Tuesday, May 31.

SECOND DIVISION.

[Sheriff-Substitute of Dumfries.

GIBSON *v.* CUTHBERTSON.

Bankruptcy — Petition for Sequestration — Appointment of Judicial Factor—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79)—*Bankruptcy and Real Securities (Scotland) Act* 1857 (20 *and* 21 *Vict. cap.* 19).

In a petition presented by a creditor in the Sheriff Court under the Bankruptcy (Scotland) Act 1856, and the Bankruptcy and Real Securities (Scotland) Act 1857, for the sequestration of the estates of a debtor deceased, the Sheriff, in the same interlocutor, ordered intimation of the petition, and *de plano* appointed a judicial factor on the estate under section 16 of the first mentioned statute. On appeal, *held* that as there was no special reason for the appointment of a judicial factor, the appointment should be recalled.

Process — Petition for Sequestration — Sheriff Courts Act 1876 (39 *and* 40 *Vict. c.* 70), *secs.* 3 *and* 6.

Opinions reserved, upon the question whether a petition for sequestration was incompetent if not in the form prescribed by the Sheriff Courts Act 1876 for all actions in the ordinary Sheriff Court.

On 15th March 1887 a petition was presented in the Sheriff Court of Dumfries by William John Cuthbertson, publisher, Annan, for sequestration of the estates of the deceased David Gibson, farmer, Barns, in that county. The petition stated that the petitioner was a creditor of the deceased, who died on 5th March 1887, to the amount of £253, 11s. 9d.; that the petitioner desired sequestration of the deceased's estate in terms of the Bankruptcy (Scotland) Act 1856, and the Bankruptcy and Real Securities (Scotland) Act 1857; and that as the said David Gibson was tenant of the farm of Barns, which was stocked with horses, cattle, sheep, &c., it was desirable that immediate measures should be taken for the preservation of the estate. The petitioner asked the Court to award sequestration of the estate, and "to take immediate measures for the preservation of the estate by the appointment of a judicial factor."

By the same interlocutor the Sheriff-Substitute (HOPE) ordered intimation to be made to the parties interested to show cause why sequestration should not be awarded, and also appointed a judicial factor "with power to take immediate measures for the preservation of the estate," &c. On 12th March previously, Robert Gibson, a son of the deceased, had been appointed executor-dative to his father, and, with the other members of the family, had been carrying on the farm. There was a dispute as to whether he had found caution or not.

Robert Gibson appealed to the Lord Ordinary on the Bills against the deliverance of the Sheriff-Substitute.

Appearance was entered for Cuthbertson.

The appellant argued—The petition which the respondent had presented to the Sheriff was incompetent, as it was not in the form prescribed by the Sheriff Courts Act 1876 (39 and 40 Vict. cap. 70), sec. 6, since it did not have a condescendence and note of pleas-in-law annexed. By section 3 of that Act it was provided that "action" should include "every civil proceeding competent in the ordinary Sheriff Court—*Crozier* v. *Macfarlane & Company*, June 15, 1878, 15 S.L.R. 630. The words in the Act of 1876 were imperative and not merely directory — *National Bank of Scotland (Limited)* v. *James Williamson & Sons*, April 8, 1886, 23 S.L.R 612; *M'Dermot* v. *Ramsay*, Dec. 9, 1876, 4 R. 217. (2) The judicial factor in this case had been appointed by the Sheriff without proper intimation to the persons interested. The Court had held that a Sheriff making the appointment of an interim judicial factor under sec. 16 of the Bankruptcy Act must be satisfied as to the necessity of the appointment, and that there must be specific averments of the danger to the bankrupt estate rendering the appointment necessary or very desirable—*M'Creadies* v. *Douglas*, Nov. 4, 1882, 10 R. 108; *Inglis* v. *Barclay* (not reported).

Argued for the respondent—The form of petition for sequestration was immaterial, as it might be either in the form prescribed by the Sheriff Courts Act 1876 or the Bankruptcy Act 1856. In the latter case a condescendence and pleas-of-law were not necessary—*Robinson* v. *Wittenberg*, Dec. 15, 1860, 23 D. 181. Considering the competition between the executor-dative, who had not found caution, and the creditor, who had presented the petition for sequestration, the Sheriff had taken the proper course in appointing a judicial factor. No other special circumstances required to be stated.

At advising—

LORD JUSTICE-CLERK—I think that this appeal should be sustained. If a creditor wishes a judicial factor appointed upon a deceased debtor's estate he must state the reasons which make such a step advisable. This is an application for sequestration, and for the appointment of a judicial factor on a deceased debtor's estate, and that assumes that there is no management of the estate at present. But the estate is being managed by the son of the deceased, and I think that in these circumstances to ask the Sheriff to appoint a judicial factor was wrong. I say nothing about there being no condescendence appended to the petition as I do not think it necessary to consider that. It is quite clear that there could be no appointment without some statement to the Sheriff of the circumstances rendering the appointment necessary, with intimation to the parties interested, and with liberty for them to state their defence. I think that the appointment of the judicial factor ought to be recalled.

LORD YOUNG—I am of the same opinion, and think that the case may be disposed of on that ground. It is not necessary to consider the question whether the procedure in an application for sequestration must be regulated by the Act of 1876 or not. The inclination of my opinion is that it need not be. The case quoted to us from the First Division (*Crozier* v. *Macfarlane & Co.*, 23 S.L.R. 630) was one of *cessio*. That is quite

a different thing, and is provided for specially by the statute. But an application for sequestration is provided for by the Bankruptcy Act, which provides for the procedure. If the application for the sequestration of a deceased debtor's estate is presented with consent of his successor, or if the successor renounces the succession, then sequestration is awarded under section 29. That procedure can take place only when the deceased's successor concurs or does not make any objection. When he does not concur, then the Sheriff hears both parties in an informal manner, and then either awards or refuses sequestration. That seems quite inconsistent with the Act of 1876, which requires a record to be made up. But, as I said before, it is not necessary—perhaps it would not be competent—for us to move in the matter. In the present case the Sheriff ordered intimation to the parties concerned. That was quite a right thing to do. Even if there was a ground for objecting to the formality of that petition, the objection may be left to parties to state when they appear, and ought not to be taken by the Sheriff on his own motion or by us here. It would require to be a very strong and obvious objection to the form of a petition which would entitle the Sheriff to say, "This petition is utterly wrong, and I cannot write upon it."

But then the Sheriff in the same interlocutor appointed a judicial factor to enter upon the management of the estate immediately. Now, that is not a competent form of procedure except under section 16 of the Bankruptcy Act, which provides—"It shall be competent for the Court to which a petition for sequestration is presented, whether sequestration can forthwith be awarded or not, on special application by a creditor, either in such petition or by a separate petition, with or without citation to other parties interested, as the said Court may deem necessary, or without such special application if the Court think proper, to take immediate measures for the preservation of the estate, either by the appointment of a judicial factor, who shall find such caution as may be deemed necessary, with the powers necessary for such preservation, including the power to recover debts, or by such other proceedings as may be requisite, and such interim appointments or proceedings shall be carried into immediate effect; but if the same have been made or ordered by the Sheriff, they may be recalled by the Court of Session on appeal taken in manner hereinafter directed." The statute here contemplates that certain measures would be necessary in an exceptional case. Now, we are told that the Sheriff made the appointment of the factor without any special reason having been stated, and as a matter of course. I am of opinion that such an appointment should not be made as a matter of course, but only in exceptional circumstances. We were told that an executor had been appointed, and on one side we were told that he had found caution, and on the other side that he had not. If he is a person who is not of good conduct, or if he has not found caution, then that is a special case, and the management of the estate might be taken out of his hands under section 16. I agree with your Lordship that this deliverance should stand so far as concerns the intimation and service contained in it, but that the appointment of the judicial factor should be recalled.

Lord Craighill—It is not necessary to say anything on the question of procedure, as it is not necessary for the decision of the case.

With regard to the second question, there appears to me to be no alternative but to recal the appointment of the judicial factor. It is plain that there was an irregularity on the part of the Sheriff when he made the appointment. The Act of Parliament makes it plain that special cause must be shown before a judicial factor can be appointed on the estate of a deceased debtor. It is not said that there is no administration of the deceased's estate here, and nothing is said in the petition against the administration that exists at present. There was no reason given, as I think section 16 requires, for the appointment of a stranger, more especially as the property consists of a farm and the cattle on it. If the judicial factor had entered upon the farm he would have sold part of the stock and reaped one crop before the question could be raised. I therefore agree with your Lordships.

Lord Rutherfurd Clark—I concur with the opinion that a judicial factor should not be appointed without special reason. I think it is too frequently done in the Sheriff Courts. But the appointment has been made, though irregularly, and the only justification for it is that it was alleged there is no legal administration. If that were so, the only course to be followed would be to confirm the appointment. But before the application was made, decree-dative had been granted to an executor. It would have relieved my mind to know if that was the title on which he was to administer the estate. The decree-dative would be idle if he did not find caution, and if he has done so, then I think we should recal the appointment of the factor. But if he has not found caution, then I see no other administrator than the judicial factor, and I therefore should have preferred to know whether the executor-dative has or has not found caution. If he has, then I should concur in your Lordships' opinion, but if he has not, or could not find it in a short time and before entering on his duty, I would allow the appointment of judicial factor to stand, even though the Sheriff had been a little premature in making it.

The Court recalled the interlocutor of the Sheriff appealed against in so far as regarded the appointment of the judicial factor, reserving to the respondent to make application for such an appointment in terms of the Bankruptcy Act, and remitted to the Sheriff to proceed, finding the appellant entitled to expenses.

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