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

admittedly prescribed, the trustee ought not to have admitted them without first ascertaining whether they could be supported by the writ of the bankrupt, who is dead."

Against this deliverance the trustee appealed to the Court of Session. The appeal being taken during time of vacation, came, in terms of section 170 of the Bankruptcy Act, before the Lord Ordinary officiating on the Bills. He ordered a record to be made up, which was closed upon the 3d October, and parties were ordered to debate at next calling. No farther step was, however, taken in the case until the meeting of the Court, when it was enrolled in the Inner-House Rolls of the First Division. When the case came before the Court the question was raised, whether, after the case had been before the Lord Ordinary on the Bills, it had been properly brought into the Inner-House without his first pronouncing judgment on it?

SCOTT, for the appellant, referred to the case of *Grant* v. *Wilson*, 1st December 1859, 22 D. 51.

MAIR and RHIND for the respondent.

At advising—

LORD PRESIDENT—This is a point of some importance in practice, and it is quite right that it should be decided. The only authority on the subject seems to be the case of *Grant* v. *Wilson*. What was there decided was merely that, when an appeal had been taken in vacation, and the note of appeal and process had been transmitted to the Clerk of the Bill Chamber before the meeting of the Court, but had never been before the Lord Ordinary at all, the jurisdiction in that appeal lay with the Inner-House. The difference between that case and the present consists in this, that here the appeal was not only taken in vacation, but was laid before the Lord Ordinary on the Bills, and several deliverances were made by him, the last of which was an interlocutor closing the record, and appointing parties to be ready to debate at the next calling. The question is, whether that interlocutor did not fix the appeal before the Lord Ordinary? But his Lordship, who pronounced that interlocutor, is now *functus officii*. Lord Benholme was only officiating in the usual way for a fortnight during vacation, he has now, during session, no authority as Lord Ordinary on the Bills, and he cannot certainly hear the cause. The Lord Ordinary on the Bills, during session, is a different judge, and has no jurisdiction under section 170 of the Act. Therefore the case must be here. If not here, it can be nowhere at all. I think therefore that the plain and reasonable interpretation of the statute is, that where an appeal is taken during vacation it goes before the Lord Ordinary on the Bills; but that, unless finally disposed of, it must come here upon the meeting of the Court.

The other Judges were of the same opinion.

The Court therefore having sustained their jurisdiction in the cause, Counsel were heard on the merits of the appeal.

The following were, *inter alia*, the pleas in law for the appellant:—"(1) Under the Bankrupt Act, the appellant was entitled to examine the various claims, and to rank those which he was satisfied were justly due. (2) The appellant being fully vested with the bankrupt estate, for the purposes of the statute, and being entitled to administer it, and having satisfied himself by due inquiry that the claims objected to were justly due, was not bound to plead the triennial prescription against them, but was entitled to rank them. (3) The appellant having ranked the respondent's claim, which was also prescribed, on the same principle on which he ranked the others, and upon less satisfactory evidence, it will be necessary, in the event of the appellant's judgment being recalled, that the whole ranking be made of new."

At advising—

LORD PRESIDENT—I am of opinion that the Sheriff took the proper course in his deliverance, and that the trustee was utterly wrong in the doctrine on which he says he proceeded in sustaining all their claims, namely, that he was entitled to use his own discretion in admitting them, if he was satisfied otherwise that they were just debts of the bankrupt, though prescribed according to law. I cannot give the smallest countenance to such a doctrine. But while I am of opinion that the Sheriff-Substitute was perfectly right in holding that the trustee ought not to have admitted them as he did, I do not think it necessary to say, as he does, that the only proper evidence to support them is the writ of the bankrupt. For it may be quite possible that the bankrupt's widow, for instance, as his executrix, may have admitted the debts so as to elide prescription. I wish it to be understood therefore that I only support the interlocutor in its terms, without endorsing the note. But the question arises, what is the meaning of the interlocutor itself when taken in connection with the note of appeal on which it was pronounced? Now, I think that by the note of appeal which Mr Watt Smith presented, under the 127th section of the Act, he brought up for consideration the claims of all the creditors, including his own. In doing so he acted quite properly. It is enough to show that his own claim stood *ex facie* in the same category, and he may be of opinion that he can otherwise support it. It was the fair and proper course to take, and I am quite satisfied that that was the real meaning of the note of appeal in his name, for he craves that the trustee be ordered to reject the claims of the said respective claimants until they are sufficiently vouched in terms of the statute; viewing apparently the trustee's deliverance as one decision, not as separate decisions on the different claims. It therefore appears to me that under this note of appeal, and the Sheriff's interlocutor upon it, it will be quite open to the trustee to reconsider the claims of the respondent here, as well as those of the other creditors.

LORD DEAS—I am not disposed to give any opinion as to how far it was or was not obligatory on the trustee to receive evidence of these claims to elide the plea of prescription, as that question is not before us; nor am I satisfied as to what the answer should be if it were. The trustee is no doubt right to collect all evidence in support of these claims. But whether, when he is satisfied as to the justice of any claim, he is bound to make further investigation, because it is *ex facie* prescribed or otherwise, is quite another matter. If that question arose, I should like to consider whether he could say to any creditor requiring such investigation, that he would make it, but at that creditor's expense. I only say that I doubt whether he is bound at the cost of the trust-estate to make such investigation where he does not think proper to do so. It would be very inexpedient and very hard upon the creditors generally, who are satisfied with the justice of the trustee's decision, and desiring to be ranked accordingly at once, if any one creditor could stop the proceedings,

and insist upon a lengthy and expensive investigation.

But I agree that the Sheriff-Substitute was right in this particular case. And I am farther disposed to agree with your Lordship that the result of his deliverance was, that the trustee must go back on the whole claims and reconsider the general objections to them all. I do not see how it could have been otherwise. I do not see how this creditor could possibly have brought up his objection to the other claims on the footing that the deliverance on his own was final, when the same objection lay *ex facie* against it, as against them.

LORD ARDMILLAN—I am of the same opinion upon both points. It is clear that the trustee's deliverance admitting or rejecting claims is liable to appeal to the Sheriff; and I think that the Sheriff is bound to require evidence sufficient in law to set aside the general rule of prescription. His judgment may be appealed to this Court, and we are bound to do the same. And I cannot think that the law has entrusted to the trustee, and to him alone, a discretion so wide that he may reject or sustain claims *ex facie* prescribed, merely on being satisfied of their justice.

On the second point I am equally clear that the appeal to the Sheriff was so expressed as to bring up Mr Smith's own claim as well as those of the other creditors. I think that both in form and phrase it has done so, and I do not do him the injustice to suppose that he meant to stand upon the trustee's decision in his favour, and at the same time to dispute that decision in the case of the other creditors. I would rather be inclined to suppose that he intended to proceed upon that footing of equality which is the root of all bankruptcy practice.

LORD KINLOCH—I agree in thinking that the Sheriff was wrong in limiting the inquiry to the writ of the bankrupt, and think that his note must therefore be held *pro non scripto*. I am further of opinion with your Lordships that the Sheriff's interlocutor is generally well-founded. It was plainly incumbent on the trustee to make inquiry into the grounds upon which the claims rest. And nothing could be wilder than the view that the trustee is entitled at his own discretion to admit or reject claims irrespectively of their being duly supported at law.

The only difficulty is, whether the trustee is bound to examine into Mr Smith's claim as well as those of the other claimants. I have difficulty in being of opinion that the meaning and intention of his appeal was to bring up his own claim with the others. I can hardly give him that credit. But there may be cases in which the consideration of the objector's own claim is a necessary element of the redress which he seeks against the admission of the claims of others. I think, on considering the whole circumstances, that the trustee did not inquire as he ought to have done into the admissibility of any one of these claims; and on that ground I am inclined to hold with your Lordships that the inquiry now to be made must comprise the claim of Mr Smith as well as the others.

LORD PRESIDENT—To prevent any mistake arising out of an apparent difference of expression in one of your Lordships' opinions, I must add, that I conceive the trustee, in giving effect to the triennial prescription, that is, in dealing with certain claims as falling under it, does not cause and cannot cause any expense to the estate. He deals with the claims at once as *ex facie* prescribed, and the expense of getting them sustained falls exclusively on the persons in right of them.

The Court accordingly sustained the appeal, and sustained the interlocutor of the Sheriff-Substitute, on the understanding that the inquiry ordered embraced the claim of the respondent as well as those of the other creditors.

No expenses awarded to either side.

Agent for Appellant—W. K. Thwaites, S.S.C.

Agents for Respondent—Lawson & Hogg, S.S.C.

Wednesday, November 8.

SECOND DIVISION.

HALDANE *v.* OGILVY.

Teinds—Bona fide *Perception and Consumption.* A heritor was not aware that his lands were situated in a certain parish, or that he was liable to pay teind, but his titles disclosed the minister's right. *Held* that the minister was entitled to sue for arrears of teind; and the heritor's plea of *bona fide* perception and consumption *repelled* as irrelevant against a stipendiary minister, and not pleadable by an heritor whose titles disclosed the minister's right.

The question in this case arose in a process of locality of the parish of Kingoldrum. The facts appear sufficiently from the interlocutor and note of the Lord Ordinary (GIFFORD):—

"*Edinburgh*, 29*th March* 1871.—The Lord Ordinary having heard parties' procurators in the question between Thomas Wedderburn Ogilvy, Esq., and the Reverend James Ogilvy Haldane, and having considered the closed records, proof, and whole process—Finds that the objector Thomas Wedderburn Ogilvy is not liable to pay to the Reverend James Ogilvy Haldane the arrears of stipend shown in the state of arrears prior to the stipend due for crop and year 1869, and to this extent sustains the objections for the said Thomas Wedderburn Ogilvy to the said state of arrears; but finds that the said Thomas Wedderburn Ogilvy is liable to be localled upon, and to pay to the minister in respect of the lands of Auldallan, situated in the parish of Kingoldrum, the sum of £7 per annum for crop and year 1869, and for all subsequent crops and years until a new locality is made: Further, and in regard to the expenses incurred in all the questions between the minister and the said Thomas Wedderburn Ogilvy, part of which were reserved by interlocutor of 9th July 1869, finds, in the circumstances, no expenses due to either party up to the present time, and decerns.

"*Note.*—The main question argued before the Lord Ordinary, and as to which the proof was led, was whether the objector Thomas Wedderburn Ogilvy was liable in the arrears of stipend prior to 1869, claimed by the minister in respect of the objector's lands of Auldallan, situated within the parish of Kingoldrum. The objector Mr Wedderburn Ogilvy has admitted that he is liable to pay stipend for crop and year 1869, and subsequent years, and the amount of stipend to be paid was fixed by interlocutor of 9th July 1869, at £7 per annum, so that the only question between the