

suer as a passenger travelling on their railway was then entitled to be, whereby his leg was injured, through the fault of the defenders—to his loss, injury, and damage?”

Damages laid at £250.

Agents for Pursuer—Murdoch, Boyd, & Co., S.S.C.

Agent for Defenders—Stodart Macdonald, S.S.C.

Thursday, Feb. 14.

FIRST DIVISION.

MARSHALL v. WINK AND WOTHERSPOON.

Bankruptcy—Appeal—Competency—Process. A party having appealed against a trustee's deliverance rejecting his claim to a fund, objection to the competency of the appeal that there was no appeal against another deliverance sustaining the claim of another party to the same fund repelled.

This was a question arising in a competition to be preferentially ranked on a sum of £200, belonging to the sequestrated estate of Archibald Livingston, writer in Glasgow. The parties to the competition were John Marshall, S.S.C., and William Wotherspoon, S.S.C. Mr Wink, the trustee, sustained Mr Wotherspoon's claim, and by another deliverance rejected that of Mr Marshall. Mr Marshall thereupon appealed to the Lord Ordinary the deliverance of the trustee rejecting his claim. The trustee pleaded:—

“1. The fund *in medio* being exhausted by the deliverance in favour of Mr Wotherspoon, and the appellant not having appealed that deliverance which is now final, the present appeal is incompetent and should be dismissed.

“2. At least the deliverance in Mr Wotherspoon's favour is *res judicata*, in reference to the fund in dispute.

“3. The appellant not having made Mr Wotherspoon a party to the present appeal it is incompetent; at least the appellant is bound to call Mr Wotherspoon as a party and dispute his preference with him.”

The Lord Ordinary (Mure) repelled the first plea-in-law for the respondent, and, before further answer, appointed the cause to be intimated to Mr Wotherspoon.

The trustee reclaimed.

The Court, after hearing the counsel for the appellant and trustee, before answer, appointed intimation to Mr Wotherspoon, who appeared and sisted himself, and was thereafter heard by counsel, not only on the competency of the appeal but also on the merits of the dispute betwixt him and Mr Marshall, which involved very delicate and difficult questions as to the effect of an inhibition and the extent of a right of hypothec.

To-day, after having taken time to consider, the Court adhered to the interlocutor of the Lord Ordinary, repelling the first plea-in-law for the respondent, and, as a consequence thereof, they also repelled the second and third.

LORD PRESIDENT—This case is before us along with an appeal against a judgment of a trustee on a sequestrated estate, by which he has rejected a claim of preference made by the appellant Mr Marshall. He has complained of that judgment, and an objection has been taken to the appeal, on the ground that while the appellant's claim was rejected, a claim by Mr Wotherspoon had been sustained, that that claim exhausted the fund, and that the judgment in regard to it had not been

appealed and was now final. Mr Marshall says he has appealed the judgment which particularly concerned him, and that that is sufficient to entitle him to have it reviewed. But the trustee, who very properly appeared in the proceedings, takes the objection expressed in his first plea in law.—[Reads.] It was impossible, when that plea was stated, to have brought the judgment sustaining Mr Wotherspoon's claim under appeal, for the statutory period for doing so had elapsed. The Lord Ordinary repelled this plea, and appointed intimation to be made to Mr Wotherspoon. By dealing with the matter in that way, there would be in the field the trustee and also Mr Wotherspoon, who is said to have a special interest in the judgment he had obtained. Mr Wink has reclaimed against that interlocutor. It appeared to us that the proper course to adopt was to have intimation made to Mr Wotherspoon that he might appear if so advised, and accordingly we pronounced an order to that effect before answer. He has appeared and sisted himself, and we have heard counsel for him both on the competency of the appeal and on the merits of the question with Mr Marshall. The discussion on the merits raised a question as to the effect of an inhibition and the nature and extent of a claim of hypothec. I think the first thing we have to do is to deal with the interlocutor of the Lord Ordinary. Now, as to the first plea, we are all of opinion that the Lord Ordinary did what was right, and we are of opinion, further, that the plea is not well founded. We think the appellant did all that was absolutely incumbent upon him under the statute when he brought his own case here. If it was necessary to do more, it might sometimes be necessary to bring appeals in regard to all the creditors on an estate. That is clearly not the meaning of the statute. I think that necessarily disposes of the respondent's 2d and 3d pleas also.

The Court accordingly repelled the first three pleas, and continued the case *quoad ultra*, in order that the parties might furnish the Court with information in regard to certain matters explained to them.

Counsel for Mr Marshall—Lord Advocate and Mr Johnstone. Agents—Marshall & Stewart, S.S.C.

Counsel for Mr Wotherspoon—Mr Gifford Agents—Wotherspoon & Mack, S.S.C.

Counsel for Trustee—Mr Scott. Agent—John Walls, S.S.C.

AIKMAN v. AIKMAN.

Process—Reponing Note—Competency. Objection to the competency of a reponing note against a judgment by default in not lodging issues, that the interlocutor ordering the issues was not prefixed, *repelled*; but *observed* that the omission was an irregularity.

This was a reclaiming note against an interlocutor assolzieng the defenders “in respect of the failure of the pursuer to lodge an issue or issues in terms of the preceding interlocutor of 24th January last.”

MARSHALL, for the defenders, objected to the competency that the interlocutor of 24th January was not prefixed to the note as well as the interlocutor assolzieng the defenders, as required by Act of Sederunt, 11th July 1828, sec. 110.

FATISON, for the pursuer, replied that what was desiderated by the defenders was not required by the Act of Sederunt; at all events, the want of it did not amount to incompetency.

The LORD PRESIDENT—There is no doubt that