Friday, November 13.

FIRST DIVISION.

THE UNION BANK OF SCOTLAND, PETITIONERS.

Sequestration—Petition for Warrant to Hold Meeting of Creditors.

On November 3rd 1891 the Sheriff-Substitute of Kirkcudbright, on the petition of the Union Bank of Scotland, sequestrated the estates of Thomas Porter Campbell, and appointed the creditors to hold a meeting on 12th November for the election of a trustee and commissioners. On 6th November the usual notices were inserted in the *Edinburgh* and *London Gazettes*, but no meeting was held on the 12th, it being thought that sufficient notice had not been given in terms of the Bankruptcy Act. The Union Bank then presented a petition to the First Division of the Court, praying the Court to appoint a meeting of creditors to be held on a certain date for the election of a trustee and commissioners, and to grant warrant for advertising the meeting in usual form.

The Court *granted* the prayer of the petition, but found that the expenses of the petition were not to be made a charge against the bankrupt's estate.

Counsel for the Petitioners — Dewar. Agents—Ronald & Ritchie, S.S.C.

Friday, November 13.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

DIVERALL *v.* GOVERNORS OF STRICHEN ENDOWMENTS.

Process—Appeal—Competency—Interlocutory Judgment—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 53.

In an action of multiplepoinding raised in a Sheriff Court, the Sheriff-Substitute pronounced an interlocutor finding that the pursuers and real raisers were entitled to be ranked on the free fund *in medio*, to the extent of the said free fund, in terms of their claim, and *quoad ultra* continuing the cause. On an appeal being taken to the Sheriff, a joint minute was lodged for all the claimants stating that they were agreed, in order to curtail the expense of litigation, and enable parties to obtain the judgment of the Inner House, to crave the Sheriff to dismiss the appeal, and find all the claimants entitled to their expenses out of the fund. The Sheriff granted decree as craved in the joint minute.

Held that an appeal to the Court of Session was incompetent, in respect that a final judgment had not been pronounced in the Sheriff Court.

In an action of multiplepoinding raised by the Governors of the Strichen Endowments in the Sheriff Court at Peterhead, the Sheriff-Substitute (GRIERSON) on 1st August 1891 pronounced this interlocutor:—"Having considered the cause, together with the productions, Finds, under reference to the annexed note, that the pursuers and real raisers are entitled to be ranked on the free fund *in medio*, to the extent of the said free fund, in terms of their claim: *Quoad ultra* continues the cause."

Mrs Diverall and certain other unsuccessful claimants appealed to the Sheriff, and on 13th October a joint minute was lodged for all the claimants to the effect that they "concurred in stating that they were agreed, in order to curtail the expense of litigation, and enable the parties to obtain the opinion of the Inner House, to crave, and hereby crave, the Sheriff-Principal to dismiss the appeal, and to find the whole of the claimants entitled to their expenses, including the expense of competition, out of the fund *in medio*."

On 15th October the Sheriff (GUTHRIE SMITH) pronounced this interlocutor:—"Having considered the joint minute, dismisses the appeals, and finds the whole of the claimants entitled to their expenses, including the expenses of competition, out of the fund *in medio:* Allows accounts to be lodged, and remits the same for taxation, and decerns."

By the 53rd section of the Court of Session Act 1868 it is provided as follows—"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 judgments 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.'"

Mrs Diverall and certain of the other claimants then appealed to the First Division.

When the case was called in Single Bills doubts were expressed by the Court as to the competency of the appeal, and the case was continued for a day that the point might be argued, though the respondents stated that they did not desire to raise any objection to the competency of the appeal.

On the case being again called, the appellants argued—The merits of the competition had been disposed of by the interlocutor of the Sheriff-Substitute. Any further interlocutors that remained to be pronounced were merely for the purpose of giving effect to that interlocutor, and as the question of expenses had been disposed of by the Sheriff, the conditions contained in the 53rd section of the Court of Session Act had been satisfied. Further, in a case like the present where the respondents did not object to the competency of the appeal, the Court would not be so ready to reject an appeal on the ground of incompetency—*Reddie's Trustees* v. *Lindsay*, March 7, 1890, 17 R. 558.

At advising—

LORD PRESIDENT—This is certainly a fine case, but I am bound to say that the Sheriff-Substitute's interlocutor of 1st August does not appear to me to be appealable. There remains yet to be pronounced an effective and operative decree, and the Sheriff's interlocutor merely lays down principles for the determination of the case. It is true that these principles are not complex, but the omission of an operative decree makes the judgment one of an interlocutory character, and while the judgment is of that character any appeal appears to me to be excluded by the Act of Parliament. The parties may yet put the matter right, and therefore the difficulty is probably not a very substantial one. The Act of Parliament, in my opinion, lays down definite limits to the right of appeal, and this case does not fall within these limits.

LORD ADAM concurred.

LORD M'LAREN—If the Sheriff-Substitute had formally pronounced a decree repelling the claim of the appellant, that is, virtually absolving the other claimants from the conclusions involved in the claim of this appellant, then I should have been of opinion that his judgment was appealable, because the appellant would then have been out of Court, and so far as he was concerned the merits of the action would have been disposed of. I think that is a specialty recognised by the statute in the case of competitions. The parties, however, instead of going to the Sheriff and getting a sham judgment, should have gone to the Sheriff-Substitute and got a decree which they might have brought before us. I am sorry that the expenses of the appeal have been thrown away, but I think we have no option and must dismiss the appeal.

LORD KINNEAR concurred.

The Court dismissed the appeal as incompetent.

Counsel for the Appellant — Morison. Agent—Alex. Morison, S.S.C.

Counsel for the Respondents — Cook. Agents—Kinmont & Maxwell, W.S.

Saturday, November 14.

FIRST DIVISION.

MACGILLIVRAY *v.* MACKINTOSH.

(*Ante*, vol. xxviii., p. 488, *et supra*, p. 56.)

Expenses — Compensation — Agent - Disburser.

Where in an action of damages for breach of promise raised in a Sheriff Court two appeals were taken to the Court of Session, one upon the merits of the cause, and another at a later stage against the competency of a decree for expenses pronounced in the Sheriff Court, the Court *refused* to pronounce decree in name of the agent-disburser for expenses to which the pursuer had been found entitled in the second appeal, a larger sum of expenses for which the defender had obtained decree in the first appeal being still unpaid.

Expense of having Auditor's Report Approved.

A defender obtained decree for expenses, and at a later stage of the same case the pursuer was found entitled to expenses. After the pursuer's account was taxed by the Auditor the defender offered to credit him with the amount of his account under deduction of the expenses of approval and decree, and only to claim payment of a balance due to her. This offer was refused by the pursuer, who enrolled the case and moved for decree in name of the agent-disburser. The Court, holding that the defender was entitled to have the one account set off against the other, *refused* to allow the pursuer the expenses of approval and decree.

This was an action of damages for breach of promise of marriage brought in the Sheriff Court at Nairn by Hugh Macgillivray against Margaret Mackintosh. On 9th October 1890 the Sheriff pronounced an interlocutor, in which after certain findings he assoilzied the defender. The pursuer appealed to the First Division, who on 17th March 1891 affirmed certain of the findings in the interlocutor of the Sheriff, assoilzied the defender, and found the pursuer liable in the expenses in this Court. The amount of the defender's account as taxed and decerned for was £25, 15s. 6d. The pursuer again appealed to the First Division against certain interlocutors pronounced in the Sheriff Court subsequent to 17th March 1891, decerning in favour of the defender for the expenses incurred by her in the Sheriff Court. In this appeal the pursuer was successful, and was found entitled to expenses in this Court and the Sheriff Court subsequent to 17th March 1891. These expenses having been taxed at £24, 17s. 8d., the defender's agents wrote to the agent for pursuer offering to give the pursuer credit for the taxed amount of his account, less £2, 18s.