

Counsel for Appellant—Cotton, Q.C., and W. A. Brown. Agents—Philip, Laing & Monro, W.S.

Counsel for Respondents—Pearson, Q.C., and Lancaster. Agents—H. & A. Inglis, W.S.

## COURT OF SESSION.

Tuesday, March 16.

### OUTER HOUSE.

[Lord Curriehill.

#### RHIND AND OTHERS v. DAVID SHIACH AND OTHERS.

*Petition for Sequestration and Appointment of Judicial Factor—Competency—Executor—20 and 21 Vict. c. 56, sec. 4.*

*Held* that a petition to sequester the estate of a person deceased, and to appoint a judicial factor thereon, was competently brought before the Junior Lord Ordinary, although the appointment of a judicial factor would have the effect of suspending the functions of the executor nominate.

The circumstances of this case are set forth in the following note of the Lord Ordinary:—

“*Note.*—The petitioners are beneficiaries materially interested in the execratory estate of the deceased John Rhind, who died on 28th August 1873, in his eighty-ninth year, leaving a last will and testament, dated 20th February 1862, by which he nominated certain persons to be his executors, of whom David Shiach, one of the respondents, is now the sole acceptor. The prayer of the petition is ‘to sequester the estate of the said deceased John Rhind, if necessary, and to appoint a judicial factor thereon with the usual powers.’ In support of the prayer of the petition it is alleged, *inter alia*, (1) that the said David Shiach fraudulently procured the execution by the deceased of three codicils to his said testament, discharging him (the said David Shiach) of all debts due by him to the deceased, and conferring upon him and certain of the other respondents benefits over and above the legacies left to them by the original testament; and (2) that the debts really due by the said David Shiach to the deceased, and now owing by him to the execratory estate, amount to about two hundred and fifty pound—nearly half the value of the whole execratory estate—and that as he disputes the existence of any debts except to the extent of about £8, his personal interests are opposed to those of the beneficiaries. The allegations regarding the said codicils are, shortly, to the effect that at the time of the alleged execution thereof the deceased could neither read nor write through blindness and bodily infirmity; that his memory was quite gone; that the codicils were not read over to him; that the said David Shiach led the deceased’s hand at the subscription; that the deceased never knew the contents of the said codicils, and did not understand what was their effect; that the deceased was not at the date of said codicils of a sound disposing mind, and from mental weakness and blindness, caused by physical weakness and old age, was incapacitated from giving directions in regard to his affairs or the disposal of his property after his death, or of executing any deeds with that view;

and that the said pretended deeds were not the deeds of the deceased. There are alternative statements of facility on the part of the deceased, and of fraud and circumvention and undue influence on the part of the said David Shiach, as having led to the execution of the said codicils; and there are other similar allegations, for which reference is made to the petition.

“The petitioners raised in the Court of Session a summons of reduction of said codicils, in which all the foregoing allegations were set forth as the reasons of reduction, and in which they called as defenders the said David Shiach, and the parties who would have taken benefit by these codicils, viz.—the respondents Jane Shiach and Helen Jane Shiach or M’Cann. Appearance was duly entered in that summons for all the defenders, but they failed to satisfy the production, and decree of certification, *contra non producta* was pronounced on 14th November 1874, with expenses against the said David Shiach, which expenses were afterwards taxed and duly paid by him.

“In these circumstances, the petitioners maintain that the administration of the execratory estate is not safe in the hands of David Shiach, and that the estate should be placed under judicial management, in order that the state of accounts between David Shiach and the deceased may be investigated and ascertained, and that the estate may be properly invested. The petition, however, does not pray for the removal of the said David Shiach from the office of executor.

“Answers have been lodged for David Shiach and certain of the other beneficiaries, who are also materially interested in the execratory estate, in which it is pleaded that the petition is incompetent, on the ground, as explained by the respondents’ counsel at the debate, that such a petition is competent only in the Inner House, and cannot competently be presented to, or entertained by, the Junior Lord Ordinary—(1) Because it is virtually an application for the removal of David Shiach from his office of executor; and (2) because it prays for sequestration of the execratory estate.

“If the petition had expressly prayed for the removal of the executor, it seems to be settled by the case of *Mitchell*, 20 July 1874, 2 Macph. 1378, that it ought to have been presented directly to the Inner House, and not to the Junior Lord Ordinary. But it does not pray for the removal of the executor, but merely for the sequestration of the execratory estate and the appointment of a judicial factor, which would not necessarily involve the removal of the executor, though it would cause a temporary suspension of his functions pending the sequestration. It becomes necessary to inquire whether and how far such a petition is, according to the sound construction of the Act 20 and 21 Vict. cap. 96, regulating the distribution of business in the Court of Session, one of those petitions which must be brought, in the first instance, before the Junior Lord Ordinary, and disposed of by him in the Outer House.”

The Lord Ordinary here notices the provisions of section 4 of the Act, and reviews the decisions bearing on the points. He then proceeds:—

“I am of opinion that such petitions are truly petitions for judicial factors within the meaning of the Act, and that the respondents’ plea of incompetency should be repelled.

“Upon the merits of the application, I am of

opinion that, at all events until the position of the executory estate is investigated by a neutral and disinterested party, the respondent David Shiach should not be allowed to have the administration and management of the estate. It is impossible that the petitioning beneficiaries can have confidence in an executor who has acquiesced in a decree reducing a material part of the settlement under which he is executor on such grounds of personal fraud and malversation on his part as have been above detailed, especially as it appears from one of the three codicils (the execution of which he has virtually admitted that he improperly procured, which have now been reduced) that he was at its date owing to the deceased debts of an undefined amount, of which he attempted by that codicil to obtain a discharge. It is true that in his answers he attempted to explain his allowing decree to pass by saying that he did so to avoid litigation with the petitioners, whose ability to pay the expense of a successful defence he doubted. But I do not think that any such consideration can justify an executor who believes himself innocent in allowing a decree of reduction to be pronounced against him in a summons containing the grave charge referred to. He must therefore be held as admitting the truth of these charges. The sequestration of the estate and the appointment of the factor will not remove him from the office of executor, but will merely suspend his functions until his position in connection with the executory of the deceased is fully investigated and ascer-

tained. It will be open to him hereafter to apply for recal of the sequestration should he be able to show satisfactory grounds for such a proceeding.

"The gentleman appointed as judicial factor being objected to by the respondent, I have appointed a neutral party to the office."

His Lordship accordingly pronounced this interlocutor:—

"*Edinburgh, 16th March 1875.*—The Lord Ordinary having heard the counsel for the parties, and considered the petition and the answer for David Shiach and others, No. 6 of process, and for Margaret James Shiach or Smith and her husband David Smith, No. 5 of process, repels the plea of incompetency stated by the respondents, sequestrates the estate of the deceased John Rhind, and appoints Mr Robert Strathern, Writer to the Signet, to be judicial factor thereon with the usual powers, he always finding caution before extract; and decerns *ad interim*. Finds the respondents liable to the petitioners in the expenses incurred since the lodging of the petition; appoints an account thereof to be lodged, and when lodged remits the same to the auditor of Court to tax and to report."

Counsel for the Petitioners—Pearson. Agent Robert J. Lindsay, W.S.

Counsel for the Respondents—Mair and Mackechnie. Agents—W. Officer, S.S.C., and Thomas Carmichael, S.S.C.