Counsel for the Pursuers — Guthrie — Burnet. Agents — Clark & Macdonald, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C. — Cooper. Agent — James Watson, S.S.C.

Saturday, July 17.

FIRST DIVISION.

[Sheriff Court of Aberdeen.

BROWN'S TRUSTEES *v.* MILNE.

Sheriff — Decree by Default — Failure to Lodge Accounts — Reponing — Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 6—*Sheriff Court Act* 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 20.

In an action of accounting in the Sheriff Court raised against the law-agent of a trust, and concluding for payment of an arbitrary sum on failure to account, the defender lodged no defences, but put in a minute craving for a sist to allow of the production of the accounts. The Sheriff - Substitute granted the sist, and on the defender's failure to produce the accounts decerned against him for payment of the sum sued for. The defender appealed to the Sheriff, who, in respect of no appearance by the appellant, dismissed the appeal. The defender thereafter appealed to the Court of Session to be reponed.

The Court (*dub.* Lord Adam) *recalled* the Sheriff - Substitute's interlocutor, and *remitted* to the Sheriff with directions to consider the defender's motion to be reponed, provided he lodged his accounts within eight days.

The Sheriff Courts Act 1853 (16 and 17 Vict. c. 80), section 6, enacts—"Where any condescendence or defences, or revised condescendence or revised defences or other paper shall not be given in within the periods prescribed or allowed by this Act the Sheriff shall dismiss the action or decern in terms of the summons as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just."

The Sheriff Courts Act 1876 (39 and 40 Vict. c. 70), section 20, enacts—"Where in any defended action one of the parties fails to appear by himself or his agent at diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the Sheriff to proceed in his absence, and unless a sufficient reason appear to the contrary he shall, whether a motion to that effect is made or not, pronounce decree as libelled, or of absolvitor (as the case may require), with expenses."

Mr Robert Brown, hotel keeper, Aberdeen, died intestate in 1887, survived by his widow and five children. Mrs Brown was appointed his sole executrix, and in 1892 she and her children assigned the whole executry estate to trustees for certain purposes.

Mrs Brown died in 1893, after which date the executry estate of Mr Brown was managed by the trustees, original and assumed, who appointed Mr Milne, one of their number, to act as law-agent in the trust.

In 1896 it was resolved that the executry estate should be wound up, and the other trustees called upon Mr Milne for an accounting and for delivery of the papers connected with the estate. Mr Milne having delayed to produce these, though repeatedly called upon to do so, an action was raised against him by the other trustees in the Sheriff Court of Aberdeen.

The pursuers craved the Court—"To ordain the defender to produce a full account of his intromissions as one of the trustees and as law-agent for the trustees acting under the said trust-disposition and deed of nomination; and to pay to the pursuers the sum of £500 sterling, or such other sum as may be the true balance due by him to them, with the legal interest thereof from the date of citation hereon till payment: And failing his producing such account, to ordain the defender to pay to the pursuers the sum of £500 sterling with interest as aforesaid: Further, to ordain the defender to deliver to the pursuers the whole title-deeds, writs, books, accounts, vouchers, notices, receipts, and all other documents whatsoever that have come into his possession as a trustee under the foresaid trust-disposition as law-agent for the said Robert Brown or for the said trustees; to find him liable in expenses; and to grant warrant to arrest on the dependence."

No defences were lodged by the defender, but he lodged a minute in the following terms—"The defender has in course of preparation the trust accounts, and expects to have them ready for production to the Court in the course of next week. The transactions extend over a considerable period of time, are numerous and somewhat involved, and the labour of producing them is pretty considerable. The accounts will show a debit balance against the trust-estate, for which the defender has a lien over the whole title-deeds, writs, books, accounts, and other documents called for by the trustees in this action, and he claims his right to retain these until the said balance is settled. In respect of this minute the defender craves the Court to sist the process for a period of fourteen days to allow of the production of the accounts, or, alternatively, to pronounce an order for production of the accounts within the time specified."

On 12th May 1897 the Sheriff-Substitute, in respect of the minute, sisted the cause for ten days to allow of production of defender's accounts.

On 26th May the Sheriff-Substitute pronounced the following interlocutor—"On the pursuers' agent's motion, in respect of defender's failure to lodge defences or produce the accounts in question, decerns against the defender for payment to the

pursuers of the sum of five hundred pounds sterling, with interest as prayed for, in terms of the second alternative conclusion of the prayer of the petition, and further decerns against the defender in terms of the conclusion for delivery."

The defender appealed to the Sheriff, who on 15th June, "in respect of no appearance for or by the defender and appellant at this diet," dismissed the appeal.

The defender appealed to the Court of Session.

Argued for respondent — The appeal was incompetent, being really nothing but an application for reponing, and the Court would not interfere lightly with the Sheriff's discretion or with decrees given in virtue of sec. 6 of the 1853 Act and sec. 20 of the 1876 Act — *M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085. The appellant had been given ample time to produce his accounts, and had no reasonable excuse for failing to do so.

Argued for appellant — The Court should remit to the Sheriff to repone him. He had been guilty of carelessness, but owing to the complicated nature of the accounts demanded, it was only natural that he should require time. The 6th section of the 1853 Act did not apply. It might be that the 20th section of the 1876 Act applied, but the Court might follow the course taken in *Bainbridge* v. *Bainbridge*, January 18, 1879, 6 R. 541.

LORD PRESIDENT — If this gentleman had desired to be reponed, his natural and proper course would have been to apply to the Sheriff-Principal, and the prevailing opinion, with which I am loth to differ, seems to be that we had better relegate matters to their proper condition, in which they should have been placed by the action of the appellant. I am accordingly disposed to concur in the view that we should recal the interlocutor of the Sheriff-Substitute, and remit to the Sheriff to consider any motion to be reponed that may be made by the appellant within eight days, provided he produces his accounts within that period.

LORD ADAM — My feeling would have rather been to refuse the appeal, but I agree in the more moderate course which has been proposed.

LORD M'LAREN — I concur. It was the duty of the appellant to have produced his accounts along with the note of appeal, or, at all events, before the case was moved in Single Bills, and he would then have been in a stronger position in asking to be reponed. If the session had not been near an end, we should probably have allowed him a few days to give in an account, but that being impossible, I think we should follow the course proposed.

LORD KINNEAR — I think that in the general case a defender, against whom a decree by default has been pronounced by the Sheriff-Substitute, has ample opportunity to be reponed against it by appealing to the Sheriff. If he appeals and does not appear to support his application to be reponed, I should in the general case have held that the matter was concluded against him here, and that the Court ought not to be asked to interfere at so late a period by giving the party a further opportunity for showing that he may be restored against the consequences of his own default when a sufficient opportunity has already been afforded to him, which — as his counsel admitted in the present case — has been neglected without any reasonable excuse. But I am much moved by the consideration which I understand has influenced your Lordships, that in this case, owing to the form of the action, decree is asked for payment by the defender of what may be described as a random sum, so that it may turn out that the penalty for failing to observe the orders of the Sheriff may be a more severe one than it would, if the whole circumstances were known to the Court, be reasonable to inflict. On that ground I am disposed to concur in the view that we should give the defender another chance by allowing him to go back to the Sheriff to satisfy him, if he can, by producing his accounts, that he may be heard upon the merits.

LORD M'LAREN — I should like to add that I concur in all that Lord Kinnear has said, and that we are entitled, for the reason that the decree is for an arbitrary sum, which the pursuer might state at any amount he pleased, to consider the case as one requiring exceptional treatment.

The Court pronounced the following interlocutor:—

> "Recal the Sheriff-Substitute's interlocutor: Remit to the Sheriff-Principal to pronounce decree in terms of the said interlocutor of the Sheriff-Substitute, unless within eight days sufficient cause is shown to the contrary and accounts are produced by the defender, and, in the event of sufficient cause being shown and accounts produced, to allow defences to be lodged within two days, and to remit to the Sheriff-Substitute to proceed, and decern: Find the pursuers entitled to expenses incurred by them both in the Sheriff Court and in this Court," &c.

Counsel for Appellant—Brown. Agents —Henry & Scott, W.S.

Counsel for Respondents — Salvesen. Agent—Alexander Morison, S.S.C.