Thursday, December 18.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

M'ADAM *v.* AGNEW.

Bankruptcy—Sequestration—Duty of Trustee—Liability to Account—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 86 *and* 127.

After a trustee had adjudicated on the claims lodged by creditors, and had paid dividends in fulfilment of those deliverances, a creditor brought, under the 86th section of the Bankruptcy Act 1856, a petition to have him ordained to account for his intromissions, alleging that he had, without sufficient claims and vouchers being produced, admitted claims and made payments. *Held* that the petition was incompetent, and that the petitioner should have appealed against the trustee's deliverance at the proper time, and in the manner provided by the Act.

Observations on the function of sec. 86 of the Act.

The 86th section of the Bankruptcy (Scotland) Act 1856 enacts that . . . "the trustee and commissioners shall be amenable to the Lord Ordinary and to the Sheriff, although resident beyond the territory of the Sheriff, at the instance of any party interested, to account for their intromissions and management, by petition served on them." . . .

James M'Adam, residing at Stranraer, a creditor on the sequestrated estate of John Martin, farmer, Smithyhill, Wigtownshire, presented this petition in the Sheriff Court at Stranraer, to have William Agnew, the trustee in the sequestration, ordained "to account for his intromissions as trustee foresaid, and to pay to the petitioner the sum of £50, or such other sum as shall be found to be due to him in said accounting, all in terms of section 86 of the Bankruptcy (Scotland) Act 1856." He stated, and it was admitted, that he was a creditor on the estate for £88. He also stated that the trustee had by his actings and management caused great loss to the estate, in particular by admitting certain claims to be ranked without any sufficient vouchers having been produced. He also stated that persons had been ranked and had received payments without production of affidavit and claims having been made.

He pleaded—"(1) In terms of sec. 86 of the Bankruptcy (Scotland) Act 1856, any person interested is entitled to ask an accounting from the defender, and the pursuer being a creditor in said sequestration, and having suffered loss as condescended on to the extent sued for, decree should be granted, with expenses, as craved. (2) The defender having made payments to persons who had not lodged affidavits and claims in terms of the statutes on the said sequestrated estates, and the pursuer as a creditor therein having suffered in consequence, decree should be granted, with expenses, as craved."

The defender pleaded—"(4) The 86th section of the Bankruptcy (Scotland) Act 1856 only gives creditors power to call on the trustee to account for his intromissions and management, but not to call in question or interfere with the trustee's deliverances on claims or actings."

The Sheriff-Substitute (MAXWELL) found, *inter alia*, that the defender had failed to account for his management of the sequestrated estates, in respect that he had admitted certain claims (specified in the interlocutor) without sufficient vouchers having been produced, or that they were otherwise established according to law in terms of the 50th section of the Bankruptcy (Scotland) Act 1856; that the total amount of these claims was £333, 5s. 4d., and the dividend £129, 7s. 2d.; and further that a certain illegal payment had been made to the agent in the sequestration; that on an accounting the petitioner was entitled to payment of £2, 14s. 7d., that being the sum falling to him, as a creditor for £88, out of what the defender had improperly paid away.

"*Note.*—This is a petition under the 86th section of the Bankruptcy Statute. The pursuer is a creditor on the sequestrated estates of John Martin, farmer, Smithyhill and Lagganmore, in the county of Wigtown. The defender is trustee on said estates. The date of his appointment was 10th May 1878. A final dividend was paid to the creditors on 11th September 1883. The previous dividend had been paid on 11th March 1879. The cause of the delay appears to have been owing to several actions having been raised against the bankrupt, and to his succession to certain property after the payment of the first dividend. The pursuer takes objection to several proceedings on the part of the trustee, whereby he alleges the estates have suffered loss. He appears to have first raised these objections at a meeting of the creditors on August 29th 1882. At this meeting a motion was moved, but not carried, that the trustee be removed, and a motion was also made for the appointment of a committee to examine into the sequestration accounts and affairs, but the minute does not bear that the motion was put to the meeting. No appeal was taken by the pursuer or other creditor under the 169th section against the resolutions come to at this meeting, but it appears that soon after communications passed between the pursuer and the trustee regarding the management of the sequestrated estates. The pursuer was not satisfied with the explanations given, and on the 18th of January 1883 he reported the actings of the trustee to the Accountant in Bankruptcy. The Accountant, after receiving answers from the trustee, issued notes on the complaint, and finally a deliverance, of date 22d May 1883, his finding being that it was not a case to report to the Court under the 159th section of the Bankruptcy Statute. The pursuer thereafter brought this petition under the 86th section, in which he raises almost the same points as were brought before the Accountant.

"The first objection taken to the management of the trustee is, that he admitted the claims of certain creditors to a ranking without sufficient vouchers. It is contended for the trustee that no appeal having been taken against his decision under the 127th section, the pursuer is now foreclosed from raising the question. This plea does not appear to me well-founded, for although by the 127th section a right of appeal is given not only to each creditor against the decision of the trustee in his own case, but also against the trustee's decision admitting the claims of other

creditors (*Morris*, 21st January 1843), yet it seems to me that this is an act of management falling within the terms of the 86th section, and for which, therefore, the trustee is liable to account at any time before his discharge. This seems to follow from the Lord Justice-Clerk's judgment in *Henderson* v. *M'Lintock*, November 22d 1882, in which he says—'The clause (*i.e.*, the 86th) is a useful one in enabling persons having an interest to come before the Court and call on the trustee to account for any proceedings which may have taken place in the course of the sequestration, though no creditor appears to challenge under the direct provisions of the statute.' In this case certain acts of omission are alleged, and I think it is for the trustee to show that his management was regular and in accordance with the statute. I have, however, had some hesitation in holding the trustee personally liable for the dividends he has paid without sufficient vouchers or proof, because he avers that in each case he was satisfied the debt claimed was due. I think, however, that something more than this is required on the part of the trustee. It is for the creditor to produce accounts and other vouchers, or to establish his debt in some other way, and unless he does so, the trustee must reject his claim. If I were to hold the trustee's answer a good one in the case of these claims, it would, I think, make an accounting under the 86th section of no value whatever." . . . . .

The Sheriff-Substitute then discussed in detail the various objections taken.

The defender appealed, and in support of his contention that the application was an incompetent one under the 86th section of the statute, relied on the case of *Henderson* v. *M'Lintock* (*Henderson's Trustee*), Nov. 22, 1882, 10 R. 188. It was not intended by section 86 to provide an alternative for the course provided under section 127, which gives an appeal from deliverances on claims.

The petitioner replied—The application was one strictly within the terms of the section. It was an act of management which any party having a legitimate interest might bring under the cognisance of the Court—*Burt* v. *Bell*, Feb. 3, 1863, 1 Macph. 382, opinion of Lord Cowan, p. 385. The case of *Henderson* v. *M'Lintock* (*Henderson's Trustee*) was a judgment entirely on relevancy, and in no way on the competency of that application under the section of the Act.

At advising—

Lord Young—I have read the Sheriff-Substitute's very careful and able judgment in this case, but without being able, I confess, to concur in his views. I say nothing about his criticisms of the grounds and documents of debt in the individual claims to which he refers, dealing with them as if he were considering an appeal against a deliverance by the trustee. He seems to have gone very carefully into the matter, and he may be right in his criticisms, and in thinking that the debts to which he refers are not satisfactorily established, but I think there is no such question here raised under the 86th clause of the Act. The clause is certainly not satisfactorily expressed. The language runs thus:—"The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the Sheriff although resident beyond the territory of the Sheriff, at the instance of any party interested, to account for their intromissions and management, by petition served on them." . . .

I repeat what I think your Lordship has expressed in the case of *Henderson* v. *M'Lintock* when I say that cases may occur, and may readily be conceived, in which the application of the clause may be useful, but I am very clearly of opinion that the clause was not designed to the end of entitling creditors or anyone else to have an accounting with the trustee with respect to his dealings as trustee with individual claims which he has admitted. These dealings of his, and his deliverance on them, are the subject-matter of other regulations in the statute. He is required to consider all the claims and vouchers, and after investigation he is to pronounce his deliverance on each, and there are very careful provisions in the statute for review of such deliverances at the instance of any person interested. In this clause, whatever it may be understood to mean—and I repeat it may be very useful in certain circumstances—it was not, I think, intended to supersede or to afford an alternative course of procedure for the procedure so elaborately provided for in these other clauses—I mean the trustee's investigation of and adjudication on the claims raised by the creditors before him. But this action in its conception is of that character—a calling of the trustee to account for his disposal of the individual claims of the creditors in the estate, and produce his grounds for his decision, so that the Sheriff may judge whether he has disposed of them satisfactorily; and if that were an allowable view, then, as Lord Rutherfurd Clark pointed out, it would not be excluded by the deliverance having been affirmed by the Sheriff or this Court. Affirming it might make the case hopeless, unless there was a case of *res noviter* made out, but the competency would not be affected because the trustee could be called upon to account for his intromissions. Hopeless confusion would result from such a view being taken. The trustee might be called upon to defend his deliverances at any time. Therefore, assuming that the Sheriff is right in holding that the trustee has not produced vouchers to establish all the debts, I am of opinion that he cannot now be required to do so, and ought not to have been called upon to do so. He has well intromitted to the extent of giving a regular deliverance, *prima facie* sufficient, and if there is ground of complaint which might have been established, to the effect that the vouchers were insufficient, it cannot be done in this process. Mr Pearson stated very rightly that the trustee had to investigate the claims, and require explanations from the persons making them, and to adjudicate on them, but this action proceeds on the view (which has been adopted by the Sheriff) that here the trustee is to give the explanations, and produce evidence to the pursuer here to justify what he did in respect to the creditors. That is a view of the statute which in my view is untenable and erroneous. I should have great sympathy with a man who had been wronged bringing forward any case of misconduct against the trustee, however small the matter might be, but there is none such brought forward in this case. It is an ill-conditioned proceeding, and no good ground of complaint has been *prima facie* stated. There-

fore, on the whole matter I come to the conclusion that the defences must be sustained, and the defender assoilzied from the conclusion of the action.

Lord Craighill—I am of the same opinion. I think that if we were to pronounce a different judgment from that which Lord Young proposes we should be introducing uncertainty and confusion, and possibly great hardship, into the administration of sequestrated estates. It is admitted that the deliverance of the trustee on the individual claims, and the distribution of the estate in accordance with these deliverances are absolutely final. The money is paid and cannot be got back. Therefore, if the pursuer here is to be found entitled to succeed in his application, the money must come out of the pocket of the trustee by whom it was paid away. Of course I should have no sympathy with a trustee who has been acting collusively and fraudulently in the interest of certain of the creditors, but on the present occasion the honesty and good faith of the trustee are not in the slightest degree impugned, and could not well be so, for there is no allegation on this record in regard even to one of the claims that the debt was not a debt which was truly due, and accordingly it would come to this if we sustained an action like the present under the 86th section, that after the trustee has paid away the sums which he has considered to be due to the several creditors, in the honest belief that he was acting in the proper administration of the sequestrated estate, and at the end of the day when the body of creditors have declared themselves satisfied, an individual creditor can come forward and raise the question whether or not there is sufficient evidence to justify the deliverance of the trustee, and ask the Sheriff—and on appeal this Court—to take up the case as if it were an appeal against these deliverances, with the result, however, that if the trustee is found to be in the wrong he will have to make good personally the money which he has erroneously paid away. It would be a monstrous hardship that every penny which the trustee has paid away should be at his own risk, while every judgment he has pronounced should be good against the world. That can never have been the result contemplated by the statute, and certainly has never been sanctioned by any judgment of this Court.

Lord Rutherfurd Clark — I am of the same opinion. I regard this application as one in which the complainer asks the Sheriff to review on their merits all the deliverances that the trustee pronounced on the creditors' claims. There is nothing more than that in the case, and I think it incompetent to entertain such a complaint under the 86th clause of the Act.

Lord Justice-Clerk—I concur in the opinions delivered, and I only make this further remark, that I rather think the object of the 86th clause of the statute has been to a certain extent misunderstood. Its main purpose (and it is an important one) is, I think, to provide that the trustee and commissioners and judicial factor shall be officers of Court, and amenable to the Lord Ordinary and Sheriff, the meaning plainly being that there shall be jurisdiction on the part of the Sheriff as well as of the Lord Ordinary to consider any petition presented against them for malversation in office.

It could never have been intended to provide a new procedure of review when there were already other sections in the statute dealing with the matter.

The Lords recalled the judgment, assoilzied the trustee, and found him entitled to expenses in the Sheriff Court and Court of Session.

Counsel for Defender (Appellant)—Hon. H. J. Moncreiff—Pearson. Agent—Robert Menzies, S.S.C.

Counsel for Pursuer (Respondent)—J. P. B. Robertson — Dickson. Agents — Martin & M'Glashan, S.S.C.

Thursday, December 18.

FIRST DIVISION.

CLARK AND OTHERS *v.* HINDE MILNE & COMPANY.

Public Company—Notour Bankruptcy—Poinding — Voluntary Winding-up continued under Supervision—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 7, 12—*Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 130, 163.

A public company registered under the Companies Acts, though it cannot be wound up by sequestration, but only under the Companies Acts, may yet be rendered notour bankrupt in terms of the Bankruptcy Acts.

A creditor of a joint-stock company registered under the Companies Acts, executed a poinding of certain of their effects, and obtained a warrant of sale. The sale was interdicted by another creditor, who presented a petition to have the company wound up by the Court. The shareholders resolved that the company should be wound up voluntarily. Thereafter, but within four months of the poinding, other creditors lodged in the process of poinding minutes of compearance, and produced their grounds of debt, claiming to be ranked *pari passu* on the price of the poinded goods when sold, in terms of section 12 of the Bankruptcy Act 1856. The liquidation was ultimately placed under the supervision of the Court. The poinding creditor compounded his claim with the liquidator for a certain sum, and the compromise was sanctioned by the Court, but the fact of other creditors being interested was not before the Court. The poinded goods had meanwhile been sold. The creditors who had compeared in the poinding and sale lodged a note in the liquidation, claiming a *pari passu* ranking along with the poinding creditor for the sum for which he had settled his claim. *Held* that they were entitled to such ranking, because (1) the compromise did not prejudice them; (2) the company was made notour bankrupt by the poinding, and within four months thereof they had compeared in the process of poinding in terms of sec. 12 of the Bankruptcy Act 1856; (3) the com-