Wednesday, November 17.

FIRST DIVISION.

(SINGLE BILLS.)

BROWN *v.* BAYLEY'S TRUSTEES.

Bankruptcy — Sequestration — Sist of Sequestration with View to Deed of Arrangement—Appointment of Judicial Factor where Trustee already in Office—Competency—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 37.

The Bankruptcy (Scotland) Act 1856, sec. 37, enacts—"In the event of such application" [*i.e.*, for a sist of a sequestration with a view to a deed of arrangement] "being granted, the Lord Ordinary or the Sheriff may, on the application of any creditor, make such arrangements for the interim management of the estate as he shall think reasonable, if any shall appear to be necessary."

Held that where a sequestration has been sisted with a view to a deed of arrangement, it is incompetent to appoint a judicial factor to manage the estate pending the sist, it being for the trustee to receive such directions regarding the interim management as may be deemed necessary.

On 17th November 1909 John Stuart Gowans, C.A., Edinburgh, judicial factor on the sequestrated estates of R. A. Brown, Edinburgh, presented a note to the Lord President craving his Lordship to move the Court to sist procedure in an action at Mr Brown's instance against the trustees of the late George Bayley, W.S., Edinburgh. In the said action, which was raised on 4th January 1909, the pursuer sought to recover the expenses of certain actions in which he had been unsuccessful, on the ground that the said trustees were bound to relieve him.

Counsel for Bayley's trustees opposed the sist on the ground that to grant any further delay would entail hardship on his clients.

The *facts* are given in the Lord President's opinion.

LORD PRESIDENT—The position disclosed here is somewhat peculiar. The actual motion arises in this way. Brown is pursuer in an action against the trustees of the late George Bayley. In that action the Lord Ordinary has sustained the first plea-in-law for the defenders, which is that the pursuer's averments are irrelevant, and has dismissed the action. Against that interlocutor a reclaiming note was taken so long ago as 10th March 1909, and when the case came up in the Single Bills we were then told that Brown was sequestrated, and the ordinary motion was then made that intimation should be given to his trustee in order that he might say whether he would take up the action or not—the ordinary sequel to that being, of course, that if the trustee took up the action he would become liable for the expenses, or if he did not, then the bankrupt would be ordered to find caution. We were then told that an arrangement was pending whereby the sequestration would be got rid of, and we were asked to put off the case for a little, because it was represented with force that it was scarcely useful to make the trustee inquire into the merits of the case with a view of considering whether or not there was a good chance of success, seeing that shortly he might have no interest in the matter one way or other. Accordingly, we did grant that indulgence, and we put off the matter for a month. The month has now expired, and the trustee comes before us and discloses what I must say is a rather startling state of affairs. Taking advantage of the 35th section of the Bankruptcy Act, a proposal has been made for a deed of arrangement; and the Sheriff in the sequestration, with the view of seeing whether that deed of arrangement would be carried through or not, has sisted the sequestration for two months, and he has appointed the trustee to be judicial factor on the estate.

Now of course in this matter the Sheriff's action is not directly before us, and we cannot interfere with it, but I am bound to say that I cannot see any warrant for what the Sheriff has done. It seems to me contrary to principle. He has proceeded, I suppose, on fancied powers in the 37th section of the Act, which provides that in the event of an application for a sist of sequestration—with a view to a deed of arrangement—being granted, the Sheriff may make such arrangement for the interim management of the estate as he shall think reasonable, if any shall appear to be necessary. Primarily speaking, it seems to me that that section applies only to the case where a deed of arrangement is propcsed before the trustee is appointed, and then of course in a case like that it would be perfectly proper to appoint a judicial factor. But after a trustee has been appointed, it seems to me more than doubtful whether the appointment of a judicial factor is of any use at all, because you would then have two people vested with the management of the estate. I should have thought that the meaning of the section, in the case where a trustee had been appointed, was this—that the Sheriff should give such directions to the trustee as might be thought necessary. I do not think the sisting of the sequestration was wrong—that was necessary in order to prevent the running of the various statutory periods, which make it imperative that certain things should be done within certain dates. It was quite proper to make the sist, but I think the appointment of a judicial factor when a trustee was already in office was really putting a fifth wheel on the coach, for which there is no authority in the Act of Parliament. I never heard of any such practice, and counsel did not seem to know of any either.

But while I say this to prevent such a thing happening again, the appointment is there, and the question is what is to be done? In the circumstances we cannot order the judicial factor to sist himself,

and it is no use ordering the trustee to sist himself, because in the meantime his management is superseded by the interlocutor of the Sheriff, and the management is in his hands as judicial factor. It would be too strict a proceeding to ordain the bankrupt to find caution at this stage, but at the same time I see that considerable hardship is imposed on the defenders in having this action hanging over them, and especially is this so where they have got into this position through no fault of their own, but solely through the faulty proceeding of the Sheriff-Substitute, which cannot be touched. What I propose, therefore, is that we should not make any order to-day, but there is no reason why Mr Gowans should not read the papers before him, though he is in a sisted condition, and I therefore give Mr Macmillan fair warning that at the end of the two months three days will be the utmost that will be allowed to the trustee to consider whether he will sist himself or not.

LORD KINNEAR and LORD CULLEN concurred.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court pronounced no interlocutor.

Counsel for Petitioner — Macmillan. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Chree. Agents—M'Ritchie, Bayley, & Henderson, W.S.

Wednesday, November 17.

FIRST DIVISION.

(SINGLE BILLS.)

BEDFORDSHIRE LOAN COMPANY v. RUSSELL.

Process—Reponing—Decree by Default.

The agents for the defender in an action in the Court of Session having written to the agents for the pursuers that they were not to appear in the procedure roll, the Lord Ordinary gave decree. The defender reclaimed, seeking to be reponed.

Circumstances in which the Court, having considered the expense incurred uselessly, *allowed* the defender (reclaimer) to be reponed on payment of fourteen guineas of expenses.

Agent and Client—Law Agent—Process—Duties of Country Agent towards (1) *the Client, and* (2) *the Edinburgh Correspondents, with regard to Action in Court of Session.*

Observations (*per* the Lord President) as to country agent's duties to (1) his client, and (2) the Edinburgh correspondents in the conduct of an action in the Court of Session.

On 8th April 1909 the Bedfordshire Loan Company, 9 Castle Lane, Bedford, brought an action against James S. J. Russell, steamship owner and broker, 105 West George Street, Glasgow, for payment of the sums of (1) £850 and (2) £39 odd in terms of a letter of guarantee granted by him on 24th December 1908.

On 7th October 1909 Messrs J. K. & W. P. Lindsay, W.S., Edinburgh, who were at that time acting for the defender, wrote to Mr Carmont, the defender's agent in Glasgow, stating that the pursuer's agents Messrs Cornillon, Craig, & Thomas, S.S.C., Edinburgh, having declined to grant delay, "the only course open for us is to intimate to the pursuer's agents at the commencement of the session that we are not to appear in the procedure roll." To that letter Messrs Lindsay got no reply.

Thereafter on 14th October 1909 Messrs Lindsay wrote to Messrs Cornillon, Craig, & Thomas, as follows:—

"*Bedfordshire Loan Co.* v. *Russell.*

"With reference to Mr Lindsay's conversation with you the other day, when you stated that your instructions would not allow of your negotiating upon any other footing than that of obtaining decree, we beg to inform you that we are not to appear in the procedure roll.—Yours faithfully, J. K. & W. P. LINDSAY."

On the same date they wrote Mr Carmont stating that they had written to the pursuer's agents that they were not to appear in the procedure roll.

On 19th October 1909 the Lord Ordinary (SKERRINGTON) in respect of the letter by the defender's agents, dated 14th October, granted decree as craved.

The defender, who had in the meantime changed his agents, reclaimed, craving to be reponed.

Counsel for the reclaimer read excerpts from a letter from Mr Carmont, the reclaimer's former agent in Glasgow, from which it appeared that Messrs Lindsay's letter of 7th October had not been brought to the reclaimer (Mr Russell's) notice.

The reclaimer argued—The reponing of a party against a decree by default was matter for the discretion of the Court—*Mather* v. *Smith*, November 23, 1858, 21 D. 24; *Arthur* v. *Bell*, June 16, 1866, 4 Macph. 841, 2 S.L.R. 88; *Anderson* v. *Garson*, December 16, 1875, 3 R. 254, 13 S.L.R. 166; *Halligan* v. *Scottish Legal Life Assurance Society*, June 14, 1883, 10 R. 972. *Esto* that Mr Carmont was to blame in not replying to Messrs Lindsay's letters, or communicating their contents to his client, the reclaimer would be prejudiced if he were not allowed to be heard on the merits.

Counsel for the respondents submitted that this was not a case in which the reclaimer should be reponed.

LORD PRESIDENT—The interlocutor here reclaimed against is an interlocutor of Lord Skerrington's, which says—"On the motion of counsel for the pursuers, and in respect of the letter by the defender's agents to the pursuer's agents, dated 14th inst., decerns against the defender." Now the letter that is there referred to is a letter