Thursday, June 7.

SECOND DIVISION.

MURRAY *v.* DICKSON.

Jurisdiction — Sheriff — Reduction — Bankruptcy Acts. Held that a Sheriff cannot entertain an action of reduction, and that the Bankruptcy Acts of 1856 and 1857 confer upon him no such power. Opinions (Lord Benholme diss.) that these Acts give a Sheriff no jurisdiction in regard to questions of heritable right which he had not before.

This was an advocation from the Sheriff Court of Kincardine. The pursuer in the Court below was Patrick Dickson, writer in Laurencekirk, trustee on the sequestrated estate of William Murray, now or lately tenant of the farm of Mill of Barns, Kincardineshire, and as such, representing the creditors on the sequestrated estate of the said William Murray, and who were true creditors of the said William Murray at and prior to the time of his granting the pretended assignation aftermentioned, and still are creditors of the said William Murray, and the defender was David Murray, millwright, residing at Mill of Barns aforesaid. The conclusions of the summons were in these terms:—"Therefore the defender ought to be decerned to exhibit and produce before me a pretended assignation, granted by the said William Murray to the defender, of a lease or tack for nineteen years from and after the term of Whitsunday 1858, of all and whole the farm and mill of Mill Barns and others, in the parish of Marykirk, entered into between the said William Murray and the Right Honourable Francis Alexander Keith Falconer, Earl of Kintore, and dated the 12th day of August 1857, and 18th day of March 1858; as also, of the whole stocking, cattle bestial, implements of husbandry, and household furniture in the offices and dwelling-house of the said farm and mill of Mill of Barns, and generally of the whole effects belonging to the said William Murray on the said farm; said assignation being dated the 3d day of January 1863, or whatever other dates, tenor, or contents the same may be, to be seen and considered by me: And the said pretended assignation, with all that has followed or may follow thereon, ought to be reduced, rescinded, annulled, and decerned to have been from the beginning, to be now, and in all time coming, null and void, and of no avail, force or effect in judgment, or outwith the same, in all time coming, and the pursuer, as trustee foresaid, reponed and restored thereagainst *in integrum*, in respect the said pretended assignation was granted by the said William Murray, when in insolvent circumstances, to the said David Murray, his son, who is a conjunct person with the said William Murray, and without any true, just, or necessary cause, and without a just price being paid for the same, with a view to defraud his just and lawful prior creditors, represented by the pursuer; and in respect of all which the same is null and void, in terms of the first clause of the Act of Parliament passed in the year 1621, chapter 18; with expenses."

The defender pleaded, *inter alia*, that the action was incompetent in the Sheriff Court.

The Sheriff-Substitute (Dove Wilson) sustained this plea, and dismissed the action as incompetent, adding to his interlocutor the following

Note.—The 10th section of the Bankruptcy Act of 1856 enacts that "all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law, may be set aside, either by way or action or exception."

The 9th section of the Act of 1857 declares that the preceding enactment is to "be taken to apply to actions and exceptions, as well in the ordinary Court of the Sheriff as in the Court of Session."

In construing these enactments in order to determine what changes they introduce in Sheriff Court procedure, it is to be observed that the second of them, which applies the first to the Sheriff Court, does not seek to introduce any new forms of actions or exceptions, but simply declares that a certain enactment shall apply to those actions and exceptions which it assumes to be already in use. There is therefore in these enactments, in so far as they apply to the Sheriff Courts, no authority to raise any action which it was not previously competent to raise, or state any exception which it was not previously competent to state.

It now becomes necessary to consider, and not difficult to determine, what the effect is of the application of the first enactment to actions and exceptions in the Sheriff Court. The enactment to be applied is, that deeds of a certain class may be set aside by way of action or exception. As regards the rights of pursuers in the Sheriff Court, the Sheriff-Substitute conceives the effect of the combined enactments to be, to render it competent for the pursuer of a Sheriff Court action "to set aside by way of action,"—that is, to reduce any deed of the class specified which he has an interest to challenge, as standing between him and the granting of his petitory conclusions; and in order that he may exercise this right, the enactments necessarily make it competent for him to insert conclusions for reduction as introductory to the petitory conclusions. Next, as regards defenders, the effect of the enactments is to enable them to pursue to an issue those exceptions to such deeds which it was always competent, and frequently necessary, to state in the Sheriff Court, but which, when stated, formerly had only the effect of obliging the Sheriff to sist procedure till they should be determined in a reduction. In this view of the effect of the enactments they have an intelligible meaning as regards the rights of both pursuers and defenders, without assuming that they confer on the Sheriff Courts power to reduce deeds to all intents and purposes—a power which belong rather to a Court of general than to a Court of local jurisdiction.

The power conferred by them is more limited, but still entirely beneficial, inasmuch as it enables the Sheriff to exercise his ordinary jurisdiction, unhindered by the existence of any fraudulent deeds, which might otherwise have impeded his functions. If the preceding view of the effect of the enactments be well founded, it is fatal to the present action. The present summons is an ordinary summons of reduction, containing no petitory conclusion, in terms of which it would be competent for the Sheriff to decern. The nearest approach to a petitory conclusion is that to have the pursuer reponed *in integrum*, and it is only petitory in the sense in which every possible conclusion is petitory. Moreover, it will be seen that it is a conclusion which, if the opinion of the Sheriff-Substitute be right, it is incompetent for him to entertain.

It is perhaps scarcely necessary to point out that the present decision does not conflict with but is in entire accordance with, the case of Gall *v.* M'Dougall, decided by Sheriffs Cleghorn and Robertson, and reported in the Scottish Law

Magazine for 1863, p. 42; for in that case there were two proper petitory conclusions, one for interdict, and the other for a removing. And the reduction was only entertained as introductory to them. Had there been such conclusions in the present action, the Sheriff-Substitute could not have doubted its competency. J. D. W.

The Sheriff (Shand), on appeal, pronounced the following interlocutor:—

Edinburgh, 26th April 1865.—Having considered the cause, recals the interlocutor complained of, and repels the first and second pleas in law for the defender: Holds the production satisfied by the production of the assignation called for, being No. 11 of process: Allows the parties a proof of their averments, and to the pursuer a conjunct probation; and remits the cause to the Sheriff-Substitute, to proceed with the proof.

ALEX. BURNS SHAND.

Note.—The Sheriff has come to the conclusion that the effect of section 10 of the Bankrupt Act of 1856, and section 9 of the Act of of 1857, is to render such an action as the present competent in the Sheriff Court. The direct result of success on the part of the pursuer in the present action would be, to give him right to delivery of the moveable effects which were carried to the defender by the assignation challenged, and a right to enter to the farm, should the landlord be willing, under any arrangement, to accept the pursuer as his tenant; or, otherwise, a right to dispose of the lease, for behoof of the bankrupt's creditors, in favour of a new tenant, under an arrangement with the landlord. The action might have contained conclusions to enable the pursuer judicially to vindicate these rights or conclusions of count and reckoning against the defender; and if it had been so framed, the Sheriff-Substitute is of opinion that it would have been competent. The Sheriff does not think that the absence of such conclusions, which, indeed, may be found altogether unnecessary, renders the action incompetent. The provision of the later of the Acts of Parliament above referred to is not happily expressed, but the Sheriff thinks it was thereby intended to give jurisdiction in the Sheriff Court to set aside deeds on grounds such as are maintained in this case, irrespective of the particular form in which the action is brought; and that the 10th section of the Act of 1856 may now be read as if the words "in the ordinary Court of the Sheriff, as in the Court of Session," in the later Act, had occurred after the words "may be set aside, either by way of action or exception," in the former; in which case there could be no question as to the competency of the action.

A proof having been led, the Sheriff-Substitute pronounced the following interlocutor, which was adhered to by the Sheriff:—

Stonehaven, 12th June 1865.—The Sheriff-Substitute having heard parties' procurators on the closed record and proof adduced, finds that the assignation called for, being No. 11 of process, granted by William Murray, tenant of Mill of Barns, now deceased, in favour of his son, the defender, on the 3d day of January 1863, was granted to a conjunct or confident person, without true, just, and necessary cause, and without a just price really paid, and after the contracting of lawful debts from true creditors: Therefore declares the said assignation to have been from the beginning, and to be in all times coming, null and of none avail, and reduces the same, in terms of the conclusions of the libel; and decerns: Finds the pursuer entitled to expenses, of which allows an account to be given in, and when lodged, remits the same to the auditor to tax and report.

J. DOVE WILSON.

The defender advocated.

SOLICITOR-GENERAL and BURNET for him argued—There was at one time a doubt whether, in order to set aside a fraudulent alienation by a bankrupt, an action of reduction was necessary. The Act of 1856 was passed to remove this doubt. These doubts having been removed in regard to the Court of Session, the Act of 1857 was passed to remove them in regard to the Sheriff Court also. But neither statute conferred any new jurisdiction, and it is admitted that unless it was conferred by these two statutes the Sheriff has no power to entertain an action of reduction. Farther, the thing here sought to be reduced is a right to a heritable estate, with which the Sheriff cannot interfere. Stair, 4, 40. 14-15, 2 Bell's Comm. p. 194, and Bowers *v.* Cowper, 1671, M. 2734, were cited.

GORDON and MILLAR, for the respondent, replied—The Act of 1856 applies to all alienations, whether of heritage or moveables. The general scope of the Act was to extend the power of the Sheriff, for it gave him power to sequestrate. The Act of 1856 ought now to be read as if it enacted that fraudulent alienations may be set aside either in the Court of Session or in the Sheriff Court, and that either by way of action of reduction or exception.

The LORD JUSTICE-CLERK said—I am not disposed to say that the question is altogether free from doubt, and I am the less inclined to say so because the Sheriff has differed from his Substitute. But I do think that the Sheriff's view is founded on an erroneous conception of the purpose of the enactments and the legal effect of their words. I rather think that section 10 of the Act of 1856 was intended to apply to proceedings in the Sheriff Court, and indeed in any Court, as well as in the Court of Session, and therefore I am disposed to construe it in that way, and to derive very little assistance from the Act of 1857, which seems to me just to declare that that was the intention of the Act of 1856. The question is, What is the purpose and effect of the provision in the Act of 1856? It is a remedial enactment, and the great thing in regard to such an enactment is to ascertain what was the mischief intended to be remedied. The mischief was the expense and delay caused in bankruptcy proceedings by the necessity of raising actions of reduction to set aside deeds which were objected to as fraudulent alienations by the bankrupt. That, I think, was the only mischief to be remedied. What, then, is the remedy one would naturally expect to see proposed for this mischief? It is not just to declare that reductions shall not be necessary hereafter, but that the objection may be pleaded without any action of reduction? No doubt a difficulty is raised by the argument for the respondent, who maintains that this 10th section permits the challenge to be made only in two forms—namely, action and exception, and does not give power to a pursuer of a petitory action to plead the objection by way of reply. I am not disposed to give effect to this argument. It is quite true that in our older pleadings an exception meant a defence, which assumed the competency and relevancy of the action, and on that assumption excluded it. But gradually in our law the word has come to have a more extensive meaning; and when it is said that you can plead an objection *ope exceptionis* you only mean that you do not require to raise it by way of action. There is pretty old authority

for this. Sir George Mackenzie in his observations on this very Act of 1621 says (vol. ii, p. 23)—"By this paragraph of the statute the nullity arising from this statute is receivable by way of exception as well as action, *ope exceptionis*, as our Practique terms it." That being so, I read section 10 as meaning that this challenge may now be given effect to either by action or exception, including in the phrase "exception" reply; so that the pursuer of a petitory action, in answer to whose demand there is produced a deed that excludes it, may challenge that deed by way of reply to the exception. That provides a remedy for the mischief; and if it is a full remedy, as I think it is, surely it is not necessary to construe the statute so as to make it mean anything more. It is said that it is to be inferred from the words of the section that reduction, a form of action unheard of in the Sheriff Court, was intended to be made competent there, but the remedy required was as far as possible to get quit of reduction altogether. It therefore appears to me that this clause only means that whereas formerly, if a question of this sort turned up in a Sheriff Court process, it was required that the action should be sisted until a reduction was brought, in future no sisting is to be required, but the question is to be tried in that action. I therefore think the Sheriff-Substitute is right, and the Sheriff-Depute wrong. If I were to examine the summons, I think I might say that it is an action competent in no court. It contains no certification *contra non producta*, and therefore there was no competency in holding the production satisfied. There is a conclusion for exhibition which the Sheriff has completely disregarded. It is altogether a mongrel sort of summons; but if it is anything it is a summons of reduction; and even though it were properly framed as such it would be incompetent in the Sheriff Court.

Lord Cowan—I have no great difficulty in this case. The question is just whether a positive jurisdiction power and authority have been conferred by these Bankruptcy Acts upon Sheriffs to reduce deeds which are voidable as fraudulent at statute or common law. I think that is not to be inferred without positive enactment. In the course of the discussion I referred to the Act 1 and 2 Vict., cap. 110, whereby the Sheriff's jurisdiction is extended to questions of nuisance and servitude in express terms. Section 15 of that Act enacts that "the jurisdiction power and authority of Sheriffs of Scotland shall be and the same are hereby extended to all actions or proceedings relative to questions of nuisance, or damages arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or praedial servitudes." Here we have no such enactment. I apprehend that section 10 of the Act of 1856 does appear to have reference to actions of reduction as I read it. I think it should be read just as if it had said that fraudulent alienations may be set aside either by way of action of reduction as hitherto or by way of exception. But it goes no further. It confers no new jurisdiction. How then does the extension of this to the Sheriff Court affect the matter? Actions of reduction may be still brought by a trustee in regard to matters which the Sheriff has no jurisdiction to try, but these can only be raised in the Court of Session. The more ordinary case is that the party claiming under the voidable title takes possession; the trustee steps in and says—that is mine. He may in a petitory action before the Sheriff narrate that the voidable deed is void, and cannot affect his right; but he cannot sue a reduction of the deed before the Sheriff because there is no extension of the Sheriff's jurisdiction. All the power given to him is to entertain in a petitory action pleas which otherwise would have required a reduction. I may add, that I think it would be a very alarming thing if the Sheriff's jurisdiction were extended to the effect of giving him power to reduce rights to heritable estates, however large, at present only competent to the Court of Session, merely because the question arose in cases of insolvency.

Lord Benholme—The arguments in this case have been very ably and ingeniously conducted, and it is only for the purpose of entering my protest against some of the arguments which have been used that I say anything. There are some things which have been urged that I cannot agree with. In the result I agree with your Lordship. In the Act of 1621 there are three expressions used—action, exception, and reply—which clearly indicate either an action of reduction by a pursuer, or an exception by a defender, or a reply by a pursuer who has no reductive conclusions in his summons. In the two recent statutes I have no manner of doubt that the word "action" means an action of reduction, and "exception" means either an exception or reply. Sir George Mackenzie clearly points out the opposition between action and exception. After noticing the distinction of the civil law betwixt nullities which are received *ipso jure*, and those which are so *ope exceptionis*, he says—"In our law, *nullum ipso jure* and *nullum ope exceptionis* are the same and *termini convertibiles;* and with us the opposition is betwixt *nullum ope exceptionis* and *actionis*." Then it is quite clear that by the Act of 1856 it was intended to remove the supposed necessity of reducing deeds challenged, and to make it competent for the party challenging to do so either by way of exception or reply. The difficulty is in the Act applying that to the Sheriff Court. But how can you apply the enactment of 1856 *in terminis* to the Sheriff Court. No new jurisdiction was conferred on the Sheriff Court in regard to actions, and when the change was to be made in the Sheriff Court, I cannot imagine that the Legislature was introducing for the first time in the Sheriff Court a form of process which they had abolished as far as possible in the Court of Session. I think the Sheriff may now judge of every deed in the way of a pursuer challenging it, to whatever it relates. On this point I differ from Lord Cowan. This no doubt is a great extension of the Sheriff's power but I think it has been conferred by the Legislature. I don't think, however, that it follows that a form of action only competent in the Court of Session has been authorised in the Sheriff Court.

Lord Neaves—I don't think either of the two statutes is intended to enlarge the jurisdiction of any Court. I see no words used pointing in that way. The use of the expression, "*may* be set aside," confirms this view. Reductions were meant to be dispensed with as much as possible, and the argument is that the object was to introduce reduction—that the evil to be remedied by the statute being the necessity for a reduction, the effect of the enactment is to repeal it very imperfectly in one Court, and to create it in another. In remedial legislation the rule of construction is to give as full a remedy as is necessary, but nothing more; but if these statutes give a power to reduce, they create an additional evil instead of providing a remedy. I differ from Lord Benholme in saying that an unlimited jurisdiction to the Sheriff to deal with heritable rights, of whatever magnitude, has been

introduced by these provisions. I don't admit that at all, and I am not sorry that we have come to the conclusion we have arrived at in this case, for I think the nature of the action of reduction is such that it ought to be confined to the Court of Session.

The interlocutors advocated were therefore recalled, and the action dismissed as incompetent, with expenses in this and in the Court below.

Agent for Advocator—John Thomson, S.S.C.
Agents for Respondent—Adam & Sang, S.S.C.

Friday, June 8.

FIRST DIVISION.

COUTTS *v.* COUTTS.

Husband and Wife—Action of Aliment—Competency. An action of aliment by a wife raised after she had been for eleven years living apart from her husband, notwithstanding his offers to receive her, which she rejected in consequence, as she alleged, of her husband's cruelty, *held* incompetent in respect there were no conclusions for judicial separation.

This was an action at the instance of a wife against her husband, in which she concluded for payment to her yearly for her aliment of the sum of £75. The parties were married in 1853, but have been living separate from each other since 1855. In the end of that year the wife raised an action before the Sheriff Court of Aberdeen for interim aliment, in which she obtained decree for £26. In that action the defender expressed his willingness to receive his wife back to his house, and in this action he repeated that offer, and said that he had been all along willing so to receive her, but that she refused to return. The wife, on the other hand, averred that she had left her husband's house in consequence of her husband's cruelty towards her. The present action contained no conclusion for separation.

The defender's first plea in law was that "the pursuer had not averred a relevant case to entitle her to insist in this action." The Lord Ordinary (Jerviswoode) repelled this plea, and allowed a proof. The defender reclaimed.

SOLICITOR-GENERAL and MAIR, for him, argued—This action is incompetent because the defender is willing to receive the pursuer into his house. It is no answer to this to say that the defender has treated the pursuer with cruelty, because in that case the action should be for separation and aliment. Countess of Caithness, 25th July 1744, M. 5886; Bell *v.* Bell, 22d February 1812, F.C.; Anderson *v.* Anderson, 3d March 1819, F.C. There is no statement as to what the pursuer has been doing in the interval since 1855, and it is not competent at this distance of time to raise a simple action of aliment.

PATTON and THOMS, for the pursuer, replied—The pursuer is not bound to return, if her averments are true, which must at present be assumed, for her life would not be safe. Lady Fowlis, M. 6158; Shand, 28th February 1832, 10 S. 384.

(Lord ARDMILLAN referred to the cases of Williamson, 27th Jan. 1860, 22 D. 599, Couper, 24th Nov. 1860, 23 D. 68; and Paterson, 14th Dec. 1861, 24 D. 215.)

In the course of the argument the defender was allowed to add the following plea:—"The action is in the circumstances averred by the pursuer incompetent, in respect there is no conclusion for a judicial separation."

At advising,

The LORD PRESIDENT said—This is an action at the instance of Mrs Coutts against her husband for payment of the sum of £75 yearly, in name of aliment, from the term of Martinmas 1864. It appears that this lady has been living separate from her husband since 1855. An objection was taken by the husband to the relevancy of the action. He says he has repeatedly offered to take his wife back to live with him—that she had no good reason for going away—and that he is still willing to receive her. She says that his conduct towards her was such as justified her leaving him, and that she cannot in safety return to live with him. The husband denies all this, and objects to a claim being made against him for aliment, there being no conclusion for judicial separation. He pleads that the pursuer has not averred a relevant case to entitle her to insist in this action. Under this plea the averments of the pursuer were somewhat closely criticised, and objections of a broader kind were stated, which some of your Lordships thought amounted to a plea against the competency of the action, and the defender added a plea to this effect. This action has undoubtedly been raised under very unusual circumstances. The lady had been living separate from her husband for about nine years before it was brought. She was not doing so under any arrangement with her husband of the breach of which she complained. What she says is, that her husband's conduct amounted to *sævitia;* and we are asked to investigate a case which, if true, would give grounds for a judicial separation in an action containing no conclusions for separation. I am not aware that any case of this kind has ever occurred; and I am of opinion that the action ought not to be sustained. If the defender had not expressed his willingness to take the pursuer back to live with him, it would have been different. It would then have been an ordinary case of aliment. Perhaps, too, the case might have been different had it been brought immediately. But in the circumstances in which the action has been raised I think it cannot be sustained. It may be a very nice question whether it should be dealt with as an irrelevant or incompetent action. These terms may run very much into one another in their meaning. It is enough that the circumstances disclosed by the pursuer don't warrant the investigation which she seeks, there being no conclusion for separation. This will not prevent her from bringing an action for judicial separation whenever she pleases. There will be conclusions for aliment in that action, under which it will be competent for the Court to award it. This is the opinion of the Court, and in the circumstances of it we don't think it a case for finding the husband liable in the wife's expenses.

Agent for Pursuer—William Officer, S.S.C.
Agent for Defender—James Finlay, S.S.C.

SECOND DIVISION.

SILLARS *v.* BOWIE.

Cautioner — Relief — Pactum de non Petendo. Circumstances in which held that a cautioner was entitled to operate immediate relief for payment of the balance of a sum advanced by him to pay the second instalment of a composition due by a sequestrated estate.

The facts of this case were these. The defender, a bankrupt, was discharged, on 2d April 1863, on paying a composition of 5s. 6d. per pound, in two instalments of 3s. and 2s. 6d. respectively. His