and there was no irregularity in the procedure, and no special circumstance that could be held to exclude sequestration. The only special circumstance founded on by the appellant was the consignation of the rent in the hands of the Sheriff Clerk Depute, but that was not such consignation as was prescribed by section 5 of the Small Debt Act; the granting of the receipt was a mere ultroneous proceeding on the part of the Sheriff Clerk, and its terms gave the respondents no security. The respondents had omitted nothing that was necessary to make the sequestration regular—*Pollock* v. *Goodwin's Trustees*, June 24, 1898, 25 R. 1051, 35 S.L.R. 821. The sequestration proceedings were justified, and even harshness in the use of diligence did not make it wrongful—*Robertson* v. *Galbraith*, July 16, 1857, 19 D. 1016. An illiquid claim of damages was no answer to a demand for payment of rent. The action was irrelevant.

Argued for the appellant—In the circumstances the rent was no more a liquid debt than the counter claim, and after consignation sequestration was unjustifiable and without cause. The pursuer was entitled to an issue—*Oswald* v. *Graeme*, June 26, 1851, 13 D. 1229; *M'Leod* v. *M'Leod*, February 11, 1829, 7 S. 396; *Munro* v. *M'Geoghs*, November 15, 1888, 16 R. 93, 26 S.L.R. 60.

LORD TRAYNER — The pursuer of this action claims damages from the defenders on the ground that the defenders executed a sequestration of her furniture, which she says was illegal, wrongous, and oppressive. The facts are, that the pursuer, who was the defenders' tenant, was due a half-year's rent at Whitsunday 1902. This she refused to pay, alleging certain counter claims against the defenders. The defenders in June 1902, not having been paid the rent due, raised an action of sequestration against the pursuer in the Small Debt Court, and sequestrated her furniture. *Prima facie*, the defenders only exercised their legal right in sequestrating, the pursuer not being entitled to retain or refuse payment of her rent on the allegation of an illiquid counter claim. But the pursuer says that the defenders' proceedings were illegal and oppressive because on 15th May, when the rent became due, she consigned the amount thereof with the Sheriff-Clerk to meet the defenders' claim. I am of opinion that such consignation was no bar to the defenders proceeding with their sequestration. In the first place, the Sheriff-Clerk had no right or authority for receiving such consignation; and in the second place, the consignation was not made on such terms as gave the defenders any right to claim the consigned money. It was not consigned under any arrangement with them, but in face of their refusal to take anything except payment of their rent. It is true that when decree was asked for the amount of the rent the Sheriff sustained the pursuer's counter claim to an extent which sopited the rent. But this was done in July 1902, and did not affect the legality of the defenders' proceedings more than a month before. In short it comes to this, in June the defenders sequestrated for rent then due. The pursuer's counter claims were not then constituted, and afforded her no answer to the defenders' claim; the defenders' proceedings were when taken quite within their right, and consequently were neither illegal nor oppressive. I think there is here no relevant statement of any wrong for which the pursuer can claim damages. The action is not only irrelevant but without substance of any kind, and ought, I think, to be dismissed.

LORD MONCREIFF—I have come to be of the same opinion, although at one time I had some doubt. I thought that it might be possible to hold that the so-called consignation of £8, 10s. with the Sheriff-Clerk-Depute was sufficient. I have come to the conclusion that this is not so. The rent, amounting to £8, 10s. was due on 15th May, and it was a liquid debt. Against that the tenant sought to put a claim of damages, but that was an illiquid debt. If there had been nothing more than an intimation of this claim of damages on behalf of the tenant there was nothing to prevent the landlord from using sequestration for the rent then due. The only way of stopping that proceeding was either for the tenant to pay the rent and bring her action, or to consign the amount of the rent in the hands of the Clerk of Court in the procees of sequestration, with £2 to cover expenses. The tenant here took neither of these courses, and therefore I think that she has no ground for bringing the present action.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, sustained the second plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Appellant —Guy—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Respondents — Salvesen, K.C. — A. Moncreiff. Agent—James Skinner, S.S.C.

Tuesday, March 10.

FIRST DIVISION.

HEALY, PETITIONER.

Company — Register of Joint-Stock Companies — Restoration of Name of Company Struck off Register — Petition of Contributory for Restoration—Companies Act 1880 (43 *and* 44 *Vict. cap.* 19), *sec.* 7 (5) *—Companies Act* 1900 (63 *and* 64 *Vict. cap.* 48), *sec.* 26 (2).

A contributory of a company which had been struck off the register of joint-stock companies under section 7 of the

Companies Act 1880, in respect of its failure to lodge annual returns under section 26 of the Companies Act 1862, presented a petition in terms of section 7, sub-section 5, of the Companies Act 1880, as amended by the Companies Act 1900, section 26, sub-section 2, praying the Court to order the restoration of the name of the company to the register of joint-stock companies. The purpose of the petition was to enable the assets of the company to be realised and distributed among those entitled thereto. On a remit, the petitioner, at the instance of the reporter, lodged in process annual returns for the years in respect of which the company had failed to make such returns. The returns so lodged by the petitioner were still defective in certain respects.

The Court, notwithstanding the defects in the returns, in respect that it was "just" that the name of the company should be restored to the register in order that its assets might be ingathered and distributed to the persons entitled to them, *granted* the prayer of the petition.

The Companies Act 1880 (43 and 44 Vict. cap. 19), section 7, sub-section 5, enacts:—"If any company or member thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member may apply to the superior court in which the company is liable to be wound up; and such court, if satisfied that the company was at the time of the striking off carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off."

The Companies Act 1900 (63 and 64 Vict. cap. 48), sec. 26, sub-sec. 2, enacts that in sub-section 5 of section 7 of the Companies Act 1880, "after the words 'or member' in each place where they occur shall be inserted the words 'or creditor,' and in the same sub-section, after the word 'operation,' the words 'or otherwise' shall be substituted for the word 'and.'"

Augustine Healy, Bank House, 369 Brixton Road, London, a contributory of the United (Hannans') Exploring and Development Company, Limited, presented a petition in terms of the Companies Act 1880, section 7, sub-section 5, as amended by the Companies Act 1900, section 26, sub-section 2, praying the Court to order that the name of the United (Hannans') Exploring and Development Company, Limited, be restored to the register of joint-stock companies.

The United (Hannans') Exploring and Development Company, Limited, was incorporated and registered as a company limited by shares under the Companies Acts 1862 to 1893, on 23rd December 1898. Its registered office was in Edinburgh.

The company was formed for the purpose of taking over the undertaking of Hannans' Development and Finance Corporation, Limited, in Western Australia, Rhodesia, South Africa, and elsewhere, together with all the properties, works, &c., in connection therewith, and to undertake all or any of the liabilities, contracts, or agreements relating thereto, and for that purpose to carry into effect an agreement, dated 23rd December 1898, made between the said Hannans' Development and Finance Corporation, Limited, of the first part, the liquidator thereof, of the second part, and the company, of the third part. The objects of the company were, *inter alia*, to lend money to such parties, and on such terms, with or without security, as might seem expedient, and to dispose by sale, lease, surrender, mortgage, or otherwise, of any part of the undertaking, property, rights or privileges of the company, for such consideration as the company might think fit, and in particular, for the stocks, shares, debentures, or other securities or property of any other company. The capital of the company was declared to be £150,000, divided into 150,000 shares of £1 each. By the agreement of 23rd December 1898, before referred to, which was duly executed and filed with the Registrar of Joint-Stock Companies, it was provided that every member of Hannans' Development and Finance Corporation, Limited, should, in respect of every fully paid-up ordinary share thereof held by him, be entitled to claim an allotment of one share of £1 each in the company, with the sum of 17s. per share credited as paid thereon; and in respect of every fully paid deferred share in Hannans' Development and Finance Corporation, Limited, be entitled to claim an allotment of ten fully paid shares of £1 each, and five additional shares of £1 each in the company with the sum of 17s. per share credited as paid thereon, the liability of 3s. per share to be paid 3d. per share on application, 9d. per share on allotment, and the balance in calls as and when required. From the share register of the company it appeared that 33,984 shares of £1 each of the company were allotted in December 1898 and January 1899. Certain moneys due on application for shares were paid to the company.

On 4th November 1899 Lord Stormonth Darling in proceedings in the liquidation of Hannans' Development and Finance Corporation, Limited, refused to sanction the agreement of 23rd December 1898, above referred to, relating, *inter alia*, to the allotment of shares of the company. That allotment accordingly fell to be cancelled, and the moneys paid to the company by the parties who applied for shares fell to be repaid. Between the date of allotment, however, and said 4th November 1899, the directors of the company, of whom the petitioner was one, had employed the moneys

subscribed for shares under the foresaid agreement by making advances on the security of a mortgage on certain mining properties. The company subsequently transferred this mortgage, receiving in consideration therefor a transfer of 6000 fully paid 10s. shares of the Premier Gold Mines, Limited, and obtaining a certificate in their name dated 16th April 1901. These were considered to be worth about £2000.

In October 1901 it was discovered by the petitioner and his co-director, when they sought to realise the company's holding in the Premier Gold Mines, Limited, that the company had in September 1900 been struck off the register of joint-stock companies on the ground that it had not filed the proper and requisite returns with the registrar. The petitioner averred that the failure to make these returns was occasioned by the neglect of the late secretary of the company, who had led the petitioner to understand that the returns had been duly made, and that at the date on which the company's name was struck off the register the company might be said to be in operation, inasmuch as it was in possession of the foresaid shares of the Premier Gold Mines, Limited, and was attempting to sell the same.

The Lord Advocate, as representing the Board of Trade and the Registrar of Joint-Stock Companies, lodged answers to the petition. It was stated in the answers that the name of the company was struck off the register in consequence of its failure to make the returns required by sections 2, 6, and 40 of the Companies Act 1862, section 19 of the Companies Act 1900, and section 45 of the Act of 1862 as amended by section 20 of the Act of 1900.

The respondents submitted that before the name of the company was restored to the register inquiry should be made as to whether the company at the time of the striking off was carrying on business or in operation, conform to section 7, sub-section 5, of the Companies Act of 1880, above referred to, and that the following returns should be made:—(1) Annual return under section 26 of the Companies Act 1862 for the years 1899, 1900, and 1901; (2) notice of change of registered office; (3) copy register of directors; and (4) A return of allotments of any shares that might have been allotted in 1901. They further submitted that the petitioner and the company should be ordained to pay to the respondents the expenses incurred in consequence of the failure of the company to make the necessary returns, including the expenses of the respondents in the petition.

The Court remitted to Sir Charles B. Logan, W.S., to inquire and report as to the regularity of the procedure and the facts and circumstances set forth in the petition and answers.

The reporter stated that the procedure in the petition had been regular, and that the petitioner had furnished him with all the documents and information called for, with the exception of the minute-book of the directors, which it was explained was in the hands of the late secretary, who refused to give it up.

The reporter further stated—"It does not appear to me that at the date when the name of the company was struck off the register in September 1900 the company could be said to be carrying on business or to be in operation, as the refusal of the Court on 4th November 1899 to sanction the agreement between the company and Hannans' Finance and Development Corporation, Limited, struck at the existence of the company, and it seems to me that the only course open to its directors was to take steps to have it wound up. On the other hand, I am of opinion that it would be just for your Lordships to order the name of the company to be restored to the register, in order that the assets, of which it appears to be possessed, may be realised and the company thereafter wound up. While I am not aware of any similar petitions having come before the Courts in Scotland, there have been a number of cases before the English Courts, and in these it has been the practice for the judge to satisfy himself that the proper and requisite returns would be filed before he pronounced an order ordaining the company to be restored—*Hollingwood Estate Company Limited* (Chitty, J., December 15, 1886, A. 203), W.N. [1887] 17. Following the course indicated in the English cases, I inquired of the petitioner's agents whether he was prepared to comply with the requirements of the respondents, and to lodge the returns referred to in the answers. The petitioner has lodged in process:—(1) to (4) Annual returns under section 26 of the Companies Act 1862 for the years 1899, 1900, 1901, 1902; (5) notice of change of registered office; and (6) copy of register of directors. With regard to the return of allotments of any shares that may have been allotted in 1901, mentioned in the answers for the respondents, I am informed that there have been no allotments, and no return therefore requires to be made."

The reporter pointed out that, whereas it was stated in the returns that the calls unpaid amounted to £1739, 10s., the amount of unpaid calls should, on the figures stated as to sums received, have been £1724, showing a discrepancy unaccounted for of £15, 10s. He also pointed out certain other defects in the returns, and stated that in their present form the returns would not be accepted by the Registrar of Joint-Stock Companies, but the petitioner professed to be able to supply no further information. The reporter added:—"The failure of the petitioner to furnish correct particulars regarding the capital of the company has this direct bearing upon the present proceedings, namely, that the object of the petition being to have the company restored to the register and thus allow the petitioner and his co-director to realise an asset of the company with a view of distributing it among their shareholders, the petitioner admits that he has not the information concerning the capital of the company which would enable him to distribute the assets in a proper manner."

Argued for the petitioner—The purpose of the application being made to have the

company restored to the register was to enable the assets, and in particular the shares of the Premier Gold Mines, Limited, held by the company, to be realised and divided. It was not necessary to have complete returns, such as the reporter desiderated, where the company was in liquidation and the only object of getting on the register was to enable the company to be wound up and the assets distributed. A company which at the time of the striking off was carrying on business only for the purpose of winding-up and realising its assets was "in operation" in the sense of section 7, sub-section 5, of the Companies Act 1880—*In re Outlay Assurance Society*, 1887, 34 Ch. Div. 479. Further, it was "just" within the meaning of the Act—and it was so stated by the reporter—that the name of the company should be restored. After the name of a company had been struck off the register it was only by getting an order to restore the name of the company that a member of the company could secure the distribution of the assets. Otherwise such assets would fall to the Crown as *bona vacantia*. The petitioner was entitled to his expenses as a first charge on the price got on the realisation of the assets.

Argued for the respondents—The returns were defective, and it was for the consideration of the Court whether in these circumstances the name of the company should be restored. The respondents, however, did not object to the name of the company being restored if the Court thought it expedient. It had been held in England that when a company had been struck off the register the proper remedy of a creditor was to petition for a winding-up order—*In re Anglo-Mexican Exploration and Development Company* [1898], 1 Ch. 100; Palmer's Company Precedents, 8th ed. Part II., at p. 647. But this rule was probably altered by the provision of the Companies Act 1900, section 26, sub-section 2. In any event, the respondents were entitled to the expenses incurred in consequence of the failure to make the necessary returns, including their expenses in these proceedings.

LORD PRESIDENT—The history of this company is rather a melancholy one, but I am afraid it is not singular. In the end the case comes to a very short point indeed. It is, in my judgment, a sufficient reason for restoring the name of the company to the register that it would be "just" to do so. The company has an asset worth about £2000. Apparently if the company is not enabled to deal with this asset it will become derelict and will fall to the Crown, instead of being distributed among the shareholders. I think it is "just" that this asset should be divided among the persons who have right to it, and that we should therefore, without answering any of the other questions submitted, order that the name of the company be restored to the register in respect that it is "just" that this should be done, in order that any assets of the company may be ingathered and distributed among the persons who are entitled to them.

LORD ADAM—I agree. It appears from the statement of counsel and Sir Charles Logan's report that it would be "just" that the name of the company should be restored to the register in order that the assets of the company may be distributed. Otherwise they will fall to the Crown as *bona vacantia*. That we consider it "just" is a sufficient reason for ordering the name of the company to be restored to the register. The only point is that there is a small discrepancy with regard to the calls unpaid, which would show that it might be difficult to distribute the assets. But I do not think that is a sufficient reason for refusing to grant the petition.

LORD M'LAREN—We are informed that the reason for striking the name of this company off the register was the neglect to make certain returns. I am satisfied from the explanations in the petition, which are stated by the reporter to be correct, that this neglect was the fault of one of the company's officials who is no longer connected with it; and as the present officials have done everything in their power to supply what is wanting I think this is a clear case for restoring the name of the company to the register in order that the assets may be realised and the company thereafter wound up.

LORD KINNEAR—I am quite satisfied from Sir Charles Logan's report that it is "just" that the name of this company should be restored to the register in order that the assets may be distributed and the company wound up.

The Court pronounced this interlocutor—

"Order the name of the United (Hannans') Exploring and Development Company, Limited, to be restored to the register of Joint-Stock Companies, and find, pursuant to the Companies Act 1880, sec. 7, sub-section 5, as amended by the Companies Act 1900, sec. 26, sub-sec. 2, that the said United (Hannans') Exploring and Development Company, Limited, is to be deemed to have continued in existence as if the name had never been struck off: Further, order the returns to be transmitted to and received by the Registrar of Joint-Stock Companies, and ordain said Registrar to advertise this order in his official name in the *Edinburgh Gazette* and in the *Scotsman* newspaper: Further, ordain the petitioner and the company to pay to the respondents the expenses incurred to them in consequence of the failure to make the necessary returns, including their expenses in these proceedings, as the same may be taxed, said expenses as well as the expenses incurred by the petitioner in the present petition to form a first charge against the assets of the said company, and remit the accounts of expenses incurred by the respondents and the petitioner to the Auditor to tax as

between agent and client, and to report; and decern."

Counsel for the Petitioner — Grainger Stewart. Agents—W. & J. L. Officer, W.S.

Counsel for the Respondents — Pitman. Agent—Henry Smith, W.S.

Tuesday, March 10.

FIRST DIVISION.

MACTAVISH'S TRUSTEES *v.* OGSTON'S EXECUTORS.

Succession—Faculties and Powers—Power of Appointment Exercised by General Will Dated before Power Conferred.

By a trust-disposition dated in 1898 a truster left certain funds to his nephew in liferent, declaring that the capital should belong to the liferenter's issue, in such proportions as he should direct, and failing such issue that it should be disposed of as the liferenter might by will direct. The nephew survived the truster, and died without issue, leaving a will dated in 1894, by which he disposed of "the whole estate and effects of every description, heritable and moveable, real and personal, of which I may die possessed." In a special case, in which there was no statement whether the nephew did or did not know of the power of appointment conferred upon him, *held* that the power was validly exercised by his will.

The late Lockhart Mactavish died domiciled in Scotland on 15th February 1899 leaving a trust-disposition and settlement dated 31st January 1898, and registered in the Books of Council and Session on 5th April 1899.

The sixth head of Mr Mactavish's trust-disposition and settlement, dealing with the residue of his estate, was in the following terms:—"With regard to the residue and remainder of my means and estate, I direct my trustees to hold the same for behoof of my grand-nephews and grand-nieces after mentioned, *videlicet*, James Schofield, Frederick Schofield, Lockhart Alexander Schofield, Letitia Maria Schofield or Macfarlane, Margaret Florence Schofield, and Mary Schofield, children of my niece the late Letitia Lockhart Hargrave or Schofield; and Francis Hargrave Ogston, Walter Henry Ogston, Mary Letitia Ogston or Grierson, and Flora Mactavish Ogston, children of my niece the late Mary Jane Hargrave or Ogston, for the alimentary liferent use of my said grand-nephews and grand-nieces respectively; and the free income, after deduction of expenses, may be paid to each on his or her own receipt, and shall not be assignable or affectable by the debts or deeds or open to the diligence of the creditors of the several liferenters; and subject to the rights hereby conferred on the said liferenters respectively, and to the declarations hereinafter written, the fee or capital shall belong to the issue of said grand-nephews and grand-nieces in such shares or proportions as the respective liferenters may appoint, and failing appointment equally *per stirpes*, and the fee or capital shall be payable to such issue only on the death of the respective liferenters, prior to which there shall be no vested interest in the fee or capital; and failing issue of any of the liferenters who may survive me, the capital destined to issue shall be disposed of as the respective liferenters may by will direct, and failing direction shall go to increase the shares of the surviving brothers and sisters german of the deceasing liferenter."

Francis Hargrave Ogston, one of the above-named grand-nephews of the testator, died without issue on 17th April 1901 leaving a will dated 3rd November 1894, and registered in the Books of Council and Session on 11th June 1902, by which he assigned, disponed, and conveyed, and made over to and in favour of his sisters the said Mary Letitia Ogston (now Grierson), Flora Mactavish Ogston, and his brother the said Walter Henry Ogston, and the survivors and survivor of them, 'the whole estate and effects of every description, heritable and moveable, real and personal, of which I may die possessed.' and he appointed the said Mary Letitia Ogston (now Grierson), Flora Mactavish Ogston, and Walter Henry Ogston, and the survivors and survivor, to be the executors or executor of his will.

Questions having arisen as to whether Mr Ogston's will operated as an exercise of the power conferred upon him in the trust-disposition of Mr Mactavish, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees acting under Mr Mactavish's settlement, and (2) the executors acting under Mr Ogston's will.

The case narrated the facts above stated. It contained no statement whether Mr Ogston did or did not know of the power of appointment conferred upon him by Mr Mactavish's settlement.

The questions of law were—"1. Are the second parties entitled under the will of the said Francis Hargrave Ogston to payment of the capital of the share liferented by him under the trust-disposition and settlement of the said Lockhart Mactavish? or 2. Is the will of the said Francis Hargrave Ogston ineffectual to exercise the power of disposal of the capital of said share, and must it accordingly be retained in the hands of the first parties so as to increase the shares liferented by the brother and sisters-german of the said Francis Hargrave Ogston?"

Argued for the first parties—The will was not an effectual exercise of the power. The result of the authorities was that there was no rule that a general bequest of a person's whole estate operated as an exercise of a power of appointment—*Smith* v. *Milne*, June 6, 1826, 4 S. 679; *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413, *per* Lord Corehouse, at p. 416; *Mackenzie* v.