that branch of the destination would have taken as the successor of his immediate predecessor in the lands, with the result that he gets the benefit of the probably close relationship existing between him and his immediate predecessor in the matter of succession-duty with the Crown. In place of inserting the destination as I have said it ought to have been in the deed, the trustees—I have no doubt from proper enough motives—it might be in order to simplify the conveyancing in the subsequent branches of the destination—inserted the names of a number of different persons who, according to their information, were the heirs entitled to succeed under the general destination. I agree with your Lordship in thinking that that is not a practice that ought to be followed, because trustees in such circumstances may make very serious mistakes, and great confusion may result. As your Lordship has put it—I cannot express it more forcibly—it is practically usurping the office of the Sheriff of Chancery in services, who is to settle these matters. But beyond that the Crown have now been enabled to say that as each of these persons was put *nominatim* into the new entail, the result in the question of succession-duty has been this, that whereas succession-duty, if the trustees had obeyed the injunctions of the entailer, would have been only on the footing that each man succeeded to his predecessor, and paid probably upon a degree of relationship somewhat close, the result of the way in which the entail has been formed is this, that each person who succeeds to the estate is held to take directly from the entailer, with reference to whom the relationship in all probability must be extremely remote, and so much larger succession-duty comes to be paid. I do not agree with the Lord Ordinary in the view he has taken, though I think the question is one not free from difficulty, where he says—"It is in these circumstances that the Crown find the claimant Henry Stewart Murray in possession of the estate (as set forth in his decree of special service) 'under and by virtue of the foresaid disposition and deed of entail, which is dated and recorded in the register of tailzies as aforesaid'—*i.e.*, in 1860. They are entitled to call upon him to account in the character under which he possesses, and not upon the footing that a different course—which would have involved payment of a lesser duty—could have been adopted. The Court must apply the law to the facts of the case, and the result is to find for the Crown in answer to both the questions put." I think we are entitled to look to the substance of the relation between the possessor of the estate and the entailer and his predecessors, and not to the mere form; and I find, looking at the substance of it, that this gentleman now in possession of the estate under the directions of the entailer is a successor, not of the entailer, but of his immediate predecessor. Having reference to the numerous authorities upon this branch of the law, I think he takes, not by the deed of the entailer as a *stirps* called under the directions of the entail, but as an heir by devolution in respect of the death of the previous heir. He takes under that general destination to the heirs of Patrick Graham, and not as himself forming a new *stirps* under the entail. On that ground I agree in thinking that we must answer the questions which have been put in this Special Case in the way your Lordship proposes.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Find that the predecessor of the defender, within the meaning of the Succession-Duty Act 1853, was his uncle John Murray Graham of Murrayshall, who died on 17th January 1881; second, that the rate of duty to which the defender is liable is 3 per cent., and find him liable in that rate accordingly, and decern: Find the defender entitled to expenses," &c.

Counsel for Lord Advocate—Trayner—Lorimer. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defender—J. P. B. Robertson—Graham Murray. Agent—G. B. Smith, S.S.C.

Friday, December 12.

FIRST DIVISION.

THE STANDARD PROPERTY INVESTMENT COMPANY (LIMITED) *v.* WHITSON (TRUSTEE OF THE DUNBLANE HYDROPATHIC COMPANY (LIMITED)).

Public Company—Incompetency of Sequestration of Public Company registered under the Companies Acts—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89)—*Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79).

Held that sequestration of a joint-stock company registered under the Companies Acts 1862 and 1867 is *incompetent.*

The Dunblane Hydropathic Company (Limited) was formed and registered as a limited company under the Companies Acts 1862 and 1867. The company was registered on 4th December 1874.

On 29th May 1884 the Standard Property Investment Company (Limited), who were creditors in a bond and disposition in security for £15,000 granted by the Hydropathic Company, dated 15th and recorded 17th May 1877, raised an action of poinding the ground against that company. Decree in the action was obtained on 20th June 1884.

On 3d June 1884 a petition for sequestration of the estates of the Hydropathic Company was presented to the Sheriff of Perthshire at the instance of the Dunblane Gas-Light Company. Answers were lodged for the Standard Property Investment Company, in which it was maintained that the sequestration of a company registered under the Companies Acts was incompetent. The Sheriff overruled the objection, and awarded sequestration on 11th July. On 25th July 1884 Thomas Whitson, chartered accountant, Edinburgh, was elected trustee.

On 19th July 1884 the Standard Property Investment Company presented a petition in the Bill Chamber for recal of the sequestration on the ground of incompetency, to which Thomas Whitson as trustee lodged answers, in which it was stated that the moveables sought to be affected by the petitioner's action of poinding the ground were the furniture and other moveables of the establishment, and worth £2000,

which constituted nearly the whole moveable property of the company, and if the sequestration were recalled the petitioners would carry them off, to the prejudice of the general creditors.

On 12th August 1884 the Lord Ordinary on the Bills (FRASER) dismissed the petition.

The Standard Property Investment Company reclaimed, and their reclaiming-note, together with a petition presented by them on 19th July 1884 for the judicial winding-up of the Dunblane Hydropathic Company, to which answers were lodged by Thomas Whitson, were heard together before the First Division, as both raised the same question, viz., whether sequestration of a company registered under the Companies Acts was competent.

A petition for the judicial winding-up of the Hydropathic Company had been presented to the Second Division by another creditor (Mr Stirling of Kippendavie) on 9th June 1884, which was duly served and advertised, but had not been further proceeded with at the date of the hearing.

Argued for the Standard Property Investment Company—Sequestration of a company registered under the Companies Acts 1862 and 1867 was incompetent. Those Acts contained a complete code of rules for the winding-up of companies registered under them, which necessarily excluded the provisions of the Bankruptcy Act of 1856. Moreover, the provisions of the Bankruptcy Act were quite inadequate. There was under that Act no provision for making calls. In certain cases, *e.g.*, of companies limited by guarantee, and the case of past members, the liability was conditional on the company being wound up, which must refer to a winding-up under the Act —*Cf.* sections 7, 9, 18, and 38 of the Companies Act 1862. Registration had the effect of preventing any creditor proceeding against a shareholder of the company—sec. 195. No provision was made in the Bankruptcy Act for the adjustment of the rights of partners *inter se* such as was found in section 38; the trustee in his quasi-judicial character must pay the surplus over to the bankrupt in accordance with the provisions of section 155 of the Bankruptcy Act. The termination of a winding-up was altogether different from the termination of a sequestration—*Cf.* sections 110, 111. An examination of the first three parts of the Act of 1862 showed that such a company could only be liquidated by means of the provisions contained in the fourth part—Lindley on Partnership, i. 8; *Hoggan* v. *Wilson and Magistrates of Edinburgh*, February 19, 1853, 15 D. 417; *Phosphate Sewage Company* v. *Lawson & Son's Trustee*, February 20, 1878, 5 R. 1125—*aff.* July 8, 1879, 6 R. (H. of L.) 113; *Wishart & Dalziel* v. *City of Glasgow Bank*, March 14, 1879, 6 R. 823; *Galletly's Trustees* v. *The Lord Advocate*, November 12, 1880, 8 R. 74; *Gardner* v. *London, Chatham, and Dover Railway*, 2 Ch. 201.

Argued for Whitson, the trustee — If the sequestration was not incompetent, then he was entitled to proceed under it. It was clear from the interpretation clause of the Bankruptcy Act that companies could be sequestrated, and there was no quality inherent in companies registered under the Companies Act which made them different from ordinary bodies corporate, or from companies under the Act of 1844 (7 and 8 Vict. cap. 110), to which the provisions of the old Bankrupt Act (2 and 3 Vict. cap. 41), secs. 3 and 6, would have been applicable. Section 38 was not in the winding-up part of the Act, so that the liability could be ascertained without referring to the winding-part. The words in that section were not "wound up under this Act," but merely "wound up," which included sequestration—Bell's Comm. (5th ed.) ii. 637. Section 153 showed that sequestration was not competent after an order for winding-up, but if well begun before an order was pronounced it might be proceeded with—*Joel* v. *Gill*, June 10, 1859, 21 D. 929. The trustee in a sequestration would not have done his duty until he had adjusted the rights of the creditors *inter se*—Lindley on Partnership, ii. 1039. Section 119 showed that liquidation was not to be exclusive of the common method of recovering debts. Sequestration was certainly preferable to winding-up under the Act, because it would cut down all preferences. Further, in a liquidation the creditor was not bound to value and deduct his security before ranking—in a sequestration he was bound.

At advising—

LORD PRESIDENT—The Dunblane Hydropathic Company was formed in 1874, and was constituted under the Companies Acts 1862 to 1867, and was duly registered under those statutes in the year 1874. In the early part of the present year the company appears to have become insolvent; their chief estate, the hydropathic establishment at Dunblane, was covered by heavy securities in favour of the Standard Property Investment Company, and apparently the business could no longer be carried on. In these circumstances a petition was presented on 3d June 1884 by the creditors of this limited company for the sequestration of its estates, and the first deliverance thereon was pronounced on the same date. There were answers lodged to this petition objecting to the competency of sequestrating a company registered under the Companies Acts 1862 and 1867, but the Sheriff overruled the objection, and awarded sequestration. Mr Whitson, the present respondent, was appointed trustee under that sequestration. On 19th July the Standard Property Investment Company (Limited) presented a petition for recal of the sequestration, which came to depend before Lord Fraser, the Lord Ordinary on the Bills, who pronounced an interlocutor on 12th August dismissing the petition, and agreeing with the Sheriff that there was no incompetency in applying for sequestration. That interlocutor of Lord Fraser is now before us on a reclaiming-note, and there is also before us a petition by the Standard Property Investment Company for the judicial winding-up of the Dunblane Hydropathic Company. In these circumstances the question comes to be, whether this company is to be wound up under the Companies Act of 1862, or whether the sequestration awarded by the Sheriff is to be sustained?

No doubt, apart from the Companies Act, the present company falls within the description of those who may be sequestrated under the Bankruptcy Act of 1856, for that Act applies to every kind of company and corporation, and its clauses have been so largely construed as to apply to the bankruptcy of a municipal corporation. But the question is, whether the provisions of the Companies Acts, particularly of the Acts of 1862 and

1867, do not render such a sequestration incompetent, for unless the petitioners can make out that it is incompetent, I do not know of any ground on which it can be recalled, and if it is not to be recalled, then the company's assets must be distributed under the sequestration. This question, whether it is competent to sequestrate a company formed and registered under the Companies Act 1862, is a very serious and important one, and must depend for its solution on the terms of the Act of 1862.

The Act of 1862, as I read it, is intended to provide a complete code of law applicable to the case of those companies to which it applies, and this is made very clear at the outset by the fifth section, which describes the different divisions or parts of the Act, and which relate to the following subject-matters, viz., the first part, to the constitution and incorporation of companies and associations under the Act; the second part, to the distribution of the capital and liability of members of companies and associations under the Act; the third part, to the management and administration of companies and associations under the Act; the fourth part, to the winding-up of companies and associations under the Act; the fifth part, to the registration office; the sixth part, to the application of the Act to companies registered under the Joint-Stock Companies Acts; the seventh part, to companies authorised to register under the Act; and the eighth part to the application of the Act to unregistered companies. Now, it appears to me that this indicates very clearly the intention of the Legislature not only to make provisions applicable to these companies but to provide a complete set of rules, so that the whole law with regard to the companies embraced by the Act should be found within the Act itself. In the next place, it is to be observed that the liability of the parties is not the same as in a common law partnership, the reason being that all companies to which the statute applies are made incorporations, and the rule of corporation law therefore applies, which is, that individual members are not liable for debts due by the corporation, nor can they sue for debts due to the corporation. Their only liability is to pay what they have undertaken to pay by the terms of the contract.

This rule of corporation law is assumed to apply to every company under the statute, under the exceptions provided by the sections after mentioned. What at present I want to make clear is that the effect of the incorporation of the company by the statute, except for the clauses I am about to mention, is that no action or diligence would lie against the individual members of a company formed and registered under the Act, whereas at common law an action would lie against every individual member of a company for a company debt. The section I refer to is the 18th, which provides—"Upon the registration of the memorandum of association, and of the articles of association, in cases where articles of association are required by this Act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited. The subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands." Now, if the 18th section had stopped there the company would have been a proper corporation without any exception, and the corporators or members of the corporation would not have been liable for the corporation debts; but then the section proceeds, "but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned." The liability therefore of the corporators, which would not have existed if it were a corporation without qualification, is made to depend on what is "hereinafter mentioned," and that we find in section 38.

Section 38 provides:—"In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves" under certain qualifications. The liability, then, of the members is only to come into operation in the event of the company being wound up, and the amount of the liability is the amount sufficient for payment of the debts, costs, charges, and expenses of the winding-up, and for payment of such sums as may be required for the adjustment of the rights of the contributories "amongst themselves." Thus the adjustment amongst themselves, after the debts and liabilities of the company have been satisfied, can take place only under the statute. It cannot take place under the Bankrupt Act, for the duty of the trustee in a sequestration is only to realise the assets and pay the creditors; if there is any surplus, then his duty ends by paying it over to the bankrupt in accordance with the express provisions of the Act of 1856. So that under a sequestration there can be no such adjustment of the rights of contributories amongst themselves. Therefore, it is plain to me that when section 38 speaks of the liabilities of a company under a winding-up, it must mean a winding-up under the Act, for it extends expressly to the adjustment of the rights of contributories. The qualifications adjected to section 38 I do not think very material, except that as regards past members, that is to say, those who have been, but have ceased to be members, rules are introduced (sub-secs. 1, 2, and 3) which are not the rules of the common law; and so the liability under section 38, which is the sole liability of the members of the corporation, is not a liability conform to the common law, but is defined and limited by the statute. The only other section which is important in the construction of the words "winding-up,"—which is to be the occasion of bringing the liability of the members into operation—is the 195th. It is in that part of the statute which is applicable to companies registered though not formed under the Act. A company formed under a deed, Act of Parliament, or charter, when registered, comes under its provisions, and among

other incidents is this, that it shall be wound up under the statute; and we know, as matter of practice, that when a company not constituted under the Act comes to be registered under it, it is for the purpose of taking the benefit of the winding-up clauses. The 195th section, in speaking of actions in dependence before registration, says:—"All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this Act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding-up the company." It is to be observed that under this section, where the company of which it speaks is registered but not constituted under the Act, there is the same limit of liability as was previously provided with regard to the shareholders of a company constituted under the Act. No diligence is competent against the shareholders; no such remedy is competent to any creditor, and the only remedy is to apply for a winding-up order.

There cannot, I apprehend, be two meanings of this section, for winding-up cannot mean by way of sequestration or a private trust-deed; it must mean winding-up under the statute. The obtaining of a winding-up order is entirely a statutory process.

If, then, the only remedy competent to creditors of a company not formed but only registered under the Act is to obtain a winding-up order, much more must it be the only remedy competent when the company is also formed and constituted under the Act. The Act cannot mean in such a case as that anything else than is meant in sec. 195.

In these circumstances, whether it is expedient that there should be sequestration or not, I am of opinion that the statute clearly excludes such a process, and therefore we must hold that on the insolvency or bankruptcy of a company registered under the Act, its winding-up must be subject to the provisions of the Act.

I am therefore for recalling the sequestration.

Lord Mure—I entirely concur with your Lordship, and on the same broad ground, viz., that as the Companies Act of 1862 introduced rules which were not those of the common law, and some of which cannot be found in the Bankruptcy Act, and some of which are inconsistent with and at variance with its provisions, it must be held that companies registered under the Act cannot be sequestrated.

Lord Shand—It is explained in the answers to the petition for recal of this sequestration that the object which the respondents have in view in wishing this sequestration to be continued is to prevent preferences being secured over the great bulk of the company's property. It is stated that on 29th May 1884, being five days before the first deliverance on the petition for sequestration, the present petitioners raised an action for poinding the ground, and the object of the respondents in keeping up the sequestration is not because sequestration is a preferable method of procedure, or because it can be as easily managed, but in order to cut down the diligence. With that object I entirely sympathise, but the question to be determined cannot be influenced by the consideration that under a sequestration preferences would be cut down which under a liquidation would stand.

This case is just one of several which show that the Acts regulating joint-stock companies are defective in two particulars, because, in the first place, the equitable rules of ranking have no place in a liquidation, and in the second place, because those statutes do not provide for the cutting down of diligences used before the company went into liquidation as is the case with regard to sequestration.

In England, so far as regards the first point, there is a provision in the Judicature Act of 1875 (38 and 39 Vict. cap. 77), the 10th section of which is to this effect—"In the winding-up of any company under the Companies Acts 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities, and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." Whether there is a further power of cutting down diligences commenced on the eve of declared insolvency I do not know, but I hope that one result of this case will be that the Legislature will consider this question.

On the merits of the question we have to deal with I entirely agree with your Lordships. In the English Bankrupt Acts there are express provisions that they shall have no application to the case of companies registered under the Act of 1862. In Scotland there is no similar provision, but though there is no express provision in the Bankruptcy Act or in the Joint-Stock Companies Acts, I am yet of opinion that the language of the Joint-Stock Companies Acts by the clearest implication excludes the provisions of the Bankruptcy Act. We must take the provisions of the Act of 1862 and subsequent Acts as a whole, and I agree in thinking that as the statutes have provided an express mode of creating incorporations by means of registration, so they have provided the only means for bringing them to an end when the time for their dissolution arises. In addition to the provisions of the statute of 1862 it is worthy of notice that in the Act 42 and 43 Vict. cap. 76 [Companies Act 1879], which deals with joint-stock banking companies, there are provisions for enabling such companies to hold a certain amount of uncalled capital, and that there is a proviso that this capital is not to be capable of being called up except in the event of the company being "wound up."

It appears to me that the term "winding-up," as used in these Acts, relates entirely to the mode of winding-up which the statutes created. In the case of a sequestration the machinery is en-

tirely different; the functions of the trustee in a sequestration are quite different from those of a liquidator; the property is transferred to him, and throughout the procedure is semi-judicial; the process is more limited than is the case with a liquidation. In a sequestration the property is divided among the creditors, but if there is any surplus the trustee has no power to settle the rights of the partners *inter se*. The only provision in the Bankruptcy Act in regard to that matter is section 155, which provides—"Any surplus of the bankrupt's estate and effects that may remain after payment of his debts, with interest, and the charges of recovering and distributing the estate, shall be paid to the bankrupt or to his successors or assignees."

The statute, however, with which we are dealing provides that in the case of a winding-up a great deal more can be done than that, for the rights of the contributories can be adjusted amongst themselves, and that either voluntarily or with the aid of the Court. Again, it is a question how far the general provisions of the Act of 1862 are to be applied in the case of a sequestration. An argument was maintained to the effect that the term "winding-up" might include sequestration—which I am satisfied was not intended,—but then I ask, Would the provisions in the winding-up clauses be applicable to the case of a sequestration? I think if that were so it would be impossible to see where the confusion would end.

I hold that by clear implication the general terms of the Joint-Stock Companies Acts refer exclusively to the mode of winding-up under those Acts, and that therefore the sequestration of joint-stock companies is entirely incompetent.

The Court pronounced these interlocutors:—

(1) In the petition for recal of the sequestration.

"Having considered the cause and heard counsel for the parties on the reclaiming note for the Standard Property Investment Company (Limited) against the interlocutor of Lord Fraser (Lord Ordinary on the Bills) of 12th August last, recal the said interlocutor, and in terms of the prayer of the petition recal as incompetent the sequestration of the estates of the Dunblane Hydropathic Company (Limited), awarded by the Sheriff of Perthshire on 11th July last (1884), and appoint this judgment of recal to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions, all in terms of the 31st section of the Bankruptcy Act 1856: Find the petitioners entitled to expenses, &c."

(2) In the petition for judicial winding-up.

"Remit the petition to the Second Division of the Court *ob contingentiam* of a petition at the instance of Patrick Stirling, Esquire, of Kippendavie, of date 9th June 1884, for the judicial winding-up of the Dunblane Hydropathic Company (Limited)."

Counsel for the Standard Property Investment Company—Mackintosh—Low. Agents—Duncan Smith & Maclaren, S.S.C.

Counsel for Thomas Whitson—Sol.-Gen. Asher, Q.C.—Lorimer. Agents—Dundas & Wilson, C.S.

Friday, December 12.

FIRST DIVISION.

[Court of Exchequer.

LOTHIAN (SURVEYOR OF TAXES) *v.* MACRAE.

Revenue — Income-Tax — Clergyman — Deduction from Assessable Income of Expenses necessarily incurred in Discharge of Public Duty—Income-Tax Act 1854 (16 *and* 17 *Vict. c.* 34), *secs.* 51 *and* 52.

Held that the minister of a parish, who from age and infirmity had been provided with an assistant to whose salary he made a considerable contribution, was not entitled to deduction from the amount of his income to be assessed under the Income-Tax Acts of the amount of such contribution, because in order to obtain the benefit of the deduction allowed by the Income-Tax Act 1854, sec. 52, the expenses in respect of which deduction is claimed must have been necessarily incurred in the personal discharge of duty.

The Income-Tax 1854 (16 and 17 Vict. c. 34), sec. 51, provides – "In assessing the duty chargeable under Schedule (E) of this Act, in respect of any public office or employment, when the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of such office or employment the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties of his office or employment, it shall be lawful to deduct from the amount of the said salary, fees, and emoluments to be assessed under this Act the amount of all such expenses necessarily incurred and defrayed in manner aforesaid."

Sec. 52 provides—"In assessing the duty chargeable under any schedule of this Act upon any clergyman . . . in respect of any . . . emolument of his profession, . . . it shall be lawful to deduct . . . from such emoluments any sum or sums of money paid, or expenses incurred by him, wholly, exclusively, and necessarily in the performance of his duty or function as such clergyman . . and if such sum or sums or expenses shall not have been deducted as aforesaid, then a proportionate part of the duty charged and paid by such clergyman . . . shall, on due proof to the Commissioners of such sum or sums having been expended as aforesaid, be repaid to such clergyman." . .

Dr John Macrae, minister of the parish of Hawick, being seventy years of age, and in the forty-first year of his ministry, an assistant was appointed by the congregation at a salary of £120, which was subscribed by Dr Macrae and the members of the congregation. During the three years prior to the raising of the present question the average sum contributed by Dr Macrae had been £45.

At a meeting of the Commissioners for general purposes of the Income-Tax Acts for the county of Roxburgh, held at Jedburgh upon 3d June 1884, Dr Macrae claimed repayment of income-tax for the three years ended 5th April 1883, in respect of the £45 per annum contributed by him