the husband by the assignation implied in marriage.

I regret, therefore, that in the circumstances, and for the reasons I have now stated, I feel myself obliged to hold that the Court ought to recall the Sheriff-Substitute's judgment appealed against, and also the deliverance of the trustee, and to remit to the trustee in the sequestration to reconsider the appellant's claim, and to sustain the same in so far as he may find it to be sufficiently established. To the extent to which there was legitim fund or estate accruing to Janet Martin or Millar on the death of her father, I am at present unable to see any sufficient answer to the appellant's claim.

The LORD JUSTICE-CLERK concurred with LORDS GIFFORD and NEAVES.

The Court pronounced the following interlocutor:—

"Find (1) that the deed No. 38 of process, the testing clause of which has now been filled up, is valid and effectual as a settlement of the personal means and estate of the deceased William Martin: (2) That by the terms of said deed the *jus mariti* and right of administration of James Millar, the husband of Janet Martin or Millar, is effectually excluded; And (3) That the present appellant is not entitled as in right of his deceased father either to claim legitim as due to his mother, or to claim any share whatever of the succession of the said deceased William Martin: Find the respondent entitled to one-half of the taxed expenses in the Sheriff Court; and with these variations affirm the judgment appealed from, dismiss the appeal, and decern: Find the respondent entitled to expenses in this Court, except those relating to the first day's discussion, and remit to the Auditor to tax the same, and to report."

Counsel for Appellant — Trayner — Mackay. Agent—Nenion Elliot, S.S.C.

Counsel for Respondent—Adam—Strachan. Agent—D. Hunter, S.S.C.

Thursday, November 9.

SECOND DIVISION.

GLASS *v.* LAUGHLIN.

Appeal—Remit—Competency—Circuit Court—Jurisdiction.

The appellant in a small debt appeal heard upon Circuit was found entitled to his expenses, and a remit made to the Auditor of the Sheriff Court for taxation, and to the Sheriff to decern for them.—*Held* that such a remit to the Sheriff by the Circuit Court was competent, and suspension of a decree granted by him for the taxed amount *refused.*

Observations as to the competency of a review by the Court of Session of a Circuit Court judgment.

Opinion (*per* Lord Young, Ordinary), that as a general rule it must be assumed that the Circuit Court, being a superior if not a Supreme Court, acted within its jurisdiction and according to the law and practice of the Court in any judgment which it pronounced.

This was a suspension at the instance of James Glass, general dealer, Glasgow, in which he sought to have suspended a decree for £56, 5s. 4d. pronounced against him and in favour of the respondent Joseph Laughlin, also a general dealer residing in Glasgow, in the Small Debt Court of Glasgow upon the 29th of February last. The circumstances, as stated by the suspender, under which he sought to have this done were as follows:—In the month of January 1875 Glass raised an action in the Small Debt Court of Lanarkshire against Laughlin, and afterwards upon 10th February obtained decree in his favour. Against this judgment Laughlin appealed to the Circuit Court of Glasgow in terms of the Small Debt Act. At the following Spring Circuit this appeal was heard, and a remit made for inquiry into the facts and circumstances of the case to the Sheriff of Lanarkshire. A further remit was made at the following Autumn Circuit Court, the appeal being finally disposed of with the consent of both parties at the Christmas sittings of that Court, when Lord Young pronounced the following interlocutor:—"Having, of consent, heard parties' procurators on the report of the Sheriff, under the remit made to him by interlocutor of the Circuit Court of Justiciary of 16th September last, Sustains the appeal: Recalls the decree complained of: Remits the cause to the Sheriff to proceed therein as may be just: Finds the appellant entitled to expenses, remits the account thereof when lodged to the Auditor of the Sheriff Court at Glasgow to tax and report to the said Sheriff, and grants power to the said Sheriff to decern for the same."

In terms of this remit the Sheriff of Lanarkshire resumed consideration of the case, and upon 29th February 1876 assoilzied the respondent, and decerned against the suspender Glass for the sum of £56, 5s. 4d., being the amount of expenses of appeal, as ascertained by taxation, under Lord Young's remit.

Glass sought to suspend this decree on the ground that the Court of Justiciary possessed no power, either by statute or at common law, to delegate any part of its functions, and that the part of Lord Young's judgment which granted power to the Sheriff of Lanarkshire to decern for the expenses incurred under the appeal was *ultra vires* and inept.

Upon 16th June 1876 the Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"16*th June* 1876,—The Lord Ordinary having heard the counsel for the parties, and considered the record and whole process, Repels the reasons of suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the suspender liable in expenses, and remits the account thereof when lodged to the Auditor to tax and report.

"*Note.*—The complainer asks suspension of a decree of the Sheriff of Lanarkshire, pronounced under a remit to him by the Circuit Court of Justiciary at Glasgow, in an appeal to that Court under the Small Debt Act. The ground of suspension is that the Circuit Court exceeded its jurisdiction in making the remit, and that there-

fore the decree of the Sheriff acting under it is inept.

"The respondent maintains (1st) that the suspension is incompetent; and (2d) that it is groundless, the Circuit Court not having exceeded its jurisdiction.

"With respect to the question of competency, the complainer, while conceding that this Court cannot directly review a judgment of the Circuit Court, contended that a decree pronounced by a Sheriff under a remit from that Court was reviewable on the ground of want of jurisdiction, and that if a remit from the Circuit Court appeared to be the only foundation of his jurisdiction, this Court might consider and determine whether that was sufficient. I do not know that it was exactly so put in argument, but as this seems to me the strongest way in which it can be put I so state it.

"I am of opinion that this Court must assume that the Circuit Court, being a superior if not Supreme Court, acted within its jurisdiction, and according to the law and practice of that Court, in any judgment which it pronounced; and that as this Court cannot under any form of review directly set aside or stay the execution of any such judgment, it cannot or ought not to do so indirectly by reviewing a Sheriff's decree pronounced under and according to the terms and directions of such judgment, on the ground that the Circuit Court had exceeded its jurisdiction in pronouncing it. But, although I state this as a general proposition, I desire to explain that I do so with the qualification which must tacitly accompany most general propositions, viz., that it is not meant to exclude the possibility of an exception from it under circumstances sufficiently exceptional to warrant it. Whether or not such circumstances may conceivably occur need not be determined. It is enough to have a general rule and no good reason for departing from it in the particular case. That there is no such reason here I think very clear. The expenses of the appeal which the Circuit Court awarded to the appellant were exceptionally heavy, from the circumstance of two remits having been made to the Sheriff to investigate and report on matters of fact, and were chiefly incurred before the Sheriff in the execution of these remits. As I was myself the Circuit Judge who saw fit to award the expenses, I am able to state (what I could otherwise only have taken as a reasonable supposition) that I remitted to the Sheriff to ascertain and decern for the amount, if not with the express consent of both parties, certainly without the slightest objection by either, as the most expedient course in the circumstances, and preferable to the alternative of a taxation and report to the next Circuit for decree. It was the third Circuit at which the appeal had come up, and being the Christmas Circuit, I only consented to hear and decide it then at the urgent request and of consent of both parties, who greatly desired then to have an end of the matter. Therefore, whether or not it be possible to conceive circumstances in which this Court might competently review, directly or indirectly, the judgment of a Circuit Court of Justiciary, I am of opinion that here are no such circumstances, and that the general, if not universal, rule against the competency of such review, must prevail.

"If the suspension were assumed to be competent, I should have to express my own opinion that it is unfounded. For I think the Circuit Court of Justiciary has jurisdiction to remit to an inferior Justiciary to tax and decern for the expenses of an appeal awarded by that Court. I have in my own practice known of remits to the inferior Judge of the whole cause, with certain instructions (the competency of which is, I suppose, not doubtful), but with power to dispose of the expenses of the appeal on the termination of the cause.

"I cannot avoid remarking, in conclusion, that the present suspension seems one regarding mere form of procedure, by which the complainer cannot possibly take any substantial benefit. Pay the expenses awarded against him by the Circuit Court he must, and if the Sheriff cannot competently decern therefor on a remit, the only result is that the Circuit Court must on application at his expense pronounce such decree. There is here no question of a peremptory diet which has fallen."

Glass reclaimed to the Second Division.

Argued for him—There is no authority for holding that in such a case as the present review by the Court of Session is excluded. Under the Heritable Jurisdictions Act, which instituted appeals to the Circuit Court, that Court only could give a decree for costs "which shall be final;" a remit to the Sheriff was *ultra vires*.

Counsel for the respondent was not called upon.

At advising—

Lord Justice-Clerk—The first question in this case is whether we have any jurisdiction to entertain it? I do not wish to put my judgment upon that, but I have the greatest doubts as to whether we have that jurisdiction. It is a suspension of a judgment of the Sheriff following upon a remit from the Circuit Court of Justiciary, and the ground of this suspension is that the Circuit Court had no power to make that remit. It is assumed that Lord Young had power to decide the appeal before him on Circuit, but it is said that he went beyond his power in directing the Sheriff to deal with the expenses.

But it is clear that on the merits—if merits they can be called—there are no grounds whatever for this suspension. These parties presented their appeal at the Christmas Circuit Court. There is a doubt whether that Court had power to deal with civil appeals. But any objection was waived of consent, and the parties must be held to have prorogated the jurisdiction. Lord Young sustained the appeal, recalled the decree complained of, and remitted the cause to the Sheriff to proceed as might be just, finding the appellant entitled to expenses. So far there can be no question as to the competency of the judgment. When the interlocutor goes on to grant power to the Sheriff to decern for the expenses, that appears to me to follow necessarily from the remit made to the Sheriff. The contention that the carrying out of such a finding for expenses must be delayed until the next Circuit Court is one which I should be sorry to affirm.

Lords Neaves and Ormidale concurred.

Lord Gifford—I have doubts as to the competency of this suspension, but I am glad to be able to deal with the question upon the merits.

I think the case falls under the common law relating to review, by which the Superior Court has power to remit to the Inferior for the purpose of carrying out its judgments. It would be hard indeed if the Circuit Court of Justiciary had not that power. No statute has been shown which excludes it, or the case might have been different. It is of importance for every Court of review, however limited the grounds upon which review is competent, to have the power which was exercised in this case, and to render unnecessary any return of the parties to the Court of review for the purpose of having its judgment carried out.

The Court dismissed the appeal, with additional expenses.

Counsel for Suspender and Appellant—Asher—Lang. Agents—Crawford & Guthrie, S.S.C.

Counsel for the Respondent—Macdonald—M'Kechnie. Agents—Adamson & Gulland, W.S.

Thursday, November 9.

FIRST DIVISION.

MACPHERSON AND ROBERTSON *v.* DUNCAN AND REID.

Process—Evidence—Competency—Hearsay.

Circumstances in which *held* that in the trial by jury of a question of pedigree, hearsay evidence of deceased persons was rightly rejected by the presiding Judge, in respect that it did not appear that they had special means of knowledge.

Observations (*per* Lord President) as to the rules which govern the admissibility of hearsay evidence of dead persons in questions of pedigree.

This was a Bill of Exceptions against the ruling of the Lord President, who was the presiding Judge in the trial by jury of conjoined petitions for special service to Christina Cockburn Ross of Shandwick.

There were three sets of claimants—First, Mrs Mackintosh; second, Mrs Macpherson and Andrew Ross Robertson, who claimed as heirs-portioners; and third, John Ross Duncan and Andrew Gildart Reid, who also claimed as heirs-portioners.

The circumstances of the case were as follows;—William Ross of Shandwick executed an entail of the Shandwick estates, dated 5th May 1790. He died unmarried in the same year, survived by one sister, whose descendants became extinct upon the death of the said Christina Cockburn Ross, and on that event occurring the succession under the entail opened to the nearest and lawful heirs whatsoever of William Ross. William Ross' father, David Ross, had brothers both older and younger than himself. Mrs Mackintosh claimed to be descended from Walter Ross, the immediate younger brother of David Ross, and it was admitted that if she proved her claim she would be entitled to succeed before either of the other sets of claimants. Mrs Macpherson and Mrs Ross Robertson claimed to be descended from George Ross, the youngest brother of David Ross, and it was admitted that if Mrs Mackintosh failed, and they established their pedigree, they would be preferable to Mr Duncan and Captain Reid, who claimed to be descended from Andrew, an elder brother of David Ross.

The pedigree which Mrs Macpherson and Andrew Ross Robertson had to establish was as follows:—Mrs Macpherson and Andrew Ross Robertson's mother were daughters of George Ross, sometime in the Sutherland Fencibles, and latterly at Lochee, near Dundee. His father was Andrew Ross, who was a small farmer or crofter at Loans of Tullich, in Ross-shire, and this Andrew was a son of George Ross, the youngest brother of the entailer's father. There was no difficulty in proving this pedigree, except in regard to the last link, namely, that Andrew Ross of Tullich was a son of George Ross, the entailer's uncle.

George Ross, the entailer's uncle, died in Gottenburg in 1783, and acording to the Gottenburg register of deaths he was then sixty-six years and three months old. It was proved that this George Ross went to Gottenburg about the year 1738, and Mrs Macpherson and Andrew Ross Robertson averred that Andrew Ross, the farmer of Tulich, was the offspring of a marriage which George Ross had contracted before going to Gottenburg with a woman called Margaret or Merran Manson.

At the trial the first witness produced for Mrs Macpherson and Andrew Ross Robertson was the former, who stated her pedigree to be as given above, having principally derived her information from her father. It was then proposed to read to the jury the deposition of Alexander Mackenzie, residing at Balintore, in Ross-shire (which had been taken in the course of the cause upon adjusted interrogatories), who by reason of great age and infirmity was unable to attend the trial.

The deposition was in the following terms:—

"*Imprimis*, Do you know the parties, petitioners and respondents in the title to these interrogatories named, or any and which of them, and how long have you known them, and any and which of them? Declare the truth and your knowledge herein. Depones—I know John Ross Duncan, whom I saw with his mother at Shandwick when he was a boy. I know Captain Reid by sight. I know Mrs Jane Ross or Macpherson, and I know Andrew Ross Robertson. I knew the two last all their days. I knew Mrs Macpherson's father when I went to Cromarty, when I was between sixteen and seventeen years of age. I knew Captain Reid since he began to go about Ross-shire some time ago. Mrs Macpherson's father's name was George Ross. He was nicknamed Geodh.

"Being interrogated in terms of the second of said interrogatories, viz.—*Second*, What is your age; where were you born, to what trade or business were you brought up? State the different places where you have resided, and for how long in each. Depones—I am eighty-five years of age. I was born at Tullich of Fearn, close by the Loans of Fearn. I was brought up to the trade of cabinet-making and carpentery. I remained at Tullich, my birth place, till I was seventeen years of age. I then went to Cromarty, where I was four or five years. I went to Edinburgh from Cromarty. I was there about a year. I then went to Ferintosh, to Mr Innes, a millwright, where I was five years, and where I