plain indications furnished by the context that the testator meant a joint bequest, in which case of course the survivors will take the whole by accretion. A familiar example is the case of a legacy to a family, the individuals not being named, in which case the words "share and share alike," which are very often added, have absolutely no meaning, because if the gift is to the family as at the date of the testator's death there can be no room for a lapse of any part of the gift. Here then are these indications, all pointing in the same direction, which make it clear to my mind that the testator contemplated a joint bequest. In the first place, she begins by describing the legatees as a family, and only introduces their names and addresses parenthetically, apparently for the purpose of enabling the trustees to trace them. In the second place, there is the distinction to which Lord Adam referred, depending on the expression of a right of survivorship in certain events. Thirdly—and this is the most important indication—when the testator comes to exercise her power of disposal of the money inherited from her father, and directs that the bequest to the American family shall be paid out of this fund. She does not repeat the words "share and share alike," but disposes of the money in terms which amount to a gift to the family jointly. For these reasons I think the rule of *Paxton's Trustees* is displaced by contrary indications, and that there is no lapse.

Lord Kinnear—I have found this question of considerable difficulty, and am unable for myself to distinguish the case from those in which it has been found that a legacy to a plurality of persons named or sufficiently described for identification, equally among them, or share and share alike, separates the bequest in favour of each of the legatees so definitely and completely from the bequests in favour of the others that there is no room for accretion. In this case the parenthetical sentence, if it is properly so described, beginning with the words "who are William" appears to me, as to your Lordships, to be inserted for the purpose of enabling the trustees under the settlement to discover who the legatees are, and that is just another form of words for expressing what is explained by the late Lord President in *Paxtons' Trustees*, where he speaks of a legacy to a plurality of persons "named or sufficiently described for identification," and I confess that I should not myself have been able to distinguish that case from the present. But I agree that the rule of that case, like other rules for the construction of wills, must be subject to this qualification, that if the testator has expressed an intention to the contrary, his intention must receive effect, and that rules of construction are not to be so rigorously applied as to defeat the intentions of the testator. Your Lordships are both of opinion that the intention of the testatrix in this case to make a joint bequest, and not a number of separate bequests, is clearly expressed in the will, and if so, it is clear that we must give effect to it. On that question of construction I am not inclined to set up my own view, which I confess is not entirely the same, in opposition to that of your Lordships, and I am content to express the serious difficulty I have in concurring in the conclusion at which your Lordships have arrived.

The Lord President was absent.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First and Second Parties—Johnston, Q.C.—W. C. Smith. Agents—J. A. Campbell & Lamond, C.S.

Counsel for the Third Parties—Guthrie, Q.C.—J. D. Millar. Agents—Duncan & Black, W.S.

Counsel for the Fourth Parties—Napier. Agents—J. A. Campbell & Lamond, C.S.

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*Friday, November 25.*

## FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

## SMITH & SONS *v.* SPENCE.

*Process—Appeal—Competency—Debts Recovery (Scotland) Act* 1867 (30 *and* 31 *Vict. cap.* 96), *sec.* 13.

There is no appeal under the Debts Recovery Act 1867, direct from the Sheriff-Substitute to the Court of Session.

In an appeal from the Sheriff-Substitute under the Debts Recovery Act 1867, the sheriff, while practically disposing of the merits of the case, remitted the question of expenses to the Sheriff-Substitute, thereby precluding appeal to the Court of Session in respect that his interlocutor was not final. *Held* (under the above rule) that an appeal to the Court of Session from the Sheriff-Substitute's interlocutor disposing of the expenses under the remit was incompetent.

Richard Smith & Sons raised an action in the Sheriff Court of the Lothians and Peebles against William Spence for payment of £37, 19s. 6d. The action was brought under the Debts Recovery Act 1867. After a proof, the Sheriff-Substitute (Hamilton) on 10th March 1898 pronounced the following interlocutor:—"Repels the defences, and decerns against the defender in terms of the libel: Finds the pursuers entitled to expenses: Appoints an account thereof to be made up, and remits the same when lodged to the Auditor of Court to tax and report."

The defender appealed to the Sheriff (Rutherfurd), who on 10th June recalled the Sheriff-Substitute's interlocutor in so far as it decerned against the defender in terms of the libel, "and in lieu thereof

ordains the defender to make payment to the pursuers of the sum of £36, 8s., and decerns: *Quoad ultra* dismisses the appeal, and remits the case to the Sheriff-Substitute."

On 27th June the Sheriff-Substitute pronounced the following interlocutor:—"The Sheriff-Substitute approves of the Auditor's report taxing the pursuers' account of expenses of process at the sum of £34, 9s. 1d., and decerns against the defender for payment to the pursuers of said sum accordingly."

On 4th July the following note of appeal was lodged by the defender's agent:—"I appeal against the judgment of the Sheriff to the First Division of the Court of Session."

The Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. cap. 96), sec. 10, provides that "it shall not in any case be competent to appeal until judgment has been pronounced by the Sheriff finally disposing of the cause, but an appeal when taken shall have the effect of submitting to review all the previous proceedings and interlocutors."

Sec. 11 enacts that, subject to the provisions contained in sec. 10, "where the case has been heard and the judgment has been given by the Sheriff-Substitute, it shall be competent for either party to appeal against such judgment to the Sheriff."

Sec. 12 enacts that, subject to the provisions contained in sec. 10, and where the cause exceeds the value of £25, "where the case has been heard and the judgment pronounced by the Sheriff (and not by the Sheriff-Substitute) in the first instance, it shall be competent for either party to appeal against such judgment to either of the Divisions of the Court of Session,"

Sec. 13. "Where the case has been heard by the Sheriff on appeal and judgment pronounced by him as above provided for, it shall be the duty of the Sheriff-Clerk, immediately on receiving the Sheriff's interlocutor, to transmit a copy thereof through the post-office to the parties or their procurators, and within eight days . . . it shall be competent for either of the parties to appeal against his (the Sheriff's) judgment in the same manner and to the same effect and under the same limitations as provided for in the immediately preceding sections with regard to appeals from judgments of the Sheriff in the first instance."

The pursuers maintained that the appeal was incompetent, and argued—This was an appeal against a judgment of the Sheriff-Substitute. No appeal direct from the Sheriff-Substitute to the Court of Session was provided by the statute. If the defender had desired to appeal he should have appealed in time against the Sheriff's interlocutor of 10th June, which was the interlocutor disposing finally of the merits of the case. An interlocutor merely decerning for expenses was not appealable—*Tennents* v. *Romanes*, June 22, 1881, 8 R. 824; *Thompson & Co.* v. *King*, January 19, 1883, 10 R. 469.

Argued for the defender—The appeal was competent. The defender could not have appealed against the Sheriff's interlocutor of 10th June, for that was not a final judgment, and contained no operative decree for expenses—*Governors of Strichen Endowments* v. *Diverall*, November 13, 1891, 19 R. 79. The Sheriff had done what was incompetent in remitting to the Sheriff-Substitute — *Bennett* v. *Wilson*, June 9, 1888, 15 R. 715; but it would be very hard for the defender to be deprived of his right of appeal by this proceeding on the part of the Sheriff. The Court, in any event, had power under sec. 10 to order the case to be reheard.

At advising—

Lord President—This appeal is incompetent on the plain ground that it is against an interlocutor of a Sheriff-Substitute. The Debts Recovery Act is careful to shut out an appeal to this Court except in those cases in which it is provided; and it is only provided against the judgments of Sheriffs-Principal. We were told with some plausibility that the procedure in the Sheriff Court had been irregular; that the Sheriff-Principal ought not to have remitted to the Sheriff-Substitute; and that the object of the appeal was to submit to our judgment the previous interlocutors. But then, in order to effect this, it is necessary that the last interlocutor which is the immediate subject of appeal shall be competently appealable to us, because the time for appealing against the Sheriff Principal's interlocutor has expired; and, for the reason already given, the interlocutor of the Sheriff-Substitute is not appealable to us. We cannot rectify irregularities in the Court below by ourselves committing the irregularity of entertaining an incompetent appeal.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court dismissed the appeal.

Counsel for the Pursuers—Lees—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Defender—Baxter—T. B. Morison. Agent—P. Morison, S.S.C.

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*Friday, November 25.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## J. A. SALTON & COMPANY *v.* CLYDESDALE BANK, LIMITED.

## HOCKEY *v.* CLYDESDALE BANK, LIMITED.

*Cautioner—Representations as to Credit—Unauthorised Communication of Guarantee to Third Party.*

Representations as to a trader's credit made or granted by A in answer to inquiries by B, and communicated by B, without A's knowledge or consent,