

and casualties following, being parts of the Earldom of Orkney, payable to me by the said Helena and Barbara Fea, for and out of their lands and others underwritten, lying in the said Earldom." Now that is not the conveyance of anything which forms the proper subject of a conveyance of heritable subjects, and the subject is not a proper one for infestment. And so we find, when we come to the precept of sasine, that the symbol to be delivered is earth and stone of the lands—certainly not an appropriate symbol for such a right as this. I do not however say that the deed is not effectual. Looking, then, to the nature of the subject, and to the fact that it was payable out of lands belonging to the purchasers, I cannot think that it is a heritable subject within the meaning of the tenth purpose of the trust-deed. We could only hold it to be so by having clear evidence that such was the intention of the Misses Fea, and I agree with your Lordship that there is no evidence of any such intention. This, coupled with the fact that there has been no payment or claim since 1818, makes it imperative on us to answer the first question in the negative.

LORD ARDMILLAN—A question has been touched in the discussion in this case which might be difficult, viz. Whether the right to the duties acquired by the Misses Fea is of a heritable character? I do not doubt that the right to exact these duties is in a certain sense of a heritable character. But it is not necessary to consider that matter here, for the real question is, whether the Misses Fea, in purchasing the right, meant to do more than to clear their estate of the burden? And I agree with your Lordships that it appears that they did not intend to do more than this.

LORD JERVISWOODE concurred.

The Court held that the first party was not entitled to one fourth part of the duties purchased by the Misses Fea from Lord Dundas.

Counsel for the First Party—Kinnear. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second Party—Balfour. Agents—H. G. & S. Dickson, W.S.

Thursday, February 6.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.]

HENRY SAWERS' EXECUTRIX v. SAWERS' TRUSTEES.

Trust—Beneficiary—Co-Trustees.

Held that a trustee who is also a beneficiary under the trust is entitled to repudiate certain acts of his co-trustees as being calculated to injure his interests, *qua* beneficiary.

This was an action of declarator, count, reckoning, and payment, raised in the year 1862 by the late Henry Sawers, residing near Whitburn in Linlithgowshire, against the trustees of the late Peter Sawers, bleacher at Nether Kirkton, acting under his trust-disposition and deed of settlement, dated 16th day of March 1853. Under that deed Henry Sawers was himself a trustee, but he was also a beneficiary, the truster having directed the

trustees, after payment of certain debts and legacies—"to pay and convey the residue and remainder of the said trust-estate to and in favour of the said Henry Sawers (the pursuer) in liferent, for his liferent use allenary, and to his male issue, if any, lawfully begotten, who shall be in life at the time of my death, in fee." Upon failure of Mr Henry Sawers, the liferent was conveyed in similar terms to the present defender, who was also a trustee, Henry Sawers raised the present action against his co-trustees, to compel them to implement the trust-deed, and the summons contained a conclusion that "the defenders ought and should be decerned and ordained, by decree foresaid, to exhibit and produce before our said Lords a full and particular account of their whole intromissions under the foresaid trust-disposition and deed of settlement with the estate of the said Peter Sawers, who died on the 27th day of November 1859, whereby the true residue and remainder of the said trust-estate, as well as the true amount of the annual produce of the said residue and remainder, may appear and be ascertained by our said Lords." The trustees appeared and defended the action. In the statement of facts for the defenders it was set forth that the accounts and vouchers of the trust were recently placed in the hands of Messrs Wink & Wight, accountants in Glasgow, that a report, in which the present position of the trust affairs should be exhibited, might be prepared for the information of all concerned. And, subsequently, an account (No. 10 of process) prepared by Messrs Wink & Wight, was lodged, which showed the position of trust affairs down to 3d Jan. 1863. By an interlocutor of Lord Kinloch, 21st January 1864, the Rev. Peter Sawers, as a beneficiary, was allowed to compare as a defender, and lodge separate answers, which he accordingly did. These answers contained a repudiation of certain proceedings of his co-trustees with regard to the administration of the trust-estate. An interlocutor of the Inner House, of date Nov. 1864, found that the pursuer was entitled to the whole free income of the residue of the trust-estate, and remitted the case for further procedure to the Lord Ordinary. This judgment recognised the right of the Rev. Peter Sawers to appear and protect his interest, but repelled the whole other pleas stated for him. Accordingly the free annual residue of the estate was paid over to the pursuer, but the action was proceeded with to determine the question of count, reckoning, and payment. After repeated orders from the Lord Ordinary, the defenders, the trustees, lodged a continuation of their intromissions (No. 25 of process) down to 31st Dec. 1864. In October 1867 the pursuer died, and the widow and executrix was sisted as pursuer. She claimed the balance alleged to be due to her husband at the time of his death. The orders of the Court for a continuation of the trust accounts being renewed, the defender, now the liferenter and only surviving and acting trustee, lodged a minute in the double capacity of beneficiary and trustee, in which he referred to the accounts Nos. 10 and 25, already lodged, as the trust accounts, and craved for a remit to an accountant to audit them. On 15th June 1869, however, he lodged a continuation of the trust accounts, in which he stated that "the previous position of affairs in this trust will be found explained in (1) Account of the trustees of the late Peter Sawers, from 27th Nov. 1859 to 3d Jan.

1863, No. 10 of process; (2) Account of the intermissions of said trustees from 3d Jan. 1863 to 31st Dec. 1864, No. 25 of process;" and elsewhere in the same document he recognised them as "detailed trust accounts." A remit was made on 13th July 1869 to Mr Charles Ogilvy, accountant in Edinburgh, to examine and audit the trust accounts of the defenders, and to report. Upon the appearance of Mr Ogilvy's report the defender stated a number of objections to it, and he now maintained that the accounts No. 10 and 25 were truly the accounts of the late pursuer Henry Sawers alone, and that they were inaccurate in many respects. By interlocutor of the Lord Ordinary, of 27th July 1870, the accountant was instructed to proceed with the remit under which he acts, on the footing that he is to reject consideration of all objections stated to the accounts referred to by him in the said note as "the prior trust accounts, closing at 31st December 1864." This interlocutor was not reclaimed against, and proceedings went on before the accountant, which resulted in a second report, with which the Lord Ordinary (JERVISWOODE) made *avizandum*, and upon 8th Nov. 1872 issued an interlocutor finding a certain balance due to the pursuer as executrix of the late Henry Sawers, and finding her entitled to expenses.

Against this interlocutor the defender, who still insisted upon the objections which he had stated to the accountant's reports, reclaimed. He asserted his right to go back upon the accounts Nos. 10 and 25 of process, and show that they were incorrect, and maintained that his rights as beneficiary were not to be prejudiced by his acting as trustee.

The respondent maintained that the defender was *personali exceptione* barred from doing this. He was one of the trustees who originally lodged the accounts in question, and had since that, while carrying on the action both as sole trustee and beneficiary, referred to them as correct. Upon the footing that they were so the accounting had proceeded.

At advising—

LORD BENHOLME—The question here is, whether Peter Sawers is precluded, as trustee or beneficiary, from objecting to the accounts? I do not think he is barred from stating such objections by anything which he has done as trustee or co-trustee or beneficiary. He alleges that injury has been done to the fee of the estate by making payments to life-rent which should have been made to fee. That is a very important objection, and I see no reason why the accounts should not be looked into.

The other Judges concurred.

Counsel for Pursuer—Fraser, Lee, and Scott-Moncrieff. Agent—D. Scott-Moncrieff, W.S.

Counsel for Defender—Lord Advocate and Scott. Agent—A. Beveridge, S.S.C.

Friday, February 7.

FIRST DIVISION.

SPECIAL CASE—PAROCHIAL BOARD OF
BOTHWELL AND ANOTHER.

Process—Special Case—Competency.

Held that it is not competent to bring a Special Case unless the question is one which

could be tried in some known form of process between the same parties.

This case was presented by the Parochial Board of the parish of Bothwell—the Local Authority of that parish—under The Public Health (Scotland) Act, 1867, and Mr Thomas Pearson, a proprietor and occupier of lands and premises in the parish.

The facts set forth in the case were as follows:—In 1866 the first parties, as the local authority in the said parish under the Nuisances Removal (Scotland) Act, 1856, in virtue of the powers contained in that Act, and also in the Sewage Utilization Act, 1865, and the Sanitary Act, 1866, so far as these last two mentioned Acts applied to Scotland, executed certain drainage works within a portion of its district. In November 1867 the local authority resolved to form a portion of its district (including the portion in which the drainage work already mentioned had been executed) into a special drainage district, under The Public Health (Scotland) Act, 1867. One of the proprietors in the proposed district appealed against the resolution defining the district, and the Sheriff sustained the appeal. Then two other proprietors opposed the carrying out of the scheme, on the ground that certain proposed outlets would be hurtful to their properties, and raised actions of suspension and interdict against the local authority. The local authority, however, executed the proposed work, with the exception of a portion which they could not complete on account of the legal proceedings mentioned above. In the course of the execution of the works expenses were incurred—(1) in giving the statutory notices regarding the formation of the special drainage district; (2) in defending the appeal against the resolution defining the special drainage district; (3) in defending the actions before referred to; and (4) in obtaining plans of a proposed intercepting sewer, in order to a compromise of the questions in dispute. The object of the case was to ascertain against what assessment these expenses were chargeable; and the questions submitted to the Court were:—

"(1) Are the expenses which were incurred in connection with the formation of the special drainage district chargeable against the special drainage assessment leviable under section 93 of the 'Public Health (Scotland) Act, 1867'?

"OR,

"(2) Are these expenses general expenses incurred in executing the Act, and chargeable against the assessment leviable under sub-section 2 of section 94 of the said Act?

"(3) Are the expenses incurred subsequent to the formation of the said special drainage district in connection with the actions before-mentioned, and with the proposed compromise of these actions, chargeable against the special drainage assessment leviable under section 93 of the 'Public Health (Scotland) Act, 1867'?

"OR,

"(4) Are these expenses general expenses incurred in executing the said Act, and chargeable against the assessment leviable under sub-section 2 of section 94 of the said Act?

"(5) If the expenses incurred in connection with the formation of the special drainage district, and the expenses incurred subsequent to the formation of the said district, or either of these expenses, are held to be chargeable against