In such circumstances is the trustee not entitled to ascertain from the examination of Brash where these goods at present are? I think he is quite entitled to find this out if he possibly can. Nor is it a sufficient answer to say that any such inquiry is incompetent, because at some future date the subject-matter of the inquiry may become the subject of a litigation. This flour may be the subject of some future litigation, but the possibility of this cannot preclude the trustee from finding out if possible where it at present is stored. In the case of creditors of the bankrupt it is well established that an inquiry of this kind cannot be made, but in the case of debtors it is different. If we refused such an inquiry as is here asked, trustees on bankrupt estates would often find it very difficult if not impossible to recover and bring into the sequestration considerable portions of the estate.

I think in this case we ought to follow the Sheriff-Substitute, and repel the objections to the questions asked by the trustee.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent from illness.

The Court refused the appeal.

Counsel for the Appellants—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Respondent—Goudy. Agent—Lockhart Thomson, S.S.C.

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*Tuesday, March* 13.

## FIRST DIVISION.

[Lord Fraser, Ordinary.

## NICOLSON AND OTHERS (BROWN'S TRUSTEES) *v.* BROWN.

*Trust—Title to Sue—Process.*

One of eight beneficiaries interested in the fund *in medio* in a multiplepoinding brought for the distribution of a trust-estate, stated as an objection to the condescendence of the fund *in medio* that it did not include a sum of £600 said to be due to the estate by one of the trustees. In answer the trustees explained that they were satisfied they could not prosecute the claim with any hope of success, and produced documents in support of that view, but they offered to give the objector their instance on his finding security for the expenses of the proceedings. *Held* that this was all the trustees could be required to do, and objection *repelled.*

By mutual disposition dated 7th April 1880 Mr and Mrs Thomas Brown disponed their whole estate, heritable and moveable, to David Nicolson and others, as trustees, for the purpose, *inter alia*, of dividing the residue among their children, or their issue, at the death of the surviving spouse. Mrs Brown died on 14th July 1884, and her husband on 18th April 1886, survived by seven children, and the family of an eighth.

After Mr Brown's death it appeared there was a sum of £600, which had been lent by Mr Brown to Mr Nicolson, one of the trustees, and was still due by him at the date of Mr Brown's death, which had not been handed over to the trustees. On inquiry it appeared that the sum was repaid by Mr Nicolson on 13th August 1884, as follows—A sum of £300, 4s. 8d. was retained by Mr Nicolson as the amount due to him by Mr Brown under a bond of caution and relief dated 26th March 1881, and letter of guarantee by Mr and Mrs Brown dated 12th July 1884, whereby Mr Brown had undertaken to be responsible, jointly along with his son Robert Kerr Brown, for any loss that might be incurred in connection with the business of hotel-keeper carried on by him (Robert Kerr Brown) at the Bursar's Hotel, Aberdeen, but that only to the extent of £400. The loss upon that business so long as it was carried on amounted to £600, 9s. 5d., and in terms of the bond Mr Brown's share, which was, however, restricted by Mr Nicolson to one-half of the loss, was satisfied as above narrated. The balance of the debt of £600, being £299, 15s. 4d., was then repaid to Mr Brown by Mr Nicolson, and appeared from Mr Brown's books to have been invested by him in shares of the Distillers' Company, which were included in the inventory of Mr Brown's estate.

The trustees entered into possession and management of the estate on the death of Mrs Brown, and on 22nd October 1884 they held a meeting, at which Mr Brown was present, and gave up a statement of his estate, and of the securities upon which it was invested. These securities were thereupon transferred to the names of the trustees, who thereafter paid the income of them to Mr Brown until his death, as directed by the mutual deed.

On Mr Brown's death, questions having arisen among the eight beneficiaries as to their respective rights, the trustees brought a multiplepoinding, in which the amount of the fund *in medio* as set forth in the condescendence was stated at £2713. There was also a statement in the condescendence giving the amounts of certain advances made to the beneficiaries, with interest thereon, which the trustees proposed to deduct from the shares of residue effeiring to each.

Objections were lodged to the condescendence of the fund *in medio* by Mrs Thomas Brown junior, the widow of one of the children, for herself and her children. She stated her objections under three heads, the second of which set forth that the above mentioned sum of £600 fell to be included in the fund, being an asset of the estate as at the death of Mrs Brown, at which date the trustees entered into possession of the estate. There were allegations that Mr and Mrs Brown had been induced to sign the letter of guarantee of 12th July 1884 under false representations, and there were other averments pointing to a reduction both of that document and of the discharge and settlement of the Bursar's Hotel transactions, which took place on 13th August following.

These averments proceeded upon the ground that previous to these dates Mr Nicolson had granted to Mr Robert Kerr Brown a discharge of the whole liabilities in connection with the hotel, which document was produced. It was further denied that the £299, 15s. 4d. was applied as stated by the trustees.

In answer the trustees produced the documents

in question, and stated that they had given very careful consideration to the matter, and were satisfied that they had no claim against Mr Nicolson.

The Lord Ordinary (FRASER) on 22nd February 1888 allowed the parties a proof of their averments, the objector to lead in the proof.

The trustees reclaimed, and argued—Even assuming that the objector's averments were relevant, they could not be required to go to proof on a question of the kind with a third party when they were satisfied they had no good ground of action, and at the expense of the trust-estate. They were willing to give the objector their instance, and let her fight the matter out herself on her finding security for expenses—*Duke of Buckingham* v. *Breadalbane's Trustees*, January 17, 1844, 6 D. 403. Beyond that they could not be asked to go, especially as the objector's share in the residue was more than swallowed up by her debt, composed of advances and interest. The documents which had been produced were *prima facie* quite regular and complete. Further, she was the only one of the eight beneficiaries who had taken the objection.

The objector argued that she had set forth a relevant case as against the trustees, and that in any view she should not be obliged to pay the expenses of the proceedings.

At advising—

LORD PRESIDENT—The complaint here is that the trustees have failed to reduce into possession £600 which it is alleged is owing to the trust-estate. That is a perfectly relevant statement, but without going into detail I may say that, *ex facie* of the documents produced, it is plain that the debt was extinguished immediately after the death of Mr Brown. The trustees are therefore of opinion, and indeed say that they know they have no claim to this £600, and decline to sue Mr Nicolson for it. The objector is not satisfied with this answer, and of course if she wishes to try the question at her own expense she is entitled to do so. But then the trustees say that the state of the facts is that she is trying to have the question tried at the expense of the trust estate, that is, at the expense of the other beneficiaries. I think she is not entitled to do that, and whether the question is to be tried under this allowance of proof or not it ought not to be tried at the expense of the estate. The mode in which it is proposed here that the question should be tried is, to say the least, most inconvenient. I can imagine nothing calculated to put the case more out of shape than what is proposed. I do not say that it is absolutely incompetent, but it is certainly most inconvenient, and therefore if the question is to be tried at all it should be tried in an action in the name of the trustees against Nicolson. They cannot be asked to try it themselves at their own expense, but in these circumstances the trustees offer the use of their name upon the party wishing to raise the action finding security that they and the trust estate shall not be liable in any part of the expenses of an action which they know, or at least say, will end in favour of the defender. I think that we should recal the interlocutor, and if the objector does not accede to the trustees' offer there is no other footing upon which proof can be allowed.

LORD ADAM—If we should allow this interlocutor to stand, matters would be in the curious position that the objector would be pursuer in an action in which the trustees would be put to prove the non-liability of Nicolson to the trust for the sum of £600. There is no duty upon them to do that. The proposal is not incompetent, but when the trustees come forward and say that they are in possession of a discharge of the sum in question, and that they see no reason for thinking that the discharge is bad in any way, I cannot see why they should be compelled at the expense of the other beneficiaries under the trust to sue a claim which they think ill founded. If, then, the objector is not prepared to accept the trustees' offer I do not think that she can be allowed to put the trustees to this expense.

LORD KINNEAR—If the documents produced are valid then the debt alleged to subsist has been extinguished. I do not think it necessary to consider whether the averments on which it is proposed to set aside the discharge are relevant, for I think that if the beneficiary who desires proof wishes to proceed with the case she must take proceedings at her own expense and not at the expense of the other beneficiaries. I therefore concur.

LORD MURE and LORD SHAND were absent.

The Court repelled the objection, and reserved to the objector all questions as to the amount of her claim and any deduction which fell to be made from it.

Counsel for the Pursuers and Real Raisers—D.-F. Mackintosh—Patten. Agents—J. & A. F. Adam, W.S.

Counsel for the Objector and Respondent—Rhind—Hay. Agents—J. B. W. Lee, S.S.C.

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*Thursday, March* 15.

## FIRST DIVISION.

[Sheriff of Roxburgh, Berwick, and Selkirk.

## WILSON *v.* BRAKENRIDGE AND OTHERS.

*Process — Sheriff — Appeal — Competency — Sheriff Courts Act* 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 24—*Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*A.S., 11th July* 1828, *sec.* 5.

*Held* that an interlocutor of the Sheriff finding that the pursuer's proof must be limited to the writ or oath of the defenders was not appealable under the 24th section of the Sheriff Courts Act of 1853.

*Shirra* v. *Robertson*, 11 Macph. 660, *followed.*

This was an action raised in October 1887 in the Sheriff Court at Jedburgh in which John Wilson sued William Brakenridge and others, the executors of the deceased Charles Jardine, for payment of £51, 13s. 7d., being the price of various quantities of lime said to have been sold to Charles Jardine as per account annexed to the petition, the last item of which was under date June 1882.

The defenders, *inter alia*, pleaded "prescription."