COURT OF SESSION.

Wednesday, November 22.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

RIACH *v.* WALLACE.

(*Ante*, 36 S.L.R. p. 520.)

Jurisdiction—Review—Reduction of Decree in Debts Recovery Court—Debts Recovery Act 1867 (30 *and* 31 *Vict. c.* 96), *sec.* 17—*Decree in Absence or in foro—Sheriff—Process—Reduction.*

The pursuer against whom a decree, which bore to be a decree *in foro*, had been pronounced at defender's instance in the Debts Recovery Court, raised an action for reduction of the decree on the ground that his wife, who appeared for him in the Debts Recovery Court, acted without his authority, and the decree ought to have been in absence. *Held* that reduction was excluded by sec. 17 of the Debts Recovery Act.

Opinion that the pursuer's proper course was to apply for a sist and rehearing under sec. 16 of the Small Debt Act of 1837, incorporated in the Debts Recovery Act by sec. 7 thereof.

Opinion that under sec. 4 of the Debts Recovery Act a wife may competently appear in Court to represent her husband.

The facts in this case are stated in a previous report (vol. xxxvi. p. 520). It was an action, *inter alia*, for reduction of a decree pronounced in the Debts Recovery Court at Glasgow, based upon the averment that the Sheriff had pronounced a decree which bore to be a decree *in foro*, when the decree ought to have been a decree in absence, in respect that the defender (pursuer in this action) had not been represented at the diet. The pursuer here averred that he instructed his wife to procure a law-agent to appear at the diet in the Debts Recovery Court and defend the action on his behalf; that his wife, instead of instructing a law-agent, appeared herself, and that she did so without his authority and against his instructions.

The defender pleaded—"(3) The present action is incompetent; and *separatim*, there is no jurisdiction. (4) The conclusion for reduction is incompetent, review in that form of a decree pronounced under the Debts Recovery Act being excluded."

The Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. c. 96), by sec. 17, enacts that "No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or to any other form of review or stay of diligence, except as herein provided, on any ground whatever."

Section 10 of the Debts Recovery Act gives a right to appeal against a decree *in foro*, provided a note of the evidence has been taken at the time; and sec. 16 of the Small Debt Act 1837 (7 Will. IV. and 1 Vict. c. 41), which is incorporated in the Debts Recovery Act, by sec. 7 thereof gives a right to sist execution of a decree in absence.

The Lord Ordinary (KINCAIRNEY), after restoring the case to the procedure roll, pronounced the following interlocutor:—"Repels the first, second, third, fourth, and fifth preliminary pleas-in-law for the defender, and appoints the defender to satisfy the production within ten days: Finds the pursuer entitled to the expenses of the debate in the procedure roll, and allows an account of said expenses to be given in," &c.

Opinion.—"This is an action for reduction of a decree for £20, 7s. 6d. pronounced in the Debts Recovery Court at Glasgow on 8th September 1898. It concludes also for damages for wrongous diligence used on the decree. Production has not been satisfied, the defender having lodged preliminary defences, on which a record has been made up and the case debated. Various preliminary pleas are stated, most of them with reference to a misnomer of the pursuer in the summons, which was allowed to be rectified in the Inner House. These were not adverted to at the debate, when the defender confined his argument to his fourth plea, which is—'The conclusion for the reduction is incompetent, review in that form of a decree pronounced under the Debts Recovery Act being excluded.' This plea is founded on the 17th section of the Act, by which it is enacted that "No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or to any other form of review or stay of diligence, except as herein provided, on any ground whatever.'

"It is ruled by the case of *Pringle* v. *Robertson*, February 5, 1887, 14 R. 474, that a plea of incompetency founded on this 17th section of the Debts Recovery Act is properly stated as a preliminary defence to a reduction, and the question therefore is, whether this action of reduction is excluded and rendered incompetent by this section of the statute.

"Various cases were referred to in the argument, but the defender affirmed that there was no case in which a decree, either in the Small Debt Court or in the Debts Recovery Court, had been reduced, and I think that no such case was quoted. At the same time most of the cases quoted by the defender related to attempted reductions of decrees in Small Debt Courts, and it does not seem safe to hold such cases conclusive in questions about decrees in the Debts Recovery Court, the provisions as to review in the two Acts being materially different. I think that only three cases of reductions of decrees in the Debts Recovery Court were quoted, viz. — *Cumming* v. *Spencer*, November 21, 1868, 7 Macph. 156; *Robertson* v. *Pringle*, *supra*; and *M'Lean* v. *M'Kenzie*, November 9, 1895, 3 S.L.T. 213, decided in the Outer House. In these cases the defender's plea on the 17th section of the Act was successful.

"Reductions of small-debt decrees have been dismissed under a variety of circumstances. One of the most noticeable of such cases is *Graham* v. *Mackay*, February 25, 1848, 7 D. 515, in which a reduction was held incompetent, notwithstanding an averment that the party against whom the judgment went was not within the Sheriff's jurisdiction. In various cases allegations of irregularities in procedure have been uniformly disregarded, as in *Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333; *Lennon* v. *Tully*, July 23, 1879, 8 R. 1253; and *Gray* v. *Smart*, March 18, 1892, 19 R. 692. These were cases where the pursuer might have appealed to the Justiciary Court. The case of *Murchie* v. *Fairbairn*, May 22, 1863, 1 Macph. 800, in which decree of reduction was pronounced, although it related to an extract of a small-debt decree, was expressly dealt with as not falling within the Small Debt Act. The pursuer referred to cases falling under other statutes containing similar clauses excluding review, in which notwithstanding decree of reduction was pronounced—as in *Crosbie* v. *M'Mann*, June 8, 1866, 4 Macph. 403; *Ashley* v. *Rothesay*, June 28, 1873, 11 Macph. 708; and *Kedger* v. *M'Fie*, November 22, 1888, 16 R. (J.C.) 24. These cases are certainly important as showing how such clauses excluding review have been interpreted and enforced, and it appears to me that the principle deducible from them may be stated thus—That where the judgment or conviction complained of amounts to an excess of power, the Court will give redress if there be no remedy provided in the special Act, but where what is complained of is only irregularity of procedure or error in judgment, review will be excluded.

"The principle is, I think, well established; but the difficulty is in applying it. For it is often very difficult to discriminate between error or irregularity in a decree and excess of power, and the first point is to determine under which category the judgment complained of falls, and for that purpose it is of course necessary to consider the grounds of the pursuer's action, which appears to raise a point which has not hitherto come up for judgment. At this stage his averments must be accepted as true. What he says is, that when the case was called his wife appeared and made a statement to the Court—to what effect is not stated, and does not signify,—that the Sheriff-Substitute thereon decided against him, that the decree bore to be a decree *in foro*, and was entered as a decree *in foro* in the books of the Court, and that he was thereby deprived of the remedies which the statute provides in the case of decrees in absence. The pursuer avers that he never authorised his wife to represent him in Court, and that he was not represented at all.

"Pursuer's counsel founded on the 4th section of the Act, which provides that 'in all actions under this Act it shall be competent for the parties, or any of them, to appear and plead personally, or by any person *bona fide* employed by them in their usual business, or by a procurator of Court.' It was pointed out that this section did not authorise appearance by a member of the litigant's family, and that in this particular it was contrasted with the 16th section of the Small Debt Act, where such appearance is expressly sanctioned. Counsel for the pursuer argued strongly that the Sheriff, in allowing the appearance of the pursuer's wife, contravened the statute, and went beyond its powers, and that his judgment was not pronounced under its authority.

"It seems to me, however, that the pursuer's counsel pressed this section too far. It is true that it does not give a litigant a right to appear by his wife. He could not insist on so appearing as he might have done in the Small Debt Court; but I see nothing to make such an appearance illegal. I think the Sheriff was entitled to hear her for her husband if he thought fit, if her husband authorised her appearance, and if the other party did not object. I see no prohibition, expressed or implied, in the Act; and I cannot say that the Sheriff's judgment was *ultra vires* and not pronounced under the authority of the Act merely because he heard the pursuer's wife and thought that she had authority to represent him.

"I do not, however, think the argument on the 4th section of the Act of much importance, because it must at this stage be accepted as true that the pursuer's wife had not authority to represent him; and it must therefore be taken to be the fact that the Sheriff-Substitute decerned against the defender (the present pursuer) *in foro* when he was absent and unrepresented, and when the decree ought to have been a decree in absence.

"The question therefore becomes of general importance, because in the pressure of a summary court a mistake of this kind might occur readily enough through the misunderstanding or oversight of the Sheriff or Sheriff-Substitute, or it may be of the sheriff-clerk. If such a mistake occurs, how is it to be corrected? It is said to have occurred in the present case, and if it cannot be corrected by a reduction, the present pursuer has now no other remedy whatever he may have had, and must suffer what is *ex hypothesi* an injustice. This question seems to me to be novel, and not to be ruled by any of the cases quoted. It is not referred to in any of these cases except by Lord Deas in *Murchie* v. *Fairbairn*.

"Is, then, the remedy of reduction open? If a sheriff pronounces a decree against a defender *in foro* when he has not appeared, under which category is such a decree to be classed? Is it to be held as an excess of power not protected by the statute or simply as a judgment from which redress by reduction is excluded? While I think this a very narrow and difficult point, I am disposed to hold that such a decree may be regarded as an excess of power, and therefore not protected from reduction by the 17th section of the Act.

"The directions of the statute contained in sections 6 and 7, and in the incorporated

section 16 of the Small Debt Act, as to the course to be followed in actions in which the defender does not appear, are detailed and explicit, and if a Sheriff should consciously and wilfully violate these directions, and should decide the case otherwise than as directed (if, for instance, he should pronounce a judgment *in foro* instead of holding the defender as confessed), I do not think that such a judgment could be held to be pronounced under the authority of the Act. It would be in direct violation of it and an excess of power; and I do not think that it would make any difference that such a judgment was pronounced under misapprehension. It would be not the less a violation of the Act, although not intentional, but by mistake.

"But although that should be held to be so, there is yet another question, which is, Does the statute provide a remedy within itself? One would have expected some provision in the Act for correction of a mistake of this kind, and if it were clear that there is such a provision, a reduction by a party who neglected to avail himself of it would not be entertained. Now, if the converse mistake were committed, and if a Sheriff should pronounce decree in absence when the defender was present, that would be an error for which an obvious remedy is supplied by sections 6 and 7 of the Act. There would be no difficulty or doubt, and I do not say that an action of reduction would be entertained in such a case. But it is different where the decree is pronounced *in foro* when it should have been in absence. In such a case it is not clear that the Act provides a remedy. If there were any remedy under the Act it would be by appeal to the Sheriff. In the present case there could not have been an appeal under the statute on the facts, for there was no evidence (section 10); and it is said that there could not have been an appeal on the law, because there was no finding in law. I have some doubt on that point, but not so clear an opinion as to lead me to throw out this reduction on the ground that the pursuer had neglected to avail himself of a simpler and less expensive remedy. It may be worth while to notice that there is at least one possible case where the Act provides no remedy for a mistake of this sort. If this case had come before the Sheriff in the first instance, and the mistake which is said to have occurred had been made in his Court, there would apparently have been no remedy unless it were reduction, because, under section 12, appeal to the Court of Session is not given unless the value of the cause exceeds £25. In such a case I think that a reduction would have been entertained, and it is not easy to hold that it would have been competent when the erroneous judgment was pronounced by the Sheriff, and excluded when it was pronounced by the Sheriff-Substitute.

"On the whole, I have come to be of opinion that the pursuer's averments are relevant to infer that the decree sought to be reduced was *ultra vires* of the Sheriff-Substitute, and was not pronounced under the authority of the Debts Recovery Act, and I am not prepared to say that the pursuer could have had any remedy by appeal under the statute, or that he is on that account excluded from the remedy of reduction.

"I am therefore of opinion that the defender's fourth plea-in-law to the competency of the action should be repelled. Pleas 1, 2, 3, and 5 are also purely preliminary pleas; but they were not supported at the debate, and fall also to be repelled."

The defender reclaimed, and argued—Whatever be the pursuer's remedy reduction is incompetent. The Lord Ordinary's view is that it was really a decree in absence, and he is right. Whichever view is taken as to the nature of the decree, there is a right of rehearing given to the pursuer by the Act, and reduction is expressly excluded. An averment of want of authority is not a relevant ground of reduction. Authorities cited—*Samuel* v. *Mackenzie*, 4 R. 187, *per* Lord President; *M'Lean* v. *M'Kenzie*, 3 S.L.T. 213; *Cumming* v. *Spencer*, 7 Macph. 156, *per* Lord Kinloch; *Graham* v. *M'Kay*, 7 D. 515, *per* Lord President; *Cruickshank* v. *Gow & Sons*, 15 R. 326.

Argued for pursuer—The decree was in excess of the power of the Sheriff, and therefore not protected by section 17 of the Act. It is not a decree in absence, as the Book of Causes shows that appearance was made for the defender, and on this matter that is sufficient. There could be no appeal under the Act as no note was taken of evidence, and this decree was illegally extracted the day after it was pronounced. If section 4 of the Debts Recovery Act be contrasted with section 15 of the Small Debt, Act it appears incompetent that a person should be represented in the Debts Recovery Court by a member of his family though he may in the Small Debt Court. In the former Court he must be represented by a person "*bona fide* employed" by him. [LORD TRAYNER—The provision of section 4 of the Debts Recovery Act was intended to extend the rights of representation given by the Small Debt Act. LORD MONCREIFF—Procurators were to be allowed to appear in the Debts Recovery Court.]

LORD JUSTICE-CLERK—This case occurs under a statute which makes careful provision against a judgment being attacked unless it is reviewed in the manner which the statute provides. The Act is 30 and 31 Vict. cap. 96, which by section 17 provides that "No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocation, suspension, or appeal, or to any other form of review or stay of diligence, except as herein provided, on any ground whatever." It is quite true that notwithstanding this clause cases may arise in which the Supreme Court may set aside what has been done on the ground that it was outside the statute and incompetent. It always requires a very strong case to be made out, and it is necessary that the

person claiming this should have exhausted every means of getting justice in the court below before coming here. I see no reason to doubt that in this case the defender (the pursuer here) was entitled to appear at the hearing of the case by his wife, and it is an undoubted fact that the Sheriff proceeded on the footing that the wife was representing her husband the defender. He pronounced a judgment which bears to be a judgment *in foro*. It is said that it is a judgment which he ought not to have pronounced, that he ought to have pronounced a decree in absence, because the wife had no authority to represent and did not represent her husband. I think the Sheriff was entitled to assume that the defender was properly represented, and that the decree must stand unless the defender follows one or other of the two courses open to him—by appeal or by having the case sisted. These are the two things he might have elected, but from the date at which the judgment was pronounced the defender (the present pursuer) did nothing at all. He neither attempted to set up a contention in the Court below that it was a decree in absence, nor a contention that it was a decree *in foro*. Having taken no steps, he asks us to allow him to proceed in a reduction on the ground that he gave his wife no authority to represent him. That is not a ground on which we shall proceed to reduce a decree of the Sheriff. He is not in circumstances in which he can come forward to ask the remedy he seeks. I do not require to express an opinion whether reduction would have been competent if the defender had taken the proper steps to obtain redress and failed. I think we should recal the Lord Ordinary's judgment.

LORD YOUNG—I am substantially of the same opinion. I am not going to decide that in no case is a decree pronounced under the statute to be reduced. I think cases may arise in which reduction may be competent, not reviewing the Sheriff's judgment on the merits, but merely setting aside his decree. But it is not necessary to enter into that matter here. This is a clear case. The pursuer here had the debts recovery summons served upon him regularly, and his wife appeared and stated some case for him. He knew that, and knew that decree was pronounced, for the next day proceedings by arrestment took place on the decree. If there was anything he had to complain of it was open to him to have taken the proceedings which the statute allowed. I think the course he did take is not to be countenanced. I desire to decide that without deciding that cases may not arise in which reduction of the Sheriff's decree may be properly sought.

LORD TRAYNER—I take the case on the pursuer's own statement of it. Having in the Debts Recovery Court received the summons at the present defender's instance, he says that he instructed his wife to obtain the services of a law-agent to state the defence. He must therefore have told her what the defence was. It appears that she thought that she could state it herself, and that she did so. I think it is a mistake to suppose that section 4 of the Debts Recovery Act prevents or prohibits a defender being represented in that Court by his wife or other member of his family. The Sheriff, after hearing the wife, gave a decree which I think we must take to be a decree *in foro*. I take it as such because it is so entered in the Debts Recovery Book, in which the Sheriff Clerk is required by the Act to enter the fact as to whether the defender is represented or not. Now, the Act excludes reduction of a decree *in foro*. If the pursuer was not represented, and the decree pronounced against him was really one in absence, his course was to apply for a sist, which is the proper remedy in such a case. But he took no step at all except the incompetent one of raising this reduction I think the Lord Ordinary's judgment should be recalled.

LORD MONCREIFF—I concur. *Ex facie* the proceedings are regular. Now, there may be cases in which proceedings *ex facie* regular may be reduced notwithstanding the finality clause of the Debts Recovery Act. But the pursuer's averment that his wife appeared for him in Court without authority, she having only authority to employ a law-agent, is insufficient to infer reduction of the decree. It certainly is so in view of the finality clause.

The Court recalled the Lord Ordinary's interlocutor, sustained the preliminary defences, and dismissed the action in so far as regards the reductive conclusions of the summons.

Counsel for the Defender and Reclaimer—Campbell, Q.C.—W. Thomson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Pursuer and Respondent—Thomson—Munro. Agents—St Clair Swanson & Manson, W.S.

Wednesday, November 22.

SECOND DIVISION.

TRAIN *v.* TRAIN'S TRUSTEES.

Succession — Foreign — Heritable Bond — Husband and Wife—Law Applicable to Succession to Heritable Bonds in Question between Husband and Wife.

A domiciled Irishman died intestate and without issue, survived by his widow. His estate consisted of, *inter alia*, sums contained in bonds and dispositions in security over heritable property in Scotland. By the law of Ireland the widow was one of his heirs *in mobilibus*, and entitled as such to a share of his moveable estate. *Held* that the widow was entitled to terce upon the bonds, and also to a share as one of her husband's heirs *in mobilibus* in the balance of the bonds after deduction of terce.