

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

the statute. An abbeviat of the petition and deliverance was regularly recorded in the Register of Inhibitions.

The appointed meeting was duly held, and a trustee and commissioners were elected. A few days before the meeting, the petition with the Lord Ordinary's deliverance thereon, the certified copy thereof, the affidavit of the concurring creditor, and the relative voucher, were destroyed by a fire which occurred in the office of the agent in the sequestration. A special report by the trustee explaining the loss of the writs was annexed to the minute of the meeting. As the writs were not produced, the clerk of the Sheriff Court at Glasgow, to which the sequestration had been remitted, declined to receive the other documents into process except on the authority of the Court of Session.

The petitioners in the original petition, namely, the bankrupt and the concurring creditors, along with the trustee, presented this petition to the Second Division of the Court, praying the Court "to grant warrant to and authorise the Sheriff-Clerk of Lanarkshire at Glasgow to receive the minute of the said first general meeting of creditors, and other productions in the process of sequestration, in order that the said trustee's election may be duly declared and confirmed; that an act and warrant may be extracted, and that the sequestration may be otherwise proceeded with in terms of statute notwithstanding the loss of the said petition and other writs."

Section 15 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), provides:—"Where a summons, petition, or other original writ or pleading is lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purpose of the action."

Authority—*Foulis*, July 18, 1872, *ante*, vol. ix. p. 631.

At advising—

LORD YOUNG—I am clearly of opinion that this application is incompetent. The petition and affidavit and the deliverance of the Lord Ordinary awarding sequestration have all disappeared. There must be some way to replace these writs if it is desired to proceed with this sequestration. The obvious mode at common law would be a proving of the tenor, which is applicable to all sorts of documents. It may be that an inexpensive procedure is competent here under sec. 15 of the Court of Session Act. If such procedure is competent, the application must be made in the Bill Chamber; if it is not competent, I see no way but a proving of the tenor.

LORD CRAIGHILL—I have come to the same conclusion, but unwillingly. Apart from authority I do not think we can do that which we are here asked to do. The case of *Foulis* was one merely of lost documents, not of a lost petition and deliverance and affidavits as here. I would gladly extend the decision in that case, but in the absence of any other authority, and in view of the fact that a remedy is open to the petitioner in an action of proving of the tenor, I find an insuperable difficulty in granting this application.

LORD RUTHERFURD CLARK—I say no more but that I am not sure how this case should be decided.

The LORD JUSTICE-CLERK was absent.

The Court refused the petition as incompetent.

Counsel for Petitioners—Young. Agents—W. Adam & Winchester, S.S.C.

Wednesday, January 9.

## SECOND DIVISION.

M'GREGOR'S EXECUTORS *v.* DUNLOP.

*Succession—Donation—Dopatio mortis causa—Gift to Donee, with Condition of Distributing to Others—Nuncupative Trust, Incompetency of.*

In an action by the executors of a woman deceased, for payment to them, as part of her estate, of a sum of money which had belonged to her, but had been lodged in bank in name of herself and the defender, payable to either or the survivor, the defender alleged a donation of the money to him, and led evidence to show that the deceased had handed the bank-book to him shortly before her death, with instructions to make small payments out of the sum contained in it to certain persons whose names she had previously told him, and to keep the balance. Held that donation to the defender was not proved, but only an attempt to constitute a will by parole, which could not competently be done.

Observed that the element of administration was inconsistent with donation.

Mrs Mary Thomson or M'Gregor died without issue at Glasgow in December 1882. She was at the time of her death possessed of certain moveable estate, among which was a sum of £134 at her credit in the National Security Savings Bank. Shortly after her death, Robert, John, and Thomas Thomson, three nephews and next-of-kin of the deceased, presented a petition in the Sheriff Court at Glasgow against James Dunlop, teacher there, whom they alleged to be a vitious intromitter with her effects. They averred that they had presented a petition to the Commissary of the county of Lanark to have themselves decerned executors *qua* next-of-kin to the deceased; that the defender, who was in no way related to the deceased, had, without any legal right or title, taken possession of her whole moveable and personal estate, consisting of furniture, sums of money, and everything else in the house, and that he had sold part of the furniture. They prayed the Court "to interdict the defender from appropriating to his own uses, from selling, paying, or giving away, otherwise than as the Court shall appoint, any of the moveable and personal means and estate of the said deceased Mrs Mary Thomson or M'Gregor, and to ordain the defender forthwith to lodge in the hands of the Clerk of Court the whole moneys, goods, gear, and effects, including bonds, mortgages, deposit-receipts, bills, bank books, security writs, and every other document or paper connected with