 9d. is to be determined with reference to the merits of the case, that would be in effect to treat this as a final interlocutor, which it is not.

It appears to me that the solution of the difficulty is to hold that the defender is entitled to bring up this interlocutor, to the effect of enabling the Court to determine whether the warrant for payment should have been granted *in hoc statu*, and that course of procedure will be in accordance with what was done in *Baird's* case. Therefore the question under this appeal will be, whether the warrant should have been granted at the time the Sheriff did grant it?

LORD DEAS concurred.

LORD MURE—I think this is substantially an interim decree for payment of a sum of money, and in consequence that on the decisions the appeal is competent.

LORD SHAND concurred.

The Court then heard counsel on the appeal, and pronounced the following interlocutor:—

"The Lords having considered the competency of the appeal, and heard counsel for the parties on the question, Sustain the appeal as competent in so far as it brings under review that part of the Sheriff's interlocutor which grants warrant to the pursuer to uplift the sum of £113, 16s. 9d. sterling; and having heard counsel on said appeal, refuse the same: Adhere to the interlocutor appealed against, and decern: Reserve the question of expenses."

Counsel for Pursuer (Respondent)—M'Lennan.
Agent—William Gunn, S.S.C.

Counsel for Defender (Appellant)—Watt.
Agents—Sutherland & Clapperton, W.S.

Wednesday, January 9.

FIRST DIVISION.

SPECIAL CASE—BEATTIE AND OTHERS.

Process—Special Case—Death of Party.

This was a Special Case, one of the parties to which died after the case had been sent to the roll. A note was then presented to the Court for the purpose of having the representatives of the deceased sisted as parties to the case. The Court refused to sist, and, on the ground that a Special Case is of the nature of a contract, held that the proper course was for the representatives of the deceased themselves, or counsel instructed for them, to sign the Case.

Counsel for First Parties—Pearson. Agents—J. & F. Anderson, W.S.

Counsel for Second Parties—Dickson. Agents—Curror & Cowper, S.S.C.

Wednesday, January 9.

SECOND DIVISION.

ANDERSON AND ANOTHER, PETITIONERS.

Process—Bankruptcy—Lost Process—Competency—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 15.

A sequestration having been awarded by the Lord Ordinary on the Bills, the petition, the affidavit of the concurring creditor, the deliverance on the petition, and the certified copy thereof, were all destroyed by an accidental fire. Thereafter the first statutory meeting was held on the date appointed by the Lord Ordinary's deliverance, and a trustee elected. The bankrupt, concurring creditor, and trustee thereupon presented a petition to the Inner House praying the Court to authorise the minute of the meeting and other productions to be received into process in order that the trustee's election might be confirmed and the sequestration proceeded with. The Court (*àub.* Lord Rutherford Clark) refused the petition as incompetent.

Question (*per* Lord Young), Whether there was, in addition to a proving of the tenor, a remedy under sec. 15 of the Court of Session Act, by application to the Lord Ordinary.

The estates of William Murray Anderson, spirit salesman in Govan, were, on 19th December 1883, on the petition of himself and certain concurring creditors, sequestrated by the Lord Ordinary officiating on the Bills, under the Bankruptcy Act. By the deliverance awarding sequestration the Lord Ordinary appointed a meeting of the creditors for the election of a trustee and commissioners, and remitted the process to the Sheriff of Lanarkshire at Glasgow, to proceed in terms of