Tuesday, June 19.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

COUTTS & COMPANY *v.* JONES.

Bankruptcy—Sequestration—Deed of Arrangement — Sheriff — Appeal — Competency — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 38 *and* 170.

The Bankruptcy (Scotland) Act 1856 provides, sec. 170, that "it shall be competent to bring under the review of the Inner House . . . any deliverance of the Sheriff, after the sequestration has been awarded (except where the same is declared not to be subject to review).".

Section 38 provides that a proposed deed of arrangement subscribed by four-fifths in number and value of the creditors of a bankrupt, may be submitted to the Sheriff for his approval; "and if he shall be satisfied that such deed of arrangement has been duly entered into and executed, and is reasonable, he shall approve thereof and declare the sequestration at an end."

Held that a deliverance of a Sheriff finding that such a deed of arrangement is not reasonable, and refusing approval thereto, may be competently appealed to the Court of Session.

The estates of A were sequestrated by decree of the Sheriff of the Lothians and Peebles on 21st March 1900. At the meeting for the election of a trustee, a majority in number and four-fifths in value of the creditors resolved that the estate should be wound up under a deed of arrangement, and a petition under section 36 of the Bankruptcy (Scotland) Act 1856 was accordingly presented to the Sheriff craving him to sist procedure in the sequestration. On 6th April 1900 the Sheriff-Substitute (HAMILTON) sisted procedure till 25th May. Within the period of the sist so granted a deed of arrangement was produced to the Sheriff-Substitute, which was subscribed by, or by authority of, seven-eighths in number and eight-ninths in value of the creditors. Coutts & Company and others, the majority of the creditors, moved the Sheriff to approve of the deed. Julius Jones and others, the objecting minority, opposed this motion.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) enacts as follows:— Section 38—"If the sequestration shall be sisted, the creditors may at any time within the period of such sist produce to the Lord Ordinary or the Sheriff a deed of arrangement subscribed by, or by authority of, four-fifths in number and value of the creditors of the bankrupt; and the Lord Ordinary or the Sheriff may consider the same and make such intimation thereof as he may think proper, and hear parties having interest, and make any inquiry he may think necessary; and if he shall be satisfied that such deed of arrangement has been duly entered into and executed, and is reasonable, he shall approve thereof and declare the sequestration at an end.". . , Section 170 — "It shall be competent to bring under the review of the Inner House of the Court of Session, or before the Lord Ordinary in time of vacation, any deliverance of the Sheriff after the sequestration has been awarded (except where the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the Sheriff-Clerk within eight days from the date of such deliverance, failing which the same shall be final." . . .

On 31st May 1900, the Sheriff-Substitute pronounced an interlocutor, in which he found that the deed of arrangement had been duly entered into and executed, but that it was not reasonable, and refused to approve of it, and appointed the sequestration to proceed.

Coutts & Company and the other concurring creditors appealed to the Court of Session.

The respondents objected to the competency of the appeal, and argued—Under section 38 of the Act of 1856 the approval or disapproval of a proposed deed of arrangement was exclusively in the discretion of the Sheriff, and appeal was incompetent. The question to be determined did not depend upon legal right, but was whether on a review of the whole circumstances the arrangement was for the benefit of the estate. That was an administrative not a judicial act, and in forming his opinion the Sheriff made inquiry in an informal way. Section 36 provided that a sist must be applied for within four days after the carrying of the resolution in terms of section 35, and if granted must not last more than two months. The procedure was therefore summary. If the sist were refused, or the deed not approved of, section 39 provided that the sequestration "shall proceed." If appeal were held competent, these provisions must be disregarded. The interests of minority creditors were sufficiently safeguarded. Authorities referred to—*Clark* v. *Board of Supervision*, December 10, 1873, 1 R. 261; *Marr* v. *Lindsay*, June 7, 1881, 8 R. 784; *Tevendale* v. *Duncan*, March 20, 1883, 10 R. 852; *Strain* v. *Strain*, June 26, 1886, 13 R. 1029; *Main* v. *Lanarkshire and Dumbartonshire Railway Company*, December 19, 1893, 21 R. 323. The decisions on the English Bankruptcy Acts were of no value in interpreting the Scotch Acts. In England it had always been assumed, but it had never been decided, that appeal was competent. The Sheriff's jurisdiction was in England exercised by the registrar, who was an officer of Court, not an independent judge.

Argued for the appellants—Under section 170 of the Act of 1856, appeal was competent from every deliverance of the Sheriff, "except where the same is declared not to be subject to review." This was a deliverance of the Sheriff, and therefore appealable. The general trend of authority was against

excluding review by implication—*Marr* v. *Lindsay, cit.* The distinction was clear between cases where the Sheriff's jurisdiction was merely statutory and appeal incompetent, and the present case, where the Court had originally jurisdiction prior to the Bankruptcy Acts—*Latta* v. *Bell*, July 4, 1862, 24 D. 1247; *Dixon* v. *Greenock Distillery Company*, July 13, 1867, 5 Macph. 1033; *Tennent* v. *Crawford*, January 12, 1878, 5 R. 433; *North of Scotland Banking Company* v. *Ireland*, November 20, 1880, 8 R. 117; *Ex parte Kearsley* (1886), 18 Q.B.D. 168. In no case had appeal been held incompetent unless where the Act expressly so declared.

An argument was also submitted by the parties on the merits of the deed of arrangement.

At advising—

LORD JUSTICE-CLERK—There is a preliminary question raised as to the jurisdiction of the Court to entertain this appeal. On that question, after considering the clauses of the Act of Parliament, I have formed a clear opinion. I am unable to find anything from which it can be implied that the jurisdiction of this Court, which is conferred upon it in section 170 of that Act, is excluded to prevent an appeal on such a deliverance as has been pronounced by the Sheriff.

[*After dealing with the merits, his Lordship proceeded*]—I would move your Lordships to sustain the appeal and to sanction the agreement.

LORD YOUNG—I substantially concur, and think it sufficient to say that I am of opinion that the deed of arrangement was regularly made and that it is reasonable, and further, that as a Court of Appeal we have jurisdiction to approve of it, although the Sheriff disapproved of it because he thought it unreasonable.

LORD TRAYNER—I think there is a great deal to be said in support of the view maintained by the respondents that under the 38th section of the Bankruptcy Act 1856, it is reserved to the Lord Ordinary or the Sheriff to decide whether the deed of arrangement is reasonable, and to decide that matter finally. The language of the section, if read alone, would, I think, support that view. But section 170 of the same statute provides that any deliverance by the Lord Ordinary or Sheriff pronounced after sequestration has been awarded shall be subject to review "except where the same is declared not to be subject to review." Now, the interlocutor of the Sheriff here appealed against is a deliverance by him after the sequestration had been awarded, and it is nowhere "declared" not subject to review. I think therefore we must hold the present appeal competent. That being done, I have no doubt that the deed of arrangement is reasonable, and ought to be approved.

LORD MONCREIFF—I am of opinion that the appeal is competent. The question is not free from difficulty, because if the 38th section alone is looked at the reasonableness of the deed of arrangement is a matter of discretion and sound judgment, and under the 38th section the person who is to be satisfied is the Sheriff. The statute does not prescribe what inquiry the Sheriff is to make, and no provision is made for taking or recording evidence. Therefore there are here some of the elements which in other cases have led the Court to hold that the decision of the Judge of first instance was final.

But the Bankruptcy Act of 1856 is so framed that I think it is impossible to hold that this deliverance of the Sheriff is not subject to review. In all cases in which it is intended that the judgment of the Sheriff shall be final this is expressly stated; and section 170 provides that it shall be competent to bring under review of the Inner House "any deliverance of the Sheriff after sequestration has been awarded, except where the same is declared not to be subject to review."

The practice under the English Bankruptcy Act 1883 appears to be the same, viz., that the decision of the Registrar (who in these matters occupies the same position as the Sheriff does in this country) as to the reasonableness of an offer of composition or deed of arrangement is subject to the review of the Court of Appeal—*Ex parte Kearsley*, L.R., 18 Q.B.D. 186.

The Court recalled the interlocutor of the Sheriff-Substitute, found that the deed of arrangement had been duly entered into and executed and was reasonable, approved of the same, and declared the sequestration at an end.

Counsel for the Appellants—Salvesen, Q.C.—Clyde—Hunter—H. Young. Agents—Charles George, S.S.C.—Dundas & Wilson, C.S.

Counsel for the Respondents—Cook—C. D. Murray. Agents—Dove, Lockhart, & Smart, S.S.C.—J. S. & J. W. Fraser-Tytler, W.S.—Nisbet & Mathison, S.S.C.

Thursday, June 21.

FIRST DIVISION.

BALLANTYNE, PETITIONER.

Bankruptcy — Sequestration — Petition to Declare Sequestration at an End.

The estates of a bankrupt were sequestrated in 1896 on a petition presented by himself, with consent of his son, who was a creditor. An abbreviate of the deliverance awarding sequestration was recorded, but no further procedure was taken. The bankrupt died in 1897, and in 1900 a petition was presented to the Court by his son, with consent and concurrence of the only other known creditor on the estate, in which the petitioner averred that he and the concurring creditor had agreed to the division of