WRYGHTE, ... APPELLANT.
LINDSAY, ... RESPONDENT.

1860. Feb. 16th.

English Bankruptcy—Scotch Sequestration—Debtor deceased—2 *&* 3 *Vict. c.* 41 (*a*)—16 *&* 17 *Vict. c.* 53 (*b*).— In dealing with the remedy under the Statute, it must appear that the liability was incurred anterior to the death. Where the liability arose after the death, the remedy held inapplicable.

Per the Lord Chancellor: In order to bring the case within the Act there must be the relation of debtor and creditor subsisting between the Petitioner and the person against whose estate the sequestration is sought; p. 778.

Per Lord Cranworth: Although by the English Winding-up Act the official assignee is put *in loco creditoris*, that purely English machinery is not introduced into Scotland; p. 780.

THE Royal Bank of Australia was established in 1840 by a deed which provided that its capital should be 100,000*l.* in shares of 50*l.* each.

In this undertaking the late Sir Francis Walker Drummond, of Hawthornden, Baronet, was an original proprietor of 120 shares, and a derivative proprietor of 20 shares.

Sir Francis died on the 29th of February 1844, and his eldest son, Sir James Walker Drummond, the present Baronet, was confirmed as his executor dative in Scotland. Sir James also obtained administration from the Prerogative Court of Canterbury, and so became his father's legal personal representative in

(*a*) "An Act for regulating the Sequestration of the Estates of Bankrupts in Scotland" (17th August 1839).

(*b*) "An Act to amend the Laws relating to Bankruptcy in Scotland" (4th August 1853).

England. He likewise was served heir-at-law in respect of the real property left by his father.

On the 26th March 1850 the Vice-Chancellor *Knight Bruce* made an order that the Royal Bank of Australia should be dissolved and wound up; and the Appellant was appointed official manager of the concern.

On the 9th August 1854 the Master of the Court of Chancery ordered Sir James, as executor of his father, one of the contributories, within seven days to pay to the Appellant 14,000*l.* as the balance due on his account with the bank; and, as the property of the deceased was principally situated in Scotland, the Appellant resorted to the Court of Session for the recovery of the amount.

On the 8th March 1856 the Master of the Court of Chancery ordered the Appellant to apply in Scotland for sequestration of the estates of the deceased.

On the 11th March 1856 the above Respondent, Mr. Donald Lindsay, was appointed judicial factor of Sir Francis's estates.

On the 22nd March 1856 the Appellant presented his petition to the *Lord Ordinary*, praying sequestration.

The petition and the answers to it came on for hearing before the *Lord Ordinary* on the 4th June 1856, when he reported the case to the Judges of the Inner House, First Division, who after having advised with him, pronounced an Interlocutor on the 18th July 1856, whereby they "refused "the petition for sequestration, and found the Ap-"pellant liable in expenses." Upon a reclaiming note, after hearing argument, the Inner House further, on the 20th Nov. 1856, "refused the reclaiming note and "adhered to the Interlocutor submitted to review, "and found the Reclaimer liable in additional ex-"penses."

In pronouncing this decision the Judges of the Court below were unanimous; the Lord President *M'Neill* observing:—

The right of the Petitioner to sue a sequestration under the 2 & 3 Vict. c. 41. is the question we have to deal with. That statute has extended the application of the process of sequestration to various classes of cases to which it was not previously applicable. Among others, it has extended it to the estates of persons deceased. That is, in some respects, treated in the statute as an exceptional class, and special provisions are made in regard to it; but I do not see that anything in this case turns on these special provisions. This is a case in which more than six months had elapsed from the death of the party, and in such a case the petitioning creditor is not required to prove the insolvency of the estate in order to get diligence on his petition. But in every case of sequestration of the estate of a deceased debtor, the leading requisites of the statute are, in the first place, that *the deceased party*, whose estate is sought to be sequestrated, shall have been a *debtor*—a deceased debtor; and, in the second place, that the party who petitions for sequestration shall be in the position of *a creditor of the deceased* to a certain amount. The present case turns on the question whether these relations subsist between Mr. Wryghte and the late Sir Francis Walker Drummond, with reference to the sum of 14,000*l.* mentioned in the affidavit, and on which the present application is rested.

I do not think that, in regard to the 14,000*l.*, Sir Francis Walker Drummond can be regarded as a deceased debtor in the sense of the statute 2 & 3 Vict., or that Mr. Wryghte can be held to be a creditor having a debt to that amount against Sir Francis. Mr. Wryghte is the official manager appointed under the Winding-up Acts, and the 14,000*l.*, as I trace it, is the amount of a call made by him in virtue of the powers conferred on him by these Acts, to make calls on those persons whom the statute describes as contributories.

A call so made is a statutory demand of a very peculiar kind. The liability for it is a statutory liability. The right to make it, and the liability to satisfy it, both spring from statute. They had no legal existence before the date of the statute, so far as has been explained to us. The Company was an English Company, but we have not been told, as matter of fact, that, according to the law of England, such a demand could have been made and enforced before the date of the statute. We know that by the law of Scotland it certainly could not. The statute does not extend to Scotland, except in certain portions of it. So far as it does extend, our duty, of course, is to apply it. I am now dealing with the peculiar character of the claim on which Mr. Wryghte rests his title in this case.

I will now advert to the affidavit of the Petitioner in support of his title. From this affidavit it appears that the sum of 14,000*l.*, upon which Mr. Wryghte rests his title, is the amount of a call made by him under the authority of the statute, for the purposes and with the qualities to which I have referred. He states in the affidavit that Sir Francis Walker Drummond was, before his death, liable to make payment of 3,850*l.*, as the balance of a contribution of 50*l.* per share on the 140 shares held by him of the capital stock of the Company. This application, however, is not for sequestrating the estate in respect of the nonpayment of that sum. The Petitioner says farther, that Sir Francis Walker Drummond is liable to make payment "for what other additional sums might fall on him as his proportional share of the losses incurred by the said Company." This is not a claim for any such proportional share of the losses of the Company. It does not appear from this affidavit that there was any such loss; there were no ascertained losses, and no apportionment of loss to each shareholder. The demand for sequestration is not rested on any such claim. The statement made in the affidavit may be true; and if so, it is equally true that, if a claim be made *habili modo* for relieving those liabilities, the law of Scotland affords the means of making it good. But such claims are not the subject-matter of this demand. The ground of this demand is a sum of 14,000*l.*

The Petitioner says that a liability for this 14,000*l.* was incurred by Sir Francis Walker Drummond anterior to his death, and that the same is now due from his estate to the Deponent, as official manager. I do not know how that can be. It is not deducible from any facts stated. It is not stated that any such liability was possible by the law of England prior to his death, or otherwise than under this statute. But the statute did not exist for years after his death (*a*). What meaning is attached in the affidavit to the word "liability," I do not know. The term may, in the law of England, be appropriate to such a case, and the meaning attached to it by the maker of this affidavit no doubt enables him to swear that there is a liability. But we are now dealing with a matter of remedy according to the law of Scotland. We are dealing with a remedy sought under the statute 2 & 3 Vict. c. 41., and the call of 14,000*l.* is clearly not a debt due by the deceased Sir Francis Walker Drummond in the sense of the statute. Sir Francis must have been a deceased debtor in that 14,000*l.* I cannot see any way of construing the facts so as to bring matters into that position, nor can I see how this 14,000*l.* had any shape or subsistence while Sir Francis was alive. It was the creature of statute, brought into existence after his death. No doubt, Parliament could make his estates liable for debts contracted by anybody else,—it is omnipotent,—but we have not that kind of

(*a*) The Winding-up Act, 12 & 13 Vict. c. 108. (1st August 1849).

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liability to deal with here, and no statute has said that the estate of a deceased debtor is to be liable to sequestration for such a claim as this. We must, in this proceeding, read the claim with reference to the 41st section of the Act of 2 & 3 Vict., and I do not find in the whole of this affidavit, or in the history of this sum, anything to constitute Sir Francis Walker Drummond a deceased debtor for the sum of 14,000*l.* referred to, or to make the claimant a creditor of Sir Francis in a debt of his for that sum. Sir Francis Walker Drummond is not in the list of contributories. If Sir Francis had been in the list, and had died pending proceedings, I pronounce no opinion whether the Act of 2 & 3 Victoria might not have come into play; for it might then have been held to be a debt in some sense of the word. But Sir Francis is not in that list, and the question is not whether there is any remedy against the estate of Sir Francis, but whether this particular remedy of sequestration of his estate can follow upon such a demand as this. The Petitioner does not possess the relation to the deceased which the statute of 2 & 3 Victoria requires prior to authorizing the issuing of sequestration.

Lord *Deas;* The Winding-up Acts do not apply to Scotland, except in so far as specially provided. It is provided that an order of the Master, registered here, shall have the same effect against the person named in the order as a registered bond by that person would have had. But a bond executed by Sir James for this 14,000*l.* would not have entitled the official manager to the particular remedy now sought against the estate of Sir Francis under the statutes 2 & 3 Vict. c. 41. and 16 & 17 Vict. c. 53. The fact would have remained, that Sir Francis was not a deceased debtor on this 14,000*l.* in the sense of these statutes.

The official manager, Mr. Wryghte, appealed.

Mr. *Daniel,* Mr. *Anderson,* and Mr. *Roxburgh* for the Appellant.

Mr. *Rolt* and Sir *Hugh Cairns* for the Respondent.

At the close of the argument the following opinions were expressed by the Law Peers.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, one question in this case is, Whether the Act of Parliament under which this proceeding is instituted has been repealed or not? I do not feel it my duty to give any opinion upon that question; because I think that even if the Act of Parliament

(*a*) Lord Campbell.

was in force at the time, still the Interlocutor appealed against was properly pronounced, and that therefore this Appeal ought to be dismissed.

I should have been very loth to reverse this Interlocutor, which turns very much upon Scotch procedure, unless I had clearly seen that the Court below was wrong; but after hearing the arguments on both sides it seems to me clear that the Court below was right.

I abstain from giving any opinion upon the validity of the order of the 9th of August 1854 (*a*). There are very serious difficulties upon that question, but I give no opinion upon it. *Esto* that that was a valid order, I am of opinion that the Court did well in refusing the sequestration.

My Lords, this is a most peculiar remedy that is given by the 4th section of the 2 & 3 Vict. c. 41. (*b*), and the question is whether this is a case coming within that enactment. It enacts that "sequestration may be applied for of the estates of any deceased debtor, who at the time of his death resided, or had a dwelling house, or carried on business in Scotland, and was at that time owner of heritable or moveable estate in

(*a*) The order of the Master, requiring the Respondent to pay 14,000*l*. See *suprà*, p. 773.

(*b*) "And be it enacted, That sequestration may be applied for of the estates of any deceased debtor who at the time of his death resided or had a dwelling house or carried on business in Scotland, and was at that time owner of heritable or moveable estates in Scotland, provided such sequestration shall be applied for by one or more creditors qualified as herein-after mentioned; but no such sequestration shall be awarded until the expiration of six months from the debtor's death, unless he shall have granted a mandate to apply for sequestration, or was at the time of his death notour bankrupt, or had remained in sanctuary for sixty days (either continuously or not) within the space of twelve months immediately preceding his death, or unless his successors shall concur in the petition or renounce the succession, in which several cases sequestration shall forthwith be awarded."

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Scotland, provided that such sequestration shall be applied for by one or more creditors qualified as hereinafter mentioned."

By this proceeding, then, the whole of the real and personal property of the deceased is to be sequestrated for the benefit of all his creditors. The question is whether the enactment has been framed so as to meet the present case. In order to bring it within the Act of Parliament it seems to me quite clear that there must be the relation of debtor and creditor subsisting between the Petitioner and the person against whose estate the sequestration is sought; it must be shown that Sir Francis Walker Dummond was the debtor of Wryghte, the Petitioner. The properly qualified persons to apply for the sequestration are described in the 8th section (*a*) of the statute. Does that description in the slightest degree accord with the situation of Wryghte, the official manager, acting under the order of the Court of Chancery? I am clearly of opinion that it does not. This reason is enough to authorize the refusal of the sequestration; that the relation of debtor and creditor never subsisted between Mr. Wryghte and Sir Francis Walker Drummond. Now it is quite certain that that relation never did subsist; and it seems to me equally certain that, according to this

(*a*) "And be it enacted, That any one creditor whose debt amounts to not less than fifty pounds, or any two creditors whose debts together amount to not less than seventy pounds, or any three or more creditors whose debts together amount to one hundred pounds or upwards, whether such debts are liquid or illiquid (provided they be not contingent) may concur in a petition by a debtor or company for sequestration, or may petition for sequestration, of the estates of any debtor or company liable to be sequestrated without consent; provided that, if it be without consent of the debtor or company, the petition be presented within four months after the date of the notour bankruptcy, or, in case of retiring to the sanctuary, within four months after the expiration of the said sixty days as aforesaid."

Act of Parliament, the relation of debtor and creditor must subsist between the Petitioner and the party against whose property the sequestration is sought. On that ground I am of opinion that the sequestration was properly refused by the Court below, and that this Appeal ought to be dismissed.

Lord Chancellor's opinion.

Lord Brougham's opinion.

Lord BROUGHAM:

The question whether or not the Act of Parliament 2 & 3 Vict. c. 41. has been repealed, it is unnecessary to dispose of. The question as to the validity of the Master's order of the 9th August 1854, I say nothing whatever upon. There are other points, particularly in various parts of the very able and elaborate judgment of the *Lord President* in the Court below, upon which considerable doubts occurred to my mind in examining that judgment from time to time, but into those matters I do not at all enter. The question, and the only question for us in this stage of the cause, is, whether the relation of debtor and creditor existed between Wryghte and Sir Francis Walker Drummond, the deceased, whose representative Sir James Walker Drummond, the party before us, was; and I entertain no doubt whatever, upon the grounds stated by my noble and learned friend, that that relation did not subsist between them; and it is enough for us to be assured of that in order to support the judgment of the Court below in refusing the sequestration.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, if this case had to be disposed of upon what I may call the preliminary point, namely, whether the statute originally giving sequestration, the 2 & 3 Vict. c. 41., was repealed and a new statute substituted for it, I give no intimation as to what opinion I might have been called upon to ex-

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press; but this I do not hesitate to say, that in determining that question I would have endeavoured to stretch language to the very utmost limits in order to show that the effect of that second statute was not what is supposed, namely, to put an end to proceedings that were actually pending at the time that it passed. I concur, however, with my noble and learned friend on the woolsack, and with my noble and learned friend who has preceded me, that on this Appeal we need not consider how that question ought to be decided, because whether the Act was in force or whether it was not in force at the time these proceedings were pending, I think the Interlocutor of the Court below was perfectly right.

My Lords, the doubt that occurred to my mind for some time during the argument was this, whether or not, throwing overboard altogether the order of the 9th of August 1854, and all which followed upon it in Scotland, the proceedings might have been sustained simply by the order of the Master of the 8th of March 1856, directing this application for sequestration grounded upon the previous order to pay the call. That was a view that for some time I thought possibly might have been sustained; but upon further consideration I think that also fails, upon the same grounds upon which my noble and learned friend thinks it fails.

With reference to the order that was registered, the Master of course could not validly direct the sequestration unless the statute authorized it. The statute authorizes the application for the sequestration of the estate of a deceased person at the instance of a creditor of that person. Now Wryghte certainly was not a creditor; and although by means of the English Act of Parliament, he is put *in loco creditoris*, so that it cannot be gainsaid as against him that he is not

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a creditor, if anybody else was a creditor in whose place he is substituted, that is purely English machinery, which is not introduced into Scotland at all. And if the judgment of the Master, establishing the fact that Sir Francis Walker Drummond was a debtor, may be taken as a judgment not conclusive,—at least a foreign judgment valid *primâ facie* in Scotland,—you cannot import into Scotland, with that *primâ facie* judgment against the estate of Sir Francis, the machinery of English law whereby that is to be enforced. Upon that short ground (I do not mean to say that there may not be other grounds) it appears to me that no sequestration could be granted under the statute of 2 & 3 Vict. c. 41., and consequently that the Interlocutor was right.

Lord WENSLEYDALE:

Lord Wensleydale's opinion.

My Lords, I am entirely of the same opinion with my noble and learned friend on the woolsack, and with the other noble and learned Lords who have preceded me. I found my opinion entirely upon the 4th clause of the 2 & 3 Vict. c. 41. I had very grave doubts upon the other parts of the case, but it is unnecessary to give any opinion upon them, I confine myself to that clause. It is necessary under that clause that the deceased should be a debtor, in some sense, at the time of his death, and that Wryghte should be a creditor, not Wryghte personally, but Wryghte as representing creditors, at the time when the order for the payment of the call was made. I think that neither of these points is clearly established, and I think the judgment of the *Lord President* in the Court of Session, though it may be open to some of the objections which have been stated in the course of the argument, was perfectly correct in that respect. Those two facts are not made out; and, therefore, I concur

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with my noble and learned friends in the opinion that the judgment should be affirmed.

Mr. *Daniel:* Would your Lordships think it right to make any addition to the order with regard to costs, that the costs of all parties should be paid out of the estate?

Sir *Hugh Cairns:* There is an absolute order of the House for the payment of costs.

Mr. *Daniel:* What I suggest does not interfere with the order of the House.

The LORD CHANCELLOR: Out of what estate do you mean?

Mr. *Daniel:* Out of the estate of the Royal Bank of Australia.

Lord CRANWORTH: The order will be without prejudice to any application you may make for the payment of your costs.

Mr. *Daniel:* It will be a personal order upon the official manager without prejudice to any application he may make under the Winding-up Acts.

Interlocutors affirmed, and Appeal dismissed with costs, without prejudice to any application which the Appellant may make to the Master or to the Court of Chancery under the Joint Stock Companies Winding-up Acts in respect of the payment of costs out of the assets of the said Bank, and the calls under the said Acts.

HARRIS—ROBERTSON AND SIMSON.