

LORD KINNEAR—I am entirely of the same opinion. The action is novel and indeed unprecedented, and it follows that there can be no direct authority for holding that it will support the arbitrary diligence which the pursuer has used.

We are, I think, to assume that the action as framed is not absolutely incompetent, because the defender's counsel—no doubt for sufficient reasons—has taken no plea to title or competency, but still, without deciding that it is competent or incompetent, we must consider what its true character is, and it is obvious that it is a combination in effect of two separate actions—an action for divorce and an action for enforcing rights that may accrue to a divorced wife after she has obtained decree of divorce. The two actions, although they are put into one summons, are so entirely separate that the right to sue the second cannot emerge until the first has been followed out to decree. So long as the pursuer remains a married woman it is clear that she can have no right to enforce an action against her husband for the performance of contractual obligations prestable only at his death. We must therefore consider the second branch of the action as being withheld from consideration until decree shall have been obtained in the first branch, because otherwise it would be incompetent, and that is very clearly set out in the terms of the summons. It follows that at the present stage we must regard this as an action of divorce and nothing else, and I agree that the use of arrestment on the dependence of an ordinary action of divorce is incompetent. A wife who has obtained divorce may arrest on the dependence of an action for her *jus relictæ* and marriage-contract provisions, but until she has obtained divorce she cannot raise her action, and cannot use arrestment on the dependence of a simple action of divorce. I therefore agree in the judgment proposed, and I think the Lord Ordinary puts his judgment on the proper ground when he says the arrestments are bad, and not merely that the circumstances justify their recal.

The LORD PRESIDENT was absent.

The defender moved for expenses.

The pursuer maintained that as this was a consistorial cause she ought not to be found liable in expenses.

LORD ADAM—The question we have dealt with in this case does not appear to me to be a proper consistorial question, and I therefore think that the respondent is entitled to his expenses in accordance with the ordinary rule.

LORD M'LAREN—I agree. It may turn out that the wife's estate is valueless, but it appears that she has certain rights under a trust, and I agree that this question, not being consistorial, must follow the ordinary rule as to expenses between party and party.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered, and found the pursuer liable in expenses from the date of the interlocutor reclaimed against.

Counsel for the Pursuer—Ure, K.C.—Ainslie. Agents—Smith & Watt, W.S.

Counsel for the Defender—Shaw, K.C.—Orr. Agents—Simpson & Marwick, W.S.

Wednesday, December 4.

FIRST DIVISION.

[Sheriff Court at Perth.

ARROL & SONS v. CHRISTIE.

Bankruptcy—Sequestration—Notour Bankruptcy—Expired Charge on Decree in Absence—Recal of Decree in Absence before Expiry of Inducie in Petition for Sequestration.

A debtor allowed a charge on a decree in absence to expire without payment, and the creditor presented a petition for sequestration. Before the induciæ in the petition for sequestration had expired, the Sheriff, on the motion of the debtor, recalled the decree in absence.

Held that the decree in absence having been recalled there was no evidence of notour bankruptcy, and that consequently the petition for sequestration fell to be refused.

This was an appeal from the Sheriff Court at Perth in a petition for sequestration upon which sequestration had been refused.

On 1st October 1901 Archibald Arrol & Sons, 16 Dixon Street, Glasgow, pursuers, obtained a decree in absence in the Sheriff Court at Perth against Annie Christie, Auncaster Arms Hotel, Comrie, for a debt which they alleged to be due to them by her.

On 14th October the pursuers executed a charge on the decree in absence, which expired without payment by the defender on 21st October.

On 24th October the pursuers presented a petition for sequestration of the defender's estates.

On 25th October, in the original action at Messrs Arrol's instance, the Sheriff-Substitute (SYM) refused a motion by the defender for recal of the decree in absence.

On 4th November, before the induciæ had expired in the petition for sequestration, the Sheriff (JAMESON) recalled the Sheriff-Substitute's interlocutor of 25th October refusing the defender's motion for recal, recalled the decree in absence of 1st October, and allowed defences to be received.

On 7th November the Sheriff-Substitute pronounced the following interlocutor:—
“In respect the decree in absence upon which the defender was charged has been recalled, and the defender reponed in the action at the instance of the present pursuers against the present defender for pay-

ment, refuses the sequestration prayed for, and dismisses the petition: finds no expenses due to or by either party; and decerns."

Note.—"The Sheriff-Substitute considers that there is much more difficulty in this matter than the procurator for the respondent appeared to realise; but he has come to think it expedient to refuse the petition, and that in the circumstances he may consider the matter in the light of expediency. The Sheriff-Substitute is strengthened in this view by the considerations (*first*) that to grant the petition would be practically to ignore and defeat the judgment reponing the respondent of the learned Sheriff, pronounced almost contemporaneously with the debate on this petition; and (*second*) by the circumstance that he does not see that there could be any answer to a petition for recall of the sequestration, in which process certainly questions of expediency are quite competent."

Messrs Arrol appealed to the Court of Session, and argued—Upon the expiry of the charge on the decree in absence insolvency was to be presumed, and there being consequently insolvency concurring with an expired charge notour bankruptcy had been constituted on 21st October. If the decree in absence had been brought under review by suspension of the charge, that would not have removed the presumption of insolvency or involved the refusal of sequestration—*Sutherland v. Sutherland*, February 11, 1843, 5 D. 544. A debtor could only get rid of notour bankruptcy by showing himself to be solvent—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 9; here there was no evidence of solvency—*Galbraith v. British Linen Company*, December 1, 1898, 36 S.L.R. 139. Though a debtor may be reponed and have his case tried on the merits, nothing that has followed on a decree in absence was affected thereby—*M'Lachlan v. Rutherford*, June 10, 1854, 16 D. 937. The case was to be viewed as if under the old law the debtor had been imprisoned. On 24th October, the date of the oath on which the petition for sequestration proceeded, the decree in absence, extract of which was the voucher of the respondent's debt, was standing. Applying the provisions of the Bankruptcy Act, which were imperative, to the circumstances of the case, the Sheriff-Substitute was bound to award sequestration—Bankruptcy Act 1856, sec. 30.

Argued for the respondent—There was no proof of insolvency. The decree in absence had been recalled, and the debt on which it proceeded was now disputed, and when the judgment appealed from was pronounced there was no *prima facie* evidence of notour bankruptcy—*M'Nab v. Clarke*, March 16, 1889, 16 R. 610, 26 S.L.R. 472. There was no voucher for the alleged debt; extract of the decree in absence, which was relied on, ceased to be a voucher as soon as the decree was recalled. The judgment of the Sheriff recalling the decree in absence was final—Sheriff Court Act 1876 (39 and 40 Vict. c. 70), sec. 14, sub-sec. 4.

LORD ADAM—This is an appeal from the Sheriff Court of Perthshire against a judgment by the Sheriff-Substitute refusing a petition for sequestration. The judgment of the Sheriff-Substitute is placed upon grounds of expediency which are not well founded, and which counsel for the respondent has not tried to support. But he has supported the judgment itself on a different ground, viz., that the statutory requisites which would have justified an award of sequestration were in this case absent.

The proceedings in the case were begun by an action for payment of an account for goods supplied, in which the present pursuers obtained decree in absence against the respondent on 1st October. They extracted this decree, and thereafter, on 14th October, they executed a charge upon the decree which expired on 21st October without payment. Three days after, on 24th October, the pursuers presented a petition for sequestration of the respondent's estates, and intimation was made of this application on 25th October on seven days' *induciae*.

In the meantime the respondent had applied to be reponed, and was on 4th November reponed by the Sheriff against the decree in absence upon which the expired charge had proceeded. The respondent was thus reponed by interlocutor of the Sheriff under section 14 of the Sheriff Courts Act 1876. This section declares (sub-section 4) that an interlocutor recalling a decree in absence under its provisions shall be final and not subject to review. Thereafter, on 7th November, the petition for sequestration came before the Sheriff-Substitute for consideration, and the procedure to be followed by him was that laid down in section 30 of the Bankruptcy Act of 1856. The application was refused, and I think the refusal was justified on the ground now pleaded that the requisites which would have entitled the Sheriff to have awarded sequestration were not before him and did not exist.

The statute requires that there should be notour bankruptcy, and the question was, whether that condition was present. From 21st October, the date of the expiry of the charge on the decree in absence, till 4th November, when that decree was recalled, notour bankruptcy as defined by the statute did exist, and if the application for sequestration had been made between these two dates the Sheriff would have been bound to award sequestration. But then on the last of these dates, the 4th November, the decree was recalled, and the whole foundation of the procedure to render the respondent notour bankrupt destroyed, and on this ground it appears to me the Sheriff could not have awarded sequestration. In my opinion the presumption of insolvency arising from the expiry of the charge without payment of the debt, which would legitimately have been drawn prior to 4th November, no longer existed when the decree upon which the charge proceeded was recalled.

LORD M'LAREN—I have only to say that the essential facts of the case are these—the debtor had allowed herself to get into the position of being liable to the diligence of sequestration, because she allowed decree for the sum claimed to be followed by a charge which expired without payment. Some days then intervened before the Sheriff came to consider whether he should award sequestration, and in the interval the debtor was allowed to be reponed against the decree on which the charge had followed.

The chief condition of sequestration is that the debtor shall be notour bankrupt, and the definition of notour bankruptcy includes insolvency as an ingredient. In the ordinary case, if the other elements of notour bankruptcy exist, such as a decree for the debt followed by poinding or evasion of diligence, the Judge who is asked to award sequestration is entitled to presume insolvency, because no rational and solvent person would allow his credit to be destroyed if he had a good defence to the claim, or was able to pay in terms of the charge. Nothing that we decide is intended to throw doubt on the practice of presuming insolvency in the ordinary case. But I agree that this is not the ordinary case. While the reponing of the debtor in the petitory action left the proceedings in the sequestration unimpaired, it took away the presumption, arising from diligence on a decree, that the debtor was insolvent. It is fair to presume insolvency where a debt is left unpaid in face of an expired charge for payment, but after a debtor is reponed, and is prepared to try the question of his liability, are we still to presume that he is unable to pay his debts? I should think the presumption would be lessened very much if not entirely displaced by reponing, and in the present case I am unable to hold that the debtor is insolvent, and therefore I think that sequestration was properly refused.

LORD KINNEAR—I am of the same opinion. I quite agree that the Sheriff-Substitute's ground of judgment is not maintainable, because he proceeds upon considerations of expediency, while such considerations are expressly shut out by the statute. Under the statute the Sheriff has no alternative but to award sequestration if the statutory requisites are satisfied, but I agree that the statutory requisites were not satisfied in this case, because when the Sheriff came to consider whether sequestration should be awarded there was no evidence before him of notour bankruptcy. The only evidence before him was that a decree in absence had been granted, that a charge had followed upon that decree and had expired without payment, that the decree had been recalled by a final judgment of the Sheriff, and therefore ceased to be of any validity or capable of supporting the diligence of which it was the foundation. All that proves nothing, except that the respondent had been charged upon a warrant that has been invalidated by the Sheriff's judgment. It does not prove that there was a duly

executed charge, and it does not prove insolvency, and these are the two elements which must concur in order to constitute notour bankruptcy. It appears to me to follow that there was no evidence before the Sheriff to entitle him to hold that the statutory requisites had been satisfied.

The LORD PRESIDENT was absent.

The Court refused the appeal.

Counsel for the Pursuers and Appellants—Ure, K.C.—Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Defender and Respondent—M'Lennan—Munro. Agent—J. T. Donaldson, Solicitor.

Friday, December 6.

SECOND DIVISION.

GAVIN'S TRUSTEES v.
JOHNSTON'S TRUSTEES.

Husband and Wife—Dissolution of Marriage—Divorce—Marriage-Contract Funds—Provisions to Children—Effect of Divorce—Parent and Child.

By an antenuptial contract of marriage the trustees were directed to pay the liferent of the means and estate conveyed to them by the wife and her father to her, and after her death, in the event of her being survived by her husband, to him, and on the death of both spouses to pay and deliver over the fee or capital to the child or children of the marriage, subject to a power in favour of the spouses jointly, whom failing the wife, whom failing the husband, of appointment and division among the children and their issue, and of substituting an annuity for the share of any child, but failing children then to the survivor of the husband and wife and his or her heirs, executors, and representatives whomsoever.

One daughter was born of the marriage. The marriage was dissolved after nineteen years by decree of divorce in an action by the wife against the husband for desertion. The wife died survived by the divorced husband and the daughter of the marriage.

Held (diss. Lord Young) that the daughter's right to payment of the funds contributed by the wife to the marriage-contract trust was contingent on her survivance of her father; that in a question regarding the provisions in her favour the decree of divorce was not equivalent to the predecease of the husband; and that the proceeds of these funds during the divorced husband's survivance fell into the wife's executry estate.

Harvey's Judicial Factor v. Spittal's Curator ad litem, July 19, 1893, 20 R. 1016, 31 S.L.R. 13, and *Taylor's Trustees v. Barnett*, July 19, 1893, 20 R. 1032, 31 S.L.R. 11, followed.