

Tuesday, July 7.

SECOND DIVISION.

[Sheriff of Roxburghshire.

DAVIDSON v. DAVIDSON.

Process—Sheriff Court Appeal—Competency—Act 6 Geo. IV. cap. 120, sec. 40; A.S., July 11, 1828, sec. 5.

The Act of Sederunt, July 11, 1828, sec. 5. provides, that whereas under the Judicature Act 1825, sec. 40, an appeal to the Court of Session is competent upon an interlocutor in the inferior courts allowing a proof, "if neither party within fifteen days . . . after the date of such interlocutor shall intimate to the inferior court the passing of a bill of advocacy, such proof may immediately thereafter effectually proceed in the inferior court, and if within" this period "no intimation shall be made of any such bill of advocacy, the proof shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

In an action by a beneficiary under a will against the executor of the testator, the Sheriff-Substitute on April 2, 1891, allowed a proof on the 7th of May. After certain adjournments of the proof the Sheriff-Substitute on 21st May sisted the cause for one month to allow the defender to raise a reduction of the will in the Court of Session. On appeal the Sheriff on June 5th recalled the interlocutor on the ground that under the Sheriff Courts Act 1877, sec. 11, the defender's objection ought to be stated by way of exception, and remitted to the Sheriff-Substitute to fix a new diet for leading the proof allowed by interlocutor of April 2nd. On June 15th the Sheriff-Substitute appointed the proof allowed by the interlocutor of April 2nd to be proceeded with on July 6th. The defender appealed to the Court of Session.

As no appeal had been taken within fifteen days from the date of the interlocutor of April 2nd, which allowed the proof, the Court (*diss.* Lord Young) dismissed the appeal as incompetent.

Kinnes v. Fleming, 8 R. 386, and *Williams & Watt v. Wilson*, 16 R. 687, followed.

The Act of Sederunt, 11th July 1828, provides, sec. 5—"Whereas it is enacted by sec. 40 (of the Judicature Act) that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced, . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and declared . . . that if . . . neither party within fifteen days after the date of such interlocutor allowing a proof shall intimate in the inferior court the passing of a bill of advocacy, such proof may immediately there-

after effectually proceed in the inferior court, and if within these periods respectively no intimation shall be made of any such bill of advocacy, the proof shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

In March 1891 the pursuer Robert Davidson, mason, Kelso, brought an action in the Sheriff Court of Roxburghshire against Richard Davidson, Glasgow, as executor-dative of the deceased Helen Davidson, the pursuer's mother, for the payment of £700 which the pursuer averred had been bequeathed to him by the deceased.

Upon 2nd April 1891 the Sheriff-Substitute (SPEIRS) closed the record and allowed the parties a proof of their respective averments, to be taken on 7th May.

Upon 4th May, upon the motion of the pursuer, the Sheriff-Substitute adjourned the diet of proof to the 14th inst. Upon 7th May, on the defender's motion, he adjourned the proof till 28th May. Upon 21st May the Sheriff-Substitute pronounced this interlocutor—"On the defender's motion sists the case for one month in order that the defender may raise an action of reduction of the document No. 5 of process in the Court of Session."

The pursuer appealed, and upon 5th June the Sheriff (BOYLE HOPE) pronounced this interlocutor:—"The Sheriff having considered the reclaiming petition for the pursuer, and answers thereto, and the whole process, sustains the appeal: Recals the interlocutor appealed against: Remits to the Sheriff-Substitute to fix a new diet for leading the proof allowed by interlocutor of 2nd April last, and decerns, reserving the question of expenses.

"*Note.*—The 11th section of the Sheriff Courts Act 1877 has clearly done away with the necessity for bringing an action of reduction of any deed which is challenged as null. It is argued for the defender that the section does not apply in the case of a challenge of a deed on the ground of forgery, but no authority has been quoted for this contention, and no exception is made in the Act. The provision is—'All objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof.' I therefore think that the Court has no power to disregard this competency, and to force the pursuer to follow the defender to the Court of Session."

On 15th June the Sheriff-Substitute appointed the proof allowed by the interlocutor of 2nd April to be led on 6th July.

Upon 16th June the defender appealed to the Court of Session, and argued—It was admitted that the appeal was not taken within fifteen days of the date of the Sheriff-Substitute's interlocutor of 2nd April; but (1) the statute did not enact that the appeal must be taken within fifteen days—it was only the Act of Sederunt that did so. Now, it had been decided—or at least an observation to the effect had been made—that the Court was not absolutely bound by the terms of an Act of

Sederunt. As it had been made by the Court, so the Court could dispense with its provisions if the interests of justice rendered that necessary—*Boyd, Gilmour, & Company v. Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104. (2) The appeal had really been within fifteen days of an interlocutor allowing proof. The Sheriff's interlocutor was pronounced upon 5th June, and the appeal was taken on the 16th. Now, an appeal brought up all the previous interlocutors in the case whether they had been specially appealed or not—*Sheriff Courts (Scotland) Act 1876* (39 and 40 Vict. cap. 70), sec. 29—this appeal therefore brought before the Sheriff the interlocutor of 2nd April, and it was in suspense until the Sheriff had pronounced his judgment. This judgment was practically affirming the interlocutor of 2nd April, so that the fifteen days for appealing ran from the 5th June. Both the cases of *Kinnes* and *Williams* were distinguishable. In *Kinnes* the decision was grounded upon the undue delay that had taken place in the Sheriff Court, and in *Williams* it was thought that that was a case in which indulgence should not be granted—*Kinnes v. Fleming*, January 15, 1881, 8 R. 386; *Williams v. Watt & Wilson*, May 28, 1889, 16 R. 687.

The respondent argued—The appeal was incompetent because the appeal must be made within fifteen days of the interlocutor allowing proof. The only interlocutor of that kind was that of 2nd April, but the appeal was not taken till 15th June. This case was decided by authority, as the cases of *Kinnes* and *Williams* were directly in point. Another case was *Duff v. Stuart*, October 20, 1881, 9 R. 17.

At advising—

LORD JUSTICE-CLERK—It is unfortunate that in the circumstances of the present case we should be called upon to decide a question of such importance. But seeing that it has been forced on our attention, we must determine it in accordance with the decisions in prior cases of a similar kind.

In this case the Sheriff-Substitute allowed a proof on 2nd April 1891. In allowing a proof he took the usual and proper course of appointing the diet of proof for a day more than fifteen days beyond the date of his interlocutor, in order that the defender—who was the party who had not moved for proof, might if he thought proper appeal within fifteen days in terms of the Act of Sederunt 1828. The defender took no steps of any kind till 4th May, long after the fifteen days had expired; even then he only moved that the diet of proof should be adjourned.

The question for us to decide is, whether the right of appeal under the Act of Sederunt falls if not taken within fifteen days.

That it does has been conclusively and definitely settled by numerous decisions. We ourselves have had recently before us the case of *Williams v. Watt & Wilson*, in which we held the point was decided, and in the words of Lord Young in that

case, that “the meaning of the Act of Sederunt has been determined, and we cannot go back on the cases that have settled it.” In the present case there had been no appeal up to 16th June, although proof was allowed on 2nd April. In accordance with the decided cases, especially *Kinnes* and *Williams*, that circumstance deprived the defender of any further right of appeal against the interlocutor allowing the proof. So strongly was that held by the Court in one case—that of *Duff v. Stewart*—that they decided that in an action in which the value of the cause was not ascertained and the Sheriff had allowed a proof, if the party wishing to appeal did not get the property valued and obtain time to appeal in time for him to take his appeal within the fifteen days, his right of appeal fell.

On the 21st of May the defender moved for a sist, on the ground that he was about to raise an action of reduction in the Court of Session, his object plainly being to get the Court of Session to remit the case to the Superior Court. The Sheriff-Substitute allowed the sist. The pursuer appealed to the Sheriff, who pronounced this interlocutor—“Sustains the appeal; recalls the interlocutor appealed against; remits to the Sheriff-Substitute to fix a new diet for leading the proofs allowed by interlocutor of 2nd April last.” Nothing can be more plain than that the Sheriff's interlocutor does not deal with an appeal against the interlocutor of 2nd April on the question of proof; that interlocutor still stood, and the only reference the Sheriff made to it was to fix a new diet for leading the proof. It was suggested that if the terms of the Sheriff's interlocutor had been different, that if instead of fixing a new diet he had of new allowed a proof, an appeal would have been competent. As to that I express no opinion. It has no bearing on the present case. There cannot be any doubt that an allowance of proof may be treated as if it had lapsed, and a proof of new allowed. Where that happens, it may be that one of the parties may get the advantage of that by having the power to appeal under the Act of Sederunt set up for another period of fifteen days. But nothing of the kind occurred here, no proof was allowed except upon the 2nd of April, and no appeal was taken within fifteen days thereafter. In the case of *Kinnes* the Lord President rules it to be absolutely decided that an appeal is incompetent on the footing that the Sheriff's interlocutor was not one allowing proof. In my opinion the interlocutor of the Sheriff in this case is exactly in the same position.

A distinction was attempted to be made between this case and the cases already decided, viz., that in the latter the appeal was taken after the expiry of the fifteen days from the date of the Sheriff's interlocutor, the fact being that the Sheriff did not fix a new diet of proof, but that this was done by the Sheriff-Substitute on a later date, while in the present case the appeal was taken within fifteen days from

the Sheriff's interlocutor by which a new diet was fixed. In my opinion this makes no difference in the present circumstances, as the proof was allowed by the Sheriff-Substitute, and his interlocutor allowing proof was never brought under the review of the Sheriff, and the Sheriff does not by his interlocutor dispose of any question of allowing a proof. It only puts matters in train for carrying out the allowance of proof which was made by the Sheriff-Substitute on 2nd April, and which is a standing interlocutor, and the only interlocutor in the case by which a proof is allowed.

I am therefore of opinion that we must hold this appeal, in which we are called on to bring the case here from the Sheriff Court, incompetent as not having been timeously put in. I understand the object of the defender is to get the Sheriff Court process absorbed in the action of reduction at present running its course in the Outer House. Our present decision does not prevent him getting this done if the Lord Ordinary, on a motion being made to have the cause remitted *ob contingentiam*, thinks such a course competent. All that we decide is that this present appeal is incompetent.

LORD YOUNG—I regard this question of the competency of this appeal from the Sheriff Court as one of extensive and general interest and importance. I think that both parties would have acted wisely in avoiding pressing it upon us, and might have been content to take the judgment of the Court—if they could not agree among themselves—upon the question whether or not it was most fitting that the real question between the parties should or should not be tried along with the action of reduction now in the Outer House? The defender of course was willing to take that course, but the pursuer thought it would be for his advantage to have this appeal dismissed, and would not concur in that plan being followed, and therefore pressed upon us this question of the competency of the appeal.

The Sheriff-Substitute pronounced an interlocutor allowing proof of the parties' averments, which we are now told include the question of the forgery of a certain document, upon 2nd April 1891. From that date down to 21st April the defender seems to have been making his inquiries as to the genuineness of the will upon which the pursuer founds, and various applications for postponement of the proof were made to the Sheriff-Substitute till the result of the inquiries was known, and with some effect, because the date of the proof was adjourned from the 7th to the 28th May, and before the 28th May arrived the Sheriff-Substitute was induced to sist the cause for one month in order that the defender might raise an action of reduction in the Court of Session. All that shows plainly that what the defender desired to avoid was having a proof in this action in the Sheriff Court, and all the actings of the defender were directed against the

interlocutor allowing the proof. After that interlocutor, and upon 23rd May, the pursuer appealed to the Sheriff. Now, section 29 of the Sheriff Court Act of 1876 is in these terms—[*Here his Lordship read the clause*]. Now, I should think it quite clear that by that section this appeal to the Sheriff was effectual to submit to his consideration this interlocutor of 2nd April.

Well, he thought it right that the proof should go on. I do not think that it is right to say that he did not address his mind to the question of proof. I think he did address his mind to that, and the result of it is that he allowed a new diet of proof. The result of that is that the principal interlocutor allowing a proof is affirmed. Was that interlocutor not in suspense until the Sheriff pronounced his judgment affirming it?

The question is, whether the time allowed for raising an appeal did not run from the date of the Sheriff's interlocutor, and upon that question I have a very distinct opinion that it is quite clear it did run from that date. It was said that this question has been decided by authority. In my opinion there is no decision on the matter, for in neither of these cases referred to was the question raised, and so it could not have been decided, because in both those cases although there was an appeal to the Sheriff, there was no appeal to this Court until long after the date of the Sheriff's interlocutor. Now, my opinion rests upon the fact that in this case the appeal has been taken within fifteen days of the Sheriff's interlocutor, and that question has not been raised before.

In the cases of *Kinnes* and *Williams*—I do not distinguish between the two—after the Sheriff had pronounced an interlocutor very similar to the one the Sheriff pronounced here, the Sheriff-Substitute fixed a new diet of proof—and it was held the appeal to this Court could not be sustained unless it was shown to the satisfaction of the Court that an appeal had been competently taken within fifteen days of the allowance of proof. No appeal of the Sheriff's judgment was taken within fifteen days, and if the Act of Sederunt applied at all the appellant's contention must have been that the Sheriff-Substitute's interlocutor appointing a diet must be taken as an interlocutor with an allowance of proof. The Court, however, could not have held that the Sheriff's interlocutor was or was not one with an allowance of proof, because no appeal had been taken within fifteen days of its date. Now, I was a concurring party to the decision in the case of *Williams*, which was similar to that of *Kinnes*, and it was upon that view that the judgment proceeded. I think, however, that where an interlocutor allowing a proof has been brought under the consideration of the Sheriff in an appeal, by the direct authority of a statute, it is in suspense and if in his judgment fixing a diet of proof he allows anything at all it is an allowance of proof, and that the fifteen days during which an appeal is competent runs from the date of that interlocutor

and not from the date of the Sheriff-Substitute's interlocutor.

The importance of the question is seen by this—if the decision should be otherwise than I have indicated, if an appeal to the Sheriff should be taken directly from the Sheriff-Substitute's interlocutor, and he does not dispose of the case until six months have elapsed—or any period you like beyond the fifteen days—then dismisses the appeal and remits the case to the Sheriff-Substitute, the proof must of necessity be taken in the Sheriff Court, and the judgment upon the facts pronounced there must be final, so that they cannot be disputed in the Court of last resort. It was the purpose of the Judicature Act in making an appeal competent, that the judgment of the Court of Session should not be final on the question of fact. The importance of that provision to the parties is well illustrated by the test of a case which was decided recently by the House of Lords. There a proof had been taken in this Court in an appeal from the Sheriff Court, and a judgment pronounced upon it with findings, which were reversed in the House of Lords. If the proof had been taken in the Sheriff Court in that case we should have pronounced the same findings, but they would have been final.

On the whole matter, I am of opinion that this appeal is competent, and ought to be sustained.

LORD RUTHERFURD CLARK—I think the appeal is incompetent. The only interlocutor which allows a proof is that of 2nd April, and no appeal was taken from it within fifteen days. I think the decision of this question turns upon this question whether the Act of Sederunt applies in this sense that the appeal must be taken within fifteen days of the date of the interlocutor allowing proof. I think that it is settled by a series of cases that it does apply in such a sense.

I do not mean to say that if the Sheriff-Substitute pronounces an interlocutor allowing a proof, and that interlocutor is appealed to the Sheriff, that the days of appeal continue to run on—far from it; the days no doubt run from the date of the Sheriff's judgment, when that is pronounced affirming the Sheriff-Substitute's decision. In this case there is nothing of the kind; the question of proof was never under the notice of the Sheriff. The only things he has done by his interlocutor is to recal the sist and appoint a new diet of proof. I therefore think the case stands in this position, that the only interlocutor with an allowance of proof is that of 2nd April, and as the appeal was not made within fifteen days, therefore the appellants is shut up from making it now.

LORD TRAYNER—I confess I was not able to appreciate the value or relevancy of much of the argument that was addressed to us from the bar. The question here is, whether this appeal is or is not competent under the fifth section of the Act of Sederunt of 1828.

The words of that section, as they have been interpreted by various decisions, are to the effect that if an appeal is not taken within fifteen days from the date of the interlocutor allowing a proof, the right of appeal falls. The only interlocutor allowing a proof that I can find in the present proceedings is that of the Sheriff-Substitute dated 2nd April 1891, and if the fifteen days for appealing are to be reckoned from that date, then this appeal is incompetent as not having been taken within the prescribed period. It is said, however, that when the defender appealed against the interlocutor of 21st May, by which the Sheriff-Substitute sisted process for a month, he also brought up for review the earlier interlocutor allowing a proof. That the defender could, under his appeal to the Sheriff, have submitted to review the interlocutor allowing a proof, and all previous interlocutors, is certain. I think, however, that he did not do so. Lord Young thinks the Sheriff applied his mind to the question whether there should be a proof, because he remits to the Sheriff-Substitute "to fix a new diet for leading the proof allowed by interlocutor of 2nd April last." I think the Sheriff applied his mind to nothing but the question of the sist, and that his interlocutor would have been in effect the same if, refusing the defender's appeal, he had remitted to the Sheriff-Substitute "to proceed with the cause." But such an interlocutor could not be read as one allowing a proof. I think further it is clear that the Sheriff had no intention of allowing a proof, for he directs the Sheriff-Substitute to proceed with the cause under an existing order for proof, with which he, the Sheriff, does not interfere. It was suggested that where an interlocutor by a Sheriff-Substitute allowing a proof was appealed against, and the appeal not decided upon for more than fifteen days, the right of appeal would be lost, if the appeal in this case was held incompetent. There is no room for apprehension on this head, because in such a case the interlocutor of the Sheriff affirming his Substitute's interlocutor would in itself be regarded as an interlocutor allowing a proof from which the fifteen days for appealing under the Act of Sederunt of 1828 would be reckoned. This has been so decided. I concur with the majority of your Lordships in thinking the present appeal incompetent. I think we could not hold otherwise without setting aside the decisions in the cases of *Kinnes* and *Williams*.

The Court dismissed the appeal as incompetent.

Counsel for Appellant—Jameson—Sym. Agents—W. & J. Burness, W.S.

Counsel for Respondent—Rhind—Wilson. Agents—William Officer, S.S.C.