Counsel for the Complainers—Balfour, Q.C.—Chree. Agents—Gordon-Petrie & Shand, S.S.C.

Counsel for the Respondent—Campbell, Q.C.—Wilson. Agent—Hugh Martin, S.S.C.

Tuesday, June 20.

FIRST DIVISION.

[Lord Kinnear, Ordinary on the Bills.

M'LETCHIE *v.* ANGUS BROTHERS.

Bankruptcy—Sequestration of Estates of a Deceased Debtor—Recal of Sequestration—Relevancy.

A petition for recal of an award of sequestration of the estates of a deceased debtor was presented by his executrix, who averred that if she were successful in an action of accounting raised by her against the creditor upon whose application sequestration had been awarded, a considerable surplus of assets over liabilities would be disclosed. The Court *dismissed* the petition.

On 14th March 1899, in the Sheriff Court of Lanarkshire, Messrs Angus Brothers Glasgow, obtained sequestration of the estates of the deceased Matthew M'Letchie, grain merchant, who died on 30th May 1898. The amount of the debt due to them by Mr M'Letchie was stated in their oath to be £975, 17s. 6d. There were a few other creditors of the deceased for comparatively small amounts, and at a meeting of creditors Mr John Wishart, accountant, Glasgow, was elected trustee on the sequestrated estates.

Mrs Annie Brown or M'Letchie, executrix-dative, *quâ* relict of the said Matthew M'Letchie, presented a petition under section 31 of the Bankruptcy Act 1856, for recal of the award of sequestration, in which she made averments to the following effect:—When Mr M'Letchie retired from business in February 1898 Messrs Angus took over the whole assets of the business with his consent in order to secure their debt, and also took out a policy on his life for £1000. In February 1899 Mrs M'Letchie raised an action of accounting against Messrs Angus for their intromissions with the proceeds of the policy of insurance and the assets of the business. The petitioner averred that Messrs Angus were, on a true accounting, due to her a large sum of money, and that the application for and award of sequestration were wrongous and oppressive.

Messrs Angus Brothers lodged answers in which they denied that there was a surplus in their hands, and averred that the policy in question never formed any part of the estate of the deceased. They accordingly submitted that the petition should be refused.

On 7th April 1899 the Lord Ordinary on the Bills (KINNEAR) dismissed the petition.

The petitioner reclaimed, and argued—Granted that sequestration could not have been refused, the petitioner now made averments which entitled her to recal thereof. The Court had an equitable jurisdiction in such matters, and inasmuch as the petitioner's averments instructed that there was a surplus sufficient to meet the claims of all the creditors of the deceased, there was no good reason why the administration of the estate should be continued in the hands of a trustee instead of being entrusted to the proper person, viz., the executrix—*Gardner* v. *Woodside*, June 24, 1862, 24 D. 1133; *Ballantyne* v. *Barr*, Jan. 29, 1867, 5 Macph. 330; *Blair* v. *North British and Mercantile Insurance Company*, Jan. 8, 1889, 16 R. 325; and *Aitken* v. *Kyd*, Nov. 19, 1890, 28 S.L.R. 115, referred to.

The respondents' argument sufficiently appears from the opinion of Lord M'Laren.

In the course of the discussion it appeared that the action of accounting against the respondents had been sisted at the instance of the petitioner herself.

LORD M'LAREN—This is a case of sequestration at the instance of a debtor in which an application for recal has been presented by the executrix. I think such cases are to be carefully distinguished from sequestrations of a living debtor, because the grounds on which sequestration may be applied for are quite different in the two cases, and it follows by clear induction that the grounds of recal must also be different. The sequestration of the estate of a deceased debtor is granted on the application of a creditor, who is not necessarily in the position of having given a charge, or having used diligence for the recovery of his debt. Of course the condition of notour bankruptcy is altogether inapplicable to the estate of a deceased debtor, for no person can be rendered bankrupt after his death. But more than that, the statute does not even require as a condition of the right to the distribution of an estate in this form that it should be shown that the estate of the deceased is insolvent, and that arises in this way. Insolvency is only a requisite in the case of a living debtor, because notour bankruptcy is necessary, and notour bankruptcy is defined as insolvency coupled with a charge or certain equivalent diligence.

Such being the condition upon which sequestration may be applied for, it appears to me that this is purely a process of distribution of the estate of a deceased debtor. The award of sequestration does not represent that the defunct was bankrupt, or even insolvent. It carries with it no interference with the conduct of a business or the conduct of any party's affairs by himself. It is merely a mode in which creditors of a deceased debtor, who had been unable to get payment of their debts in the ordinary way, may by judicial authority take the management of his estates into their own hands. Now, while I wish to guard myself against the view which has been deduced from some of the cases, that equitable considerations enter into the question of a recal of the sequestration of a living debtor, because I think that there the matter must be determined by the

existence or non-existence of the statutory conditions, I by no means assert that equitable considerations may not enter the question of the recal of the sequestration of a deceased debtor. If the sequestration is no more than a process of distribution it may very well be a discretionary question for the Court which is the best mode of distributing the estate.

Now, if the executrix came forward and said that she had funds in her hands, or that there were funds which would presently be available for the payment of creditors, I think that would be a strong argument to induce the Court to grant recal of a sequestration inconsiderately applied for. But that is not the case here. The petitioner does not say that she is in a position to clear the estate of debts, but she says that she has an action in Court, in which, if she succeeds, the debts will be paid and there will be a surplus. Why that action should not be proceeded with I do not know, for the sequestration is obviously no bar to proceeding with that action. But seeing that the executrix is not in a position to offer payment, I am unable to see any grounds that would justify the withdrawal of this estate from the creditors which would not be applicable to every similar case in which creditors had, in default of payment, sought to recover the amount of their claims by means of this process.

I think there is some analogy between the cases of sequestration of a deceased debtor and confirmation of executor-creditors, and certainly the rights of the body of creditors are substantially the same as those of the individual creditors who confirm to their debts. Now, if this be a sound analogy, it is adverse to the petitioner's claim, for it is quite settled that the confirmation of an executor-creditor is independent of the right of an executor of the general estate whose administration will to the extent of the subjects confirmed be controlled by the co-existence of executor-creditors.

Accordingly I am of opinion that the interlocutor of Lord Kinnear is sound and should be adhered to.

Lord Adam concurred.

Lord Kinnear—I agree. I think with Lord M'Laren that the material point to consider is, that this is a process for the administration and distribution of an estate among the persons interested, and that the only question really in controversy at present is, whether the title to administer should be vested in the official trustee or in the widow of the deceased. I think that is a question of expediency, and that in disposing of it we ought to consider what is the simplest and best method of administration in the interest of all parties interested in the estate. At the same time I think I may say that the consideration which chiefly moved me in the Bill Chamber was that it seemed to me to be perfectly plain from the papers in the case that there was a controversy between the parties which could not be advantageously or satisfactorily determined in the Bill Chamber at all, because the competency of this application depends upon an averment that there was a surplus in the hands of the respondent, and the validity of that averment depended upon the petitioner having taken a sound view of the respondent's rights on the one hand and her own on the other in the money insured in a policy on the life of the deceased.

I could not determine that question, for in the first place I had not the policy before me, and in the next place, because if the parties were at all right in their view of the kind of question that would arise, it might be necessary to ascertain matters of fact. It appeared to me that that was a consideration which might not tell at all so strongly against the petitioner's application in this Court as in the Bill Chamber, because the policy might have been before us, and the petitioner might have had time to put her case into a more distinct shape than it was in the Bill Chamber. But after hearing the arguments of counsel, I have come to be very clearly of opinion that there is no real change in that respect, for we are still without the policy of insurance. Parties are not agreed about its terms, and I cannot say that I think that the questions upon which they would have to join issue if the policy were before us have been quite clearly formulated, or that the parties have made them quite clear to their own minds. At all events, I am by no means persuaded that it could be determined that the executrix has any interest whatever in the insured money without an investigation, which we have not had, and cannot reasonably have here, though I think it is an investigation which may be very conveniently had either in the action or in the course of the sequestration. In the meantime the creditor's proceeding upon an action being brought against him, was to put the estate, which was at that time in his own hands, into neutral custody by applying for sequestration and obtaining the appointment of a trustee. We must assume that the trustee will honestly discharge his duty, and therefore I think there would be no advantage in replacing the estate in the hands of the respondent, and leaving the executrix to recover the balance due to her if there is any such balance as the result of an action. That would not be for her advantage, and if there are other creditors (and there are some though not many) it would not be for theirs.

The Lord Pesident concurred.

The Court adhered.

Counsel for the Petitioner—Baxter—Orr. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents — Cullen. Agents—Auld & Macdonald, W.S.