Friday, January 14.

SECOND DIVISION.

[Lord Low, Ordinary.

WHITLIE *v.* JAMES GIBB & SON.

Bankruptcy — Sequestration — Competency of Action for Reduction of Sequestration —Irregularity in Conduct of Sequestration.

A bankrupt, who had himself petitioned for sequestration, and made oath to a state of affairs showing that he was insolvent, brought an action of reduction of the sequestration against the concurring creditor and the trustee, on the ground that he had been induced by the fraud of his concurring creditor to apply for sequestration in the belief that he was insolvent, when in point of fact he was not. He also averred that the trustee had acted in collusion with this creditor in the conduct of the sequestration. The Court *dismissed* the action.

Observed that a bankrupt's remedy when he avers that there has been any irregularity in the conduct of the trustee in the course of the sequestration is to apply to the Accountant of Court, whose duty it will be to inquire into the complaint.

This was an action at the instance of Robert Whitlie, builder, Edinburgh, against James Gibb & Son, cabinetmakers, house factors, and property agents in Edinburgh, and James Gibb and Thomas Gibb, as the sole partners of and trustees for the said firm, and as individuals, and against James Pearson Callum, chartered accountant, Edinburgh, as trustee under a trust-deed granted by the pursuer in his favour, and also as trustee upon the pursuer's sequestrated estates, and also against Robert Rendall, Edinburgh, for his interest.

The summons concluded (1) for reduction of a trust-deed, dated 26th October 1895, granted by the pursuer in favour of the defender Callum, and of the sequestration of the pursuer's estates, including an interlocutor pronounced by the Sheriff-Substitute of the Lothians and Peebles at Edinburgh on 9th November 1895 in a petition for sequestration at the instance of the pursuer with concurrence of the defenders James Gibb & Son, and the act and warrant in favour of the defender Callum, dated 20th November 1895; (2) for an accounting from the defenders James Gibb & Son and James Gibb and Thomas Gibb, and failing accounting for payment of £200; and (3) for payment of £500 as damages as against James Gibb & Son and James Gibb and Thomas Gibb.

The pursuer averred that he was a mason to trade, that in 1894 he entered upon the builder's business of his deceased father, and carried it on latterly in Pitt Street and East Silvermills Lane, Edinburgh, as tenant of the defenders James Gibb & Son; that on 20th May 1895 the defender James Gibb proposed to the pursuer that the defenders James Gibb & Son should conduct the financial part of his business, providing money for the payment of accounts, material, wages, &c., and that after making him an allowance of 15s. per week they would account to him for the profits of his business, and that the pursuer agreed to this arrangement, which was carried out; that James Gibb & Son kept the books in connection with pursuer's business, except the books with regard to time and material and an order book, which were kept at the pursuer's premises, rendered and collected the accounts, opened an account in his name with a bank, and drew cheques upon it by signing the pursuer's name therefor, the pursuer not being allowed to have any control over the bank account, and all cheques received by the pursuer from customers being handed to the defenders for collection. "(Cond. 4) The pursuer never received any state of accounts from the defenders of their intromissions with regard to his business from the time of the said arrangement being entered into. Until recently he had full confidence in their duly accounting to him. He has now, however, discovered that the representations of the said James Gibb were made in pursuance of a fraudulent scheme on the part of himself and his brother Thomas Gibb for behoof of themselves or their said firm of James Gibb & Son, to obtain the absolute control of and interest in the pursuer's business for their own benefit, and in order that, after getting rid of him, they might carry it on in his name in the same way as they are carrying on several other ostensibly separate businesses, among others, Gibb & Fraser, plumbers, No. 35 Dundas Street, Edinburgh, and Bell & Co., coal masters and contractors, No. 47 Pitt Street, Edinburgh." That in October 1895 Mrs Elizabeth Condon, having obtained a decree against the pursuer for £14, and used arrestments thereon, the defenders James Gibb and Thomas Gibb, "in pursuance of their said fraudulent scheme, conceived the idea of availing themselves of this decree and arrestment as a means of getting the pursuer into bankruptcy, and by that means getting him to be divested of all interest in his business and having a nominee of their own in his place;" that having control of pursuer's business they refused to pay the debt of £14, representing falsely that the pursuer was insolvent, although they were indebted to him in a much larger balance; that James Gibb represented to the pursuer that his financial position, as disclosed by his books kept by Gibb's firm, was such that he could not extricate himself from his embarrassments without granting a trust-deed, which upon the faith of these allegations the pursuer did, granting a trust-deed in favour of the defender Callum as trustee; that these representations were made falsely, and for the purpose and with the effect of deceiving the pursuer, he being as James Gibb knew solvent; that thereupon James Gibb & Son arranged for a sale of the pursuer's business, including book debts, from the

defender Callum as trustee under the trust-deed to the defender Rendall, a clerk in Gibb's employment, the price paid being £50; that while this sale was nominally to Rendall, it was truly a transference to James Gibb & Son. "(Cond. 8) On or about the 9th November 1895 the defender James Gibb, acting on behalf of himself and the said Thomas Gibb, and with his knowledge and consent, induced the pursuer to present a petition in the Sheriff Court at Edinburgh for the sequestration of his estates on the false representation that this was essential for the extrication of his alleged business difficulties. The pursuer trusted the said defender, and believed that, as they represented to him, he was in such monetary difficulty as to necessitate sequestration. He was not allowed by them to see the books kept by them, and had no means of testing the truth of his, the said James Gibb's, said representations. The defenders James Gibb & Son were parties to the petition presented in name of the pursuer by their said agent as concurring creditors in respect of an account and claim for £53, 6s. 9d., alleged to be due to them by the pursuer. Sequestration was awarded on 9th November 1895, and by means of pretended claims as after mentioned the said James Gibb & Son procured the election of the said James Pearson Callum as trustee. The pursuer was not cognisant of the terms of the said petition. He only signed a mandate for the presentation of a petition which was never read to him. He had no opportunity of seeing or examining their said account and claim. The statements in the said petition, which was prepared by the said W. R. Mackersy, the agent of the said James Gibb & Son, to the effect that the pursuer was insolvent, were untrue. Further, as after explained, the defenders James Gibb & Son had no such claim of £53, 6s. 9d. against the pursuer. (Cond. 10) The pursuer is not conversant with business affairs, and he believed thoroughly in the various representations condescended upon of the said James Gibb. But after the said James Gibb & Son summarily and wrongfully dismissed him from his business premises, which they did in or about the first week of December 1895, his suspicions were aroused as to the integrity of their conduct and the honesty of their said representations and dealings with him. Since then he has become acquainted with certain facts, in consequence of which he has raised this action." That in March 1896 the pursuer learned for the first time that the defenders James Gibb and Thomas Gibb, in their capacity of partners of the firm of James Gibb & Son, had lodged false, fictitious, and fraudulent claims in the sequestration, amounting in all to £152, 7s. 8d., the whole ordinary claims being £223, 5s. 3d.; that the concurring affidavit and claim upon which sequestration was granted, sworn to by James Gibb on behalf of James Gibb & Son, was to his and their knowledge false and fraudulent; that the claim, in so far as it embraced items between 28th June 1894 and May 1895, amounting in all to £25, 12s. 1d., had been received and discharged by him or his firm; that for £16, 13s. 4d. of this sum the pursuer held a receipt signed by James Gibb & Son, and that the remainder of the claim had been either not incurred by the pursuer, or paid to the Gibbs, or discharged by contra accounts due to the pursuer and collected by them on his behalf; that the other three affidavits and claims for the Gibbs were to their knowledge false and fraudulent, being in great part not due by the pursuer but by his father, and also having been paid, as evidenced by receipts and discharges and by a holograph statement in the handwriting of James Gibb showing that at 13th May 1895 the pursuer was not indebted to the Gibbs in a larger sum than £1, 11s. 9d., which was shortly thereafter converted into a balance in the pursuer's favour; that the oath taken by the pursuer with regard to his affairs in the course of the sequestration was not read over to him; that the state of affairs lodged in the sequestration process, in which the pursuer's whole assets, including book debts, were shown as valued at £53, 15s. 7d., his preferable debts as £40, 17s. 8d., and his other debts as £219, 8s. 7d., including claims for £168, 16s. 7d. by the Gibbs, was made up by the defender Callum upon information supplied by the other defenders, and that the pursuer deponed to its accuracy in the belief, induced by the false statements of the defenders James Gibb & Son, that it truly represented the state of his affairs; that the book debts of the pursuer were valued in the state of affairs at £50, whereas they ought to have been stated at not less than £200; that a claim against a certain customer, valued in the state of affairs at *nil*, had since been recovered in full, and that although owing to the refusal of the defenders James Gibb & Son to allow the pursuer access to the books kept by them in connection with his business, which had not been handed over to the trustee, and which the trustee declined to take steps to recover, the pursuer had been unable to ascertain the particulars and extent of his assets and liabilities as at 26th October 1895, or at 9th November 1895, the dates of the trust-deed and the application for sequestration respectively, he had discovered from his account ledger that the Gibbs debited themselves with an account for £85, 15s. 1d. as due to the pursuer, and as paid by them to themselves for his behoof on 11th November 1895, and that they had collected upwards of £180 between 5th November and 24th December 1895 without accounting therefor to the defender Callum, that they had also collected other accounts due by customers to the pursuer (which were not set forth specifically), and that the accounts to which the pursuer had access showed that the defenders Gibb & Son were largely indebted to the pursuer, and were in a position to pay the decree for £14 due to Mrs Condon. "(Cond. 20) The fraudulent actings before set forth on the part of the defenders James Gibb & Son have been notified to the defender Callum,

but he refuses to take any steps to protect the interests of the pursuer by requiring an accounting from them or otherwise. The said sequestration was procured by the defenders James Gibb & Son, not for the *bona fide* purpose of distributing the pursuer's assets, or of relieving him of liabilities, but fraudulently for the purpose of securing for themselves his said business, and that while they were acting as trustees for him and bound to safeguard his interests." The pursuer also averred that of the twelve affidavits and claims six were claims by the defenders James Gibb & Son, or by firms with which they were identified, that three represented claims which had since been withdrawn, and that of the other three one for £6, 8s. 4d. had been partly incurred by pursuer's father, another for £1, 1s. 8d. had been incurred by the pursuer's father and was prescribed, and the third was for a loan of £1 alleged to have been given to the pursuer's father but unvouched. The pursuer also averred that the defender Callum did not consult the pursuer as to the validity of the claims lodged for the defenders James Gibb & Son, that he never examined the books of the pursuer or of the Gibbs until the present action was raised, that generally he was under the influence of the Gibbs, and that if he had not connived at their actions he had been guilty of great negligence in the performance of his duties as trustee.

Defences were lodged (1) for the defenders James Gibb & Son, James Gibb, and Thomas Gibb, and (2) for the defender Callum.

It was admitted by the defenders Gibb that their claims had not yet been adjudicated upon by the trustee, but it was explained by the trustee that as the assets available for ordinary creditors amounted only to £2, there was no need for the trustee to adjudicate upon the claims.

The pursuer also averred that upon an accounting the Gibbs were due him £200, and that he had suffered damage through their actings by being deprived of his business and otherwise to the extent of £500. He averred that in the circumstances the Gibbs acted maliciously and without probable cause, as well as fraudulently.

The pursuer pleaded—"(1) The pursuer having been induced to grant the trust-deed and to apply for sequestration upon the false representations of the defenders James Gibb & Son, acting by the said James Gibb, and not being now, or having been then, insolvent, is entitled to decree of reduction as concluded for. (2) The said sequestration having been awarded upon the false and fraudulent claim of the defenders James Gibb & Son, as concurring creditors, ought to be reduced, as craved. (3) The claims of the defenders James Gibb & Son in the said sequestration being false, fictitious, and fraudulent, and the pursuer having no other creditors entitled to apply for or to insist in the continuation of sequestration, decree of reduction should be pronounced, as craved. (4) The defenders James Gibb & Son having intromitted with the pursuer's assets, are bound to count and reckon with him as concluded for. (5) Failing such count and reckoning, the pursuer is entitled to decree for the balance sued for. (6) The pursuer having suffered loss, injury, and damage through the wrongous and fraudulent actings of the defenders James Gibb & Son, is entitled to reparation as concluded for."

The defenders Gibb pleaded, *inter alia*—"(1) The action is incompetent, and should be dismissed. (2) No title to sue any of the conclusions, other than the conclusion for reduction of the sequestration. (3) *Lis alibi pendens.* (4) The pursuer's averments are not relevant or sufficient to sustain the conclusions of the action."

The defender Callum pleaded, *inter alia*—"(2) The action is incompetent. (3) The pursuer has no title to insist in the conclusions for count and reckoning. (4) The pursuer's statements are irrelevant and insufficient."

Twelve claims were lodged in the sequestration. The total amount of these claims was £178, 7s. 9d. James Gibb & Son lodged four claims, amounting in all to £152, 2s. 8d. Of the other claims the largest was Gibb & Fraser's for £7, 13s. 7d., and the largest claim lodged for any creditor unconnected with the Gibbs (as averred by the pursuer) was that lodged for Charles Finlayson & Son for £6, 8s. 4d. Mrs Condon did not lodge a claim in the sequestration.

By interlocutor dated 13th November 1896 the Lord Ordinary (Low) found in the circumstances that the action was incompetent, and therefore dismissed the same, and decerned, and found the defenders entitled to expenses.

Opinion.—"I do not think that it can be affirmed that the reduction of an award of sequestration under the Bankruptcy Acts is necessarily and in all circumstances incompetent. To justify such a proceeding, however, the circumstances would require to be most exceptional, and there is, I believe, only one instance of such a thing being attempted, and then the attempt was unsuccessful.

"In the present case the pursuer raises the action in very unfavourable circumstances, in this respect that the petition for sequestration was at his instance, and that he took the oath to a state of affairs showing that he was hopelessly insolvent.

"It appears that the pursuer carried on a small business as a builder, and an arrangement was come to between him and the defenders Gibb & Son, under which the latter financed his business. The pursuer says that Gibb & Son were to pay him 15s. per week, and account to him for the balance of the profits. The pursuer only kept books with regard to time and material, and an order-book. The other business books and the bank account for the business were kept by Gibb & Son, and they also collected accounts. The pursuer says that the consequence is that he knew nothing in regard to the actual position of the business except what Gibb & Son chose to tell him.

"In October 1895 a Mrs Condon obtained

decree against the pursuer for £14, and used arrestments in the hands of Gibb & Son. The pursuer avers that the latter then told him that he was insolvent, and ultimately induced him to apply for sequestration. The pursuer's case is that he was quite solvent, and that Gibb & Son represented that he was not so, and induced him to apply for sequestration, with the fraudulent design of acquiring his business for themselves.

"The pursuer says that Gibb & Son are practically his only creditors, because although two other firms—Gibb & Fraser and Bell & Co.—have put in claims, these firms are only a name under which the partners of Gibb & Son carry on certain branches of their business. The pursuer further avers that the greater part of the sums for which Gibb & Son claim have either been paid or are debts of his father for which he is not responsible. He also avers that the book debts, instead of being only £52, as entered in the state of affairs, amount to not less than £200, and that he is and always has been solvent.

"It seemed to me to be well to ascertain whether other persons besides Gibb & Son and the two partners of that firm—James and Thomas Gibb—were claiming as creditors in the sequestration, and accordingly I examined the sederunt book and the claims which have been put in. It appeared that there were several persons not said to be connected with Gibb & Son who claimed as creditors. The pursuer, however, has lodged a minute in which he, *inter alia*, alleges that these small creditors have withdrawn their claims, and he produces copies of letters by them to the trustee to that effect.

"There were in all twelve claims lodged in the sequestration. Four of them were by Gibb & Son, one by each of Bell & Co. and Gibb & Fraser, and the remaining six by persons not said to be connected with Gibb & Son. Assuming that three of these six have been withdrawn, there still remain three creditors not said to be connected with Gibb & Son. The amount for which they claim is very small, but the amount of the claim does not in my opinion affect the principle applicable to the case, and it is not competent for me to consider the claims upon their merits, as the pursuer seems to ask me to do both in the condescendence and in the minute.

"Further, the claim by Gibb & Fraser, which is of considerable amount, is sworn to by William Inglis, who describes himself as a partner of the firm, and who is not one of the partners of Gibb & Son. *Prima facie*, therefore, the partners of the latter firm have not, as alleged by the pursuer, the sole interest in Gibb & Fraser.

"Now, when sequestration has been awarded, and has not been recalled in the manner provided by statute, creditors, whether their debts are great or small, are entitled to rely that the debtor's estates will be ingathered and distributed in terms of the Act of Parliament.

"If the pursuer's averments in regard to the claim of Gibb & Sons and others, and the amount of the estate, are true, the sequestration should speedily be brought to an end by payment of all debts which are truly due in full, and there should be a balance remaining over, to which the pursuer would be entitled.

"If that should be the result of the sequestration, the pursuer would then be in a position to present a strong case against Gibb & Son of having wrongfully and fraudulently procured the sequestration.

"But the pursuer suggests—for he does not make any specific averment on the subject—that the trustee has not been doing his duty, but has been playing into the hands of Gibb & Son, and will neither realise the estate nor adjudicate upon the claims. If that is the case, the law provides a remedy, but it affords no ground for reducing the sequestration.

"In the whole circumstances I am of opinion that the action is incompetent and must be dismissed."

The pursuer reclaimed, and by interlocutor dated 19th February 1897 the Second Division, of consent, recalled the interlocutor reclaimed against, opened up the record, reserved the preliminary defences to be discussed with the defences on the merits, held the production satisfied, and appointed parties to lodge their proposed adjustments within eight days.

By interlocutor dated 16th March 1897, the Court having received the adjustments proposed, remitted the cause to the Lord Ordinary in order that he might of new close the record, and to proceed in the action as accords.

The above summary of the pursuer's averments is taken from the record as ultimately amended, but it may be noted that the pursuer's amendments chiefly consisted in adding the minute referred to in the Lord Ordinary's opinion *supra* to his condescendence, and in making the averments of fraud against the Messrs Gibb more pointed, and also in adding certain averments with regard to the trustee.

The record having been closed of new, the Lord Ordinary on 7th December 1897 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the closed record as amended, and considered the same and whole cause, Dismisses the action, and decerns," &c.

Opinion.—"I have again considered this case with the additions which the pursuer has made to the record.

"The main object of the action is to reduce the sequestration of the pursuer's estates under the Bankruptcy Acts, which was awarded on 9th November 1895. The petition for sequestration was at the instance of the pursuer himself; he made oath to a state of affairs showing that he was insolvent, and the proceedings have been *ex facie* regular, and in conformity with the statutes.

"The pursuer now says that he was not insolvent, although he was induced to believe that he was so by the fraudulent representations of the defenders the Messrs

Gibb. Except the pursuer's averments, there is nothing in the case to suggest that he was not insolvent when he applied for sequestration. In these circumstances I adhere to the opinion which I formerly expressed, that the action cannot be allowed to proceed. Reduction of an award of sequestration is not a remedy contemplated by the statutes. On the contrary, it is plain that in the ordinary case such a remedy is excluded. There may be exceptional cases in which a reduction is competent, but I do not think that this is one of them.

"I shall therefore dismiss the action."

The pursuer reclaimed, and argued—(1) Reduction of a sequestration was not incompetent—*Gibson* v. *Munro*, June 5, 1894, 21 R. 840. (2) If it were proved, as was alleged, that at the date of the sequestration there was a receipt which would have instantly verified that the debt of the concurring creditor was not of sufficient amount to warrant sequestration, then the sequestration was fundamentally null. (3) The pursuer had been induced to apply for sequestration through the fraudulent misrepresentations of the Gibbs, who were really the only persons interested in the sequestration, when he was not insolvent, and in these circumstances he was entitled to the reduction sought. He was not barred by having deponed to the state of affairs. He was induced to do so by the fraudulent misstatements of the Gibbs and the trustee. Even if fraud was not relevantly averred, error induced by misrepresentation was sufficient—*Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108. The Gibbs were not entitled to say that if the pursuer had made an examination he would have found that their statements were false. A debtor had been held entitled to demand repetition or to reduce an illegal preference granted by himself to one of his creditors—*Arrol & Cook* v. *Montgomery*, February 24, 1826, 4 S. 504 (499), and this case was analogous. (4) Here the sequestration did not need to be maintained in the interests of third parties, for there were practically no such interests. (5) If this remedy were refused the pursuer had no other. The pursuer could not have applied for recal (*a*) because section 31 of the Bankruptcy Act 1856 did not seem to contemplate recal of a sequestration at the instance of a person who had himself petitioned for his own sequestration; and (*b*) because he did not discover the erroneous nature of the statements made to him till too late for recal. [Counsel for pursuer in answer to the Bench stated that the pursuer had made application to the Accountant of Court after the present action was raised, but that he had refused to interfere while the present action was in dependence, and that the pursuer had not brought his case under the notice of the Accountant of Court prior to raising this action.] If the matter was to be referred to the Accountant of Court, the action should be sisted and not dismissed. (6) This sequestration had been resorted to, not for the *bona fide* purpose of distributing the pursuer's estates, but for ulterior and unfair and illegitimate purposes. The sequestration had never been treated as a *bona fide* sequestration by either the Gibbs or the trustee, but had simply been used as a means of carrying out the Gibbs' designs upon the pursuer's business. This was an abuse of the process of sequestration which the Court had jurisdiction to prevent, and which the Court ought to and would prevent—*In re A Company* [1894], 2 Ch. 349; *Gardner* v. *Woodside*, June 24, 1862, 24 D. 1133. (7) The pursuer was entitled to damages for wrongous sequestration—*J. & W. Kinnes* v. *Adam & Sons*, March 8, 1882, 9 R. 698, *per* Lord Shand at p. 704, and he was entitled to proceed with the action as an action of damages independently of the other conclusions. As the trustee had refused to take up the case, the pursuer was entitled to sue for damages without him.

Argued for the defenders Gibb—Reduction of a sequestration was incompetent—see *Gibson* v. *Munro, cit.* The Bankruptcy Act 1856, section 31, did not countenance any such proceeding, and a sequestration could not be set aside otherwise than as provided by that Act. The only averments in the pursuer's condescendence which had substance in them practically amounted to this, that on a proper accounting between these defenders and the pursuer it would be found that they were in the pursuer's debt, and that he was not insolvent. That was a matter which could quite well be inquired into in the course of sequestration, and apart from the more general question, reduction of a sequestration was incompetent when justice could be done without reduction, as was the case here. Apart from that, however, the pursuer had not made averments relevant to entitle him to a proof. The averments made here by the pursuer would not have been relevant to support a timeous and competent application for recal of a sequestration *Macnab* v. *Hunter*, December 13, 1851, 14 D. 182; *Ure* v. *M'Cubbin*, May 28, 1857, 19 D. 758; *Cumming* v. *Bailey*, November 30, 1866, 5 Macph. 81; *Gibson* v. *Cæsar*, November 1, 1882, 10 R. 59. The receipt for the sum of £16 in the concurring affidavit and claim bore to have been settled *per contra*, and would not have instantly verified that the debt was paid. There was no case in which a person who had himself petitioned for his own sequestration had ever attempted to have such a sequestration set aside. There was here no relevant averment of deceit such as would entitle the pursuer to contradict his own petition and oath.

Argued for the defender Callum—Upon the legal question this defender adopted the argument for the other defenders. This defender did not seek to shun inquiry, and indeed for the sake of his professional reputation he desired that the pursuer's allegations should be investigated by the Accountant of Court, but he was not willing to have these questions inquired into by means of a proof at large in this Court.

LORD JUSTICE-CLERK — This pursuer applied for sequestration of his own

estates, and did so with the concurrence of a creditor, the defender in this case, to make the application for sequestration competent. That creditor was the principal creditor, but there were some other creditors who also had claims in the sequestration. That sequestration proceeded, and no difficulty arose about adjudicating on claims, which was absolutely unnecessary, because there was practically no dividend available for the different creditors, and therefore no adjudication has taken place. There has been no dividend. The allegation of the pursuer is that this sequestration was brought about practically in consequence of fraud on the part of the concurring creditors. That is a matter that might have been inquired into in the sequestration. If there had been any irregularities or anything that is contrary to the statute or inconsistent with it in the granting of the sequestration or in the conduct of it, any party to the sequestration complaining is entitled to have the matter inquired into by the Accountant in Bankruptcy, and also has his remedies in this Court. In these circumstances, while I do not say, and I do not think the Lord Ordinary says, that there may not be a case in which a reduction may be competent, certainly this is not a case that calls for the intervention of the Court; and as to the reductive conclusion I do not think it would be right for us to do otherwise than what the Lord Ordinary has done in dismissing the action. By dismissing the action of course every right the pursuer can have is left open to him, as the Lord Ordinary has expressed it. In the meantime I see no ground for holding that this sequestration should be subjected to reduction, and I agree with the Lord Ordinary.

Lord Young—I am of the same opinion. The action is in all respects admittedly unprecedented. It has been pointed out more than once in the course of the argument here, and indeed the Lord Ordinary points out in his note very distinctly, that if the pursuer's averments are true, and he has any real grievance in respect of the facts as averred by him, he may have that grievance remedied in the sequestration process by requiring, and if necessary compelling, the trustee to do his duty, and therefore to sustain this unprecedented action in order to do justice is unnecessary. Complete justice can be done in the regular course of the process of sequestration, and if there is any claim of damages against the defender as having been instrumental in procuring the sequestration, again, as the Lord Ordinary points out, a remedy will be open to the pursuer although this unprecedented action is dismissed.

Lord Trayner—I have come to the same conclusion. I think the averments by the the pursuer here, if they are assumed—as on relevancy they will be assumed—to be true, present a very strong case for inquiry —so strong a case that I should not have expected the defender to offer, as indeed he does not offer, any opposition to inquiry, and if the course we are taking were to exclude the pursuer from all inquiry into the circumstances averred, or to exclude Mr Callum from his answer, I should have been very slow—notwithstanding that the action is unprecedented—to have taken it, but would have endeavoured to discover some mode of doing justice to both parties in the case presented to us. But then there is no necessity for taking any unusual course in this case to do full justice to both parties, because the remedy which the pursuer seeks can be got by an appeal to the Accountant in Bankruptcy. The whole of this action, except the conclusion for damages, on which I shall have a single word to say afterwards, is based on the averment that this was an altogether irregular and invalid sequestration, procured through the fraud—for it amounts to that—of the Messrs Gibb. Now, if there is any irregularity either in obtaining sequestration or in the conduct of the trustee in the course of the sequestration the Accountant in Bankruptcy is charged to inquire into that, and it will be his duty if he finds anything to complain of to bring that before the Court for consideration. The fullest inquiry is open to the pursuer before the Accountant in Bankruptcy, and before the Court if the Accountant in Bankruptcy thinks his case such as warrants him reporting to the Court in the matter.

In regard to the reductive conclusion, I think the action is irrelevant. I know of no case in which a sequestration has been reduced at the instance of the person who applied for it. Whether the pursuer could have applied for recal of the sequestration awarded on his petition or not we need not consider, for that course was not adopted within the limited period allowed by the statute.

In regard to the conclusion for damages, if there had been a substantive case for damages apart from the reduction of the sequestration proceedings, I would have been disposed to allow the pursuer an issue, but there is no such substantive case. The conclusion for damages depends on the antecedent averment of wrongous sequestration. Now, I am not prepared to assume that the sequestration was wrongous, and until that matter has been determined I think the pursuer can get no issue with regard to his claim for damages. I therefore agree that the Lord Ordinary's interlocutor should be adhered to.

Lord Moncreiff—I concur in thinking that the course which the pursuer has adopted is unprecedented and unnecessary. If he succeeds in the sequestration in establishing the strong averments which he makes against the defenders James Gibb & Son, he will not by our judgment be deprived of any remedy he may have in an action of damages against them.

The Court adhered.

Counsel for the Pursuer and Reclaimer—G. Watt—Wilton. Agent—James Anderson, Solicitor.

Counsel for the Defenders and Respondents Gibb—Balfour, Q.C.—N. J. D. Kennedy. Agent—W. R. Mackersy, W.S.

Counsel for the Defender Callum—Graham Stewart. Agent—A. C. D. Vert, S.S.C.

Tuesday, January 25.

FIRST DIVISION.

GREVILLE-NUGENT'S TRUSTEES *v.* GREVILLE-NUGENT.

Fee and Liferent — Marriage-Contract — Construction—Mineral Royalties.

A husband and wife by an antenuptial marriage-contract conveyed the estate of C, belonging to the latter, to trustees, who were directed to sell it on the request of the spouses or the survivor of them, or after the death of the survivor, at their own discretion. The trustees were to hold the proceeds arising from the sale and pay the "annual income" to the wife during her life, and thereafter, on certain conditions, to her husband.

It was further provided that until the estate should have been sold the trustees should have power "in the meantime to lease the unsold parts, and as to the mansion, whether furnished or unfurnished, for occupation or other purposes, for the best rent that can be reasonably gotten, and to hold the nett proceeds of such sale, and the nett rents and profits of the said Cove estate until sale," for the purposes thereafter declared, with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust.

These "rents and profits" were to be paid to the wife during her life. No express power to work or lease the minerals was conferred upon the trustees.

Quarries had been worked upon the estate at intervals during 100 years, but there had been no working for four years previous to the execution of the contract, the last quarries worked having extended over 13 acres.

The estate not having been sold, the trustees let certain quarries extending over 46 acres, which included the 13 acres last let. In the course of opening the quarries a quantity of timber had to be cut down.

Held that the rent and royalties obtained for the quarries, and the price of the timber, fell to be regarded as capital, and not as "rents and profits," in a question with the liferentrix, and that she was entitled only to the interest of the amounts so received.

By indenture of settlement dated 3rd June 1882, entered into in contemplation of the marriage of the Honourable Patrick Greville-Nugent and Miss Emma Ogilvy, it was agreed that the spouses should convey to trustees, *inter alia*, the estate of Cove in Dumfriesshire, which was the property of Miss Ogilvy, for the following purposes —"upon trust at the request in writing of the said Patrick Emilius John Greville-Nugent and Emma Ermengarda Ogilvy during their joint lives, and of the survivor of them during his or her life, and after the death of both, at the discretion of the said trustees, to sell the same, for which purpose all necessary and usual powers, including power to sell by public auction or private contract, shall be and are hereby given to the said trustees or trustee to contract for and complete the sale and give absolute conveyances and dispositions of the lands and heritages and discharges for the purchase moneys to the several purchasers paying the same, but with the application of which purchase-moneys the purchasers shall have no concern, And in the meantime to lease the unsold parts, and as to the mansion, whether furnished or unfurnished, for occupation or other purposes, at the best rent that can be reasonably gotten, and to hold the net proceeds of such sale and the net rents and profits of the said Cove estate until sale, upon the trusts hereinafter declared of and concerning the same respectively, with such powers of leasing the lands and hereditaments and other powers necessary and expedient in the execution of the trust: And this indenture also witnesseth that in consideration of the premises it is hereby agreed and declared that the said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor or other, the trustees or trustee of these presents (all of whom are herein referred to under the designation of 'the said trustees or trustee') shall hold [certain investments including] the net moneys to arise from the sale of the said estate of Cove and hereditaments in Scotland under the like trusts for sale herein contained, upon trust, to retain any of the investments forming part of the said trust premises in their actual state of investment, or with the consent of the said Emma Ermengarda Ogilvy and Patrick Emilius John Greville-Nugent during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor, at the discretion of the said trustees or trustee to vary the investment thereof, and with such consent or at such discretion as aforesaid, to invest any moneys from time to time forming part of the said trust premises, or held upon the trusts thereof in or upon any of the investments hereinafter authorised, and [subject to the above-mentioned burdens] the said trustees or trustee shall hold all the said trust premises and the investments and annual income thereof upon trust to pay the said annual income during the life of the said Emma Ermengarda Ogilvy to the said Emma Ermengarda Ogilvy for her sole and separate use, and