reasonable provision, and that she is accordingly entitled to absolvitor. There may be other questions behind. All that we should fix is, that this settlement of the liferent on the husband, and fee on the wife, is not an unreasonable settlement; and therefore assoilzie.

LORD DEAS—It is impossible to decern in terms of the conclusions of the summons; for (1) The husband was not insolvent at the date of the purchase; and (2) The settlement was a reasonable provision to the wife, for whom no previous provision had been made out of funds which came by her. The summons is limited to the property so far as purchased with the £405. We have nothing to do with the bond in favour of the Standard Investment Company. On the footing that the wife has no power to evacuate the husband's liferent, I am of opinion that the deed must stand.

LORD ARDMILLAN—I concur. We must not be deterred from pronouncing absolvitor by the difficulties that may lie behind. Parties should come to some agreement about them.

LORD KINLOCH—We are not called upon to make a provision for this lady. The parties have made a provision themselves. The point to be decided is, whether the provision is reasonable or not. That depends on the construction of the deed. I do not think there can be any difference of opinion on its construction. By the deed the wife obtains a fee, and the husband an indefeasible liferent. So construed, I am of opinion that it was a reasonable provision.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders, with expenses.

Agent for Pursuer—William Officer, S.S.C.

Agents for Defenders—J. B. Douglas & Smith, W.S.

Teusday, November 7.

SECOND DIVISION.

SHIELL *v.* MOSSMAN.

Jurisdiction—Appeal—Small Debt Act, 1 *Vict. cap.* 41, §§ 13, 30–31. A small debt decree had been granted against a defender who was not personally present, and the clerk granted a warrant for imprisonment without a charge. *Held* that this was an irregular proceeding, and that the Court of Session have jurisdiction to suspend such a charge.

This was a suspension of a warrant of imprisonment obtained in the Sheriff-court of Berwickshire by William Mossman against John Shiell.

The Lord Ordinary (MACKENZIE) pronounced an interlocutor in the following terms, which explain the facts of the case and the conclusion of the parties:—"Finds the complainer liable in expenses; of which allows an account to be given in, and remits," &c.

"*Note.*—The complainer admits that a decree *in foro* was pronounced against him on the 4th August 1871, in the Sheriff Small Debt Court at Dunse, for the sum of £11, 10s. 9d., with £3, 4s. 7d. of expenses. He avers that, although this decree was *in foro*, he was not personally present at the time that it was pronounced; and he maintains that the decree which was annexed to the summons, in conformity with the provisions of section 13 of the Small Debt Act, 1 Vict. cap. 41, improperly contains a warrant authorising poinding and sale and imprisonment, after the elapse of ten free days from the date of the decree, which is only competent, according to the provisions of the section, if he had been personally present, and does not contain a warrant authorising poinding, and sale and imprisonment after a charge of ten free days, as it ought to do, seeing that he was not personally present. Having been imprisoned on 29th August 1871, without any previous charge, the complainer, who offers neither caution nor consignation, craves in his note that what he calls the warrant of imprisonment contained in the decree be suspended, and that he be liberated.

"The Lord Ordinary is of opinion that the note of suspension and liberation is incompetent, in respect of the provisions contained in the 30th and 31st sections of the Small Debt Act. By these sections it is enacted that 'no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act,' shall be subject to any form of review or stay of execution on any ground or reason whatever, otherwise than by appeal to the Court of Justiciary, and such appeal is declared to be competent only upon the grounds therein specially set forth, one of these being, 'such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done.' The Lord Ordinary considers what the complainer seeks to suspend, under the name of the warrant of imprisonment, is truly the decree given by the Sheriff against him under the authority of the Act, which, in conformity with the provisions of the 13th section of the Act, is annexed to the summons. That section provides, that when the parties shall appear, the Sheriff, after hearing them and taking proof when necessary, 'may pronounce judgment, and the decree, stating the amount of expenses, if any, and containing warrant for arrestment, and for poinding and imprisonment, when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in schedule (A) annexed to this Act, or to the like effect.' The form No. 7 of schedule A, being that referred to in this section, is entitled—'Decree for pursuer in a civil cause,' and it bears that 'the sheriff of the shire of finds the within designed defender liable to the pursuer in the sum of , with of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent after free days.'

"The decree pronounced against the complainer, and annexed to the respondent's summons, is in exact conformity with this schedule, and it is not disputed that it is *ex facie* regular. The Lord Ordinary cannot doubt that this is, according to the true intent and meaning of the Small Debt Act, a decree given by the Sheriff under the authority of that Act. It is called a decree in the 13th section of the statute, and it is thereby directed to contain, as part of it, a warrant for arrestment and for poinding and imprisonment. It is entitled a decree in the statutory schedule, and it bears that the Sheriff decerns and ordains execution by poinding and sale and imprisonment. It is also called a decree in the 19th section of the Act, which provides that such decree, or an extract thereof, may

be enforced in another county, upon being produced to and indorsed by the Sheriff-clerk of such other county. No doubt the decision of the Sheriff, entered in the Book of Causes in conformity with the provisions of section 17 of the Act, is in that section called 'the final decree.' But that does not, it is thought, affect the construction of the 13th section, in which that final decree is called 'judgment,' and which contains the provisions for the 'decree' containing warrant for arrestment and poinding and imprisonment, when competent, being annexed to the summons, according to the form in the statutory schedule. It is this decree only which could be produced to and indorsed by the Sheriff-clerk of any other county. The complainer is truly therefore seeking a review or stay of execution of that statutory decree, on the ground of deviation in point of form from the statutory enactment. Such review and stay of execution cannot, the Lord Ordinary considers, be given in the Court of Session.

"It may be noticed that the Sheriff-court Act of 1853 (16 and 17 Vict. cap. 80), provides (section 26,) that when a decree pronounced by the Sheriff in the Small Debt Court, for any sum exceeding £8, 6s. 8d., shall have been put in execution by imprisonment, the party imprisoned may bring such decree under the review of the Sheriff, by way of suspension and liberation."

The suspender reclaimed.

BRAND for him.

M'KECHNIE for the respondent.

At advising—

LORD JUSTICE-CLERK.—It does not seem to me that the Lord Ordinary's view can be supported. The 13th section of the statute authorises execution on small debt decrees in two different positions—*first*, where the party decerned against was personally present; and, *second*, where he was not personally present. He may not have been personally present, and yet the decree may have been *in foro*. In the first of these positions there is no necessity for a charge, and imprisonment may follow after a lapse of ten days from the date of the decree without a charge; but in the second there must be a charge, whether the decree be *in foro* or in absence. There are certain remedies provided when the decree is in absence: but a decree may be, as this was, a decree *in foro* although the party was not personally present. The irregularity in the proceedings occurred subsequently to the decree. The clerk granted a warrant for imprisonment without a charge, whereas there ought to have been a charge. This is thus a suspension, not of a small debt decree, but of irregular proceedings occurring after the decree.

I think the note should be passed, and warrant granted for the liberation of the complainer.

The other Judges concurred.

Agent for Suspender—Adam Shiell, S.S.C.

Agent for Respondent—Thomas Lawson, S.S.C.

Wednesday, November 8.

FIRST DIVISION.

MARSHALL *v.* SMITH.

Process—Appeal—Bankruptcy Act, 19 *and* 20 *Vict. c.* 79, § 170.

Trustee—Ranking of Claims—Prescription. Where an appeal against the Sheriff's judgment in a sequestration was, in terms of the 170th section of the Bankruptcy Act, brought, during vacation, before the Lord Ordinary officiating on the Bills, by whom a record was made up and closed, but no farther step had been taken when the Court met—*held* that the case, on the meeting of the Court, *ipso facto* came to depend before the Inner-House, and that the Lord Ordinary had no authority to entertain the case farther.

Held, on the merits, that a trustee is not entitled, at his own discretion, to sustain claims admittedly prescribed, merely on being satisfied that they are just debts of the bankrupt, without obtaining legal evidence to elide prescription.

The sequestration of the late Robert Inglis, who died on 22d November 1867, was not awarded until 28th February 1871, the creditors, out of consideration for the widow and children, having allowed their debts to lie over for that time. When the trustee on the sequestrated estate, Mr David Marshall, C.A., came to look into the claims of the creditors, with a view of admitting or rejecting them in terms of the statute, he found them all *ex facie* prescribed; but, being satisfied of their justice, he admitted them all on an equal footing, notwithstanding the objection of prescription. One of the creditors, Mr William Watt Smith, the respondent in the present action, having obtained, in absence, decree *cognitionis causa* for his debt against the heir of the deceased debtor, then a minor, by which he was of opinion that he had overcome the plea of prescription, and obtained for himself a preferable right, took the following appeal to the Sheriff of Edinburgh against the deliverance of the trustee:—"Of this date (July 18, 1871), the trustee issued circulars to those creditors who had ranked, and to those creditors whose claims he had admitted, that a first and final dividend would be paid at his chambers, 21 Abercromby Place, on Tuesday, 29th day of August current; and having admitted the claim of the appellant for the sum of £31, 2s. 7d., and likewise admitted claims made by the following parties, viz.—'Messrs Abram & Walter Douglas, mill-masters, Dalkeith, £69, 13s. 4d.,' &c. The said William Watt Smith being dissatisfied with the decision of the trustee in admitting the said claims, now appeals to your Lordship against the same. Your Lordship is therefore humbly moved to alter and recall the decision of the trustee admitting the claims of the said respective claimants, and to order the trustee to reject the same until their said claims are sufficiently vouched in terms of the statute, the same being prescribed, and until so vouched, to find them not entitled to a dividend. The appellant also craves to be found entitled to expenses."

The Sheriff-Substitute having ordered service upon the trustee, thereafter pronounced the following interlocutor:—

"*Edinburgh*, 21*st August* 1871.—The Sheriff-Substitute having resumed consideration of the foregoing appeal, and having heard parties by counsel, sustains the appeal; recalls the deliverance of the trustee, and directs him to call for and receive such further evidence as may be competently adduced in support of the claims mentioned in the note of appeal: Finds the appellant entitled to expenses; modifies these to the sum of £4, 4s. sterling; and decerns against the respondent for payment of said sum accordingly.

"*Note.*—The several claims referred to being