their consent has been obtained. I agree with your Lordships in thinking that a creditor's silence does not presume his consent in this matter, and if there were no evidence of actual consent I think we could not hold from mere silence that consent had been obtained. But looking to the fact that the consents are signed professedly with authority, and that in the second case the agents who sign them were the agents who acted for the creditors in the negotiation of the loan and the advancing of the money, I think that we have sufficient evidence of consent in the present case. There may be other cases in which it will be necessary to be more critical, but I am satisfied with the evidence in this case.

Lord Deas was absent.

This interlocutor was pronounced:—

"The Lords . . . settle the list No. 7 of process [that of 31st Dec. 1881] as the list of creditors entitled to object under sec. 13 of the Companies Act 1867: Find that they, the creditors in the said list, have all consented or had their debts paid with the exception of fourteen creditors holding twenty-eight debentures amounting to £9300: Appoint the petitioners to consign in the Bank of Scotland the sum of £1010 to secure the said sum of £9300, and interest thereon till paid at the rate of 5 per centum, in name of the reporter Mr C. B. Logan, repayable, with interest accrued thereon, on the order of the reporter, which he is empowered to grant for the amount of any one or more of the said twenty-eight debentures, with corresponding interest, on production to him of such debenture or debentures duly discharged."

Thereafter a minute having been lodged as required by sec. 15, above quoted, the Court on 4th November 1882 pronounced this interlocutor:—

"The Lords . . . . confirm the reduction of capital as set forth in the petition; approve of the minute No. 33 of process; authorise the registration of this order and of the said minute by the Registrar of Joint Stock Companies; fix this date as the date down to which the words 'and reduced' shall be added to the name of the company [under sec. 10]; and appoint this order and the said minute to be advertised once in the *Edinburgh Gazette;* and decern."

Counsel for Petitioners—Mackintosh—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, November 4.

FIRST DIVISION.

DOUGLAS *v.* M'CREADIES.

Bankruptcy—Petition for Sequestration—Title to Sue—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 16 *and* 170.

Decree for the expenses of an action was allowed to go out in name of the agent of the pursuers, who were successful in the action, as agent-disburser. Thereafter, the expenses not having been paid, and the defender having become notour bankrupt, the pursuers presented a petition, which was signed on their behalf by the same agent, for sequestration of his estates and for the appointment of a judicial factor pending the election of a trustee. The debt alleged in their affidavits to exist was the amount of the expenses for which decree had been given in their agent's name. *Held* that the pursuers were not divested of their title to present such a petition by the mere fact that the decree for expenses had gone out in their agent's name.

Observed that it would have been otherwise had the petition been presented after diligence had been done on the decree by the agent.

Judicial Factor, Interim Appointment of, pending Election of Trustee.

Observed that the interim appointment of a judicial factor pending proceedings for sequestration is not matter of course, but ought only to be made when the Sheriff is satisfied of the necessity thereof, and that it is incumbent on the petitioner for such an appointment to make specific averments of the danger to the bankrupt estate which makes the appointment necessary.

On 29th June 1882 the Second Division of the Court pronounced an interlocutor in an appeal for the pursuers in an action at the instance of William M'Creadie and John M'Creadie against James Douglas, by which interlocutor the Court sustained the appeal for the pursuers John and William M'Creadie, found Douglas liable in the expenses of the appeal and a portion of those in the Inferior Court, and authorised the Sheriff of Dumfries and Galloway, before whom the case had originally depended, to decern for the amount of these expenses as taxed. The amount as taxed was £112, 6s. 2d., and the Sheriff on pursuers' motion gave decree therefor in name of William Ross Garson, the M'Creadies' agent, as agent-disburser. Thereafter, on 27th July 1882, Douglas was rendered notour bankrupt as the result of the diligence of certain creditors on a promissory-note granted by him.

In September 1882 the M'Creadies presented this petition in the Sheriff Court of Dumfries and Galloway at Stranraer, in which they asked the Court to grant warrant to cite Douglas to appear and show cause why sequestration of his estates should not be granted, and further to appoint a judicial factor on his estate in terms of section 16 of the Bankruptcy (Scotland) Act 1856, which provides that "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 Court may deem necessary, or without such special application, if the Court think proper, to take immediate steps for the preservation of the estate either by the appointment of a judicial factor . . . or by such other proceedings as may be requisite; and such interim appointment 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" (by section 170, quoted *infra.*) With regard to the prayer for the appointment of a judicial factor the petitioners averred—"There is danger of the estate of the said James Douglas being consumed by him, to the prejudice of his creditors, prior to the appointment of a trustee in the sequestration, and it is necessary for the interim preservation of the estate that a judicial factor be appointed thereon." The debt sworn to in the petitioners' affidavits was the sum of £112, 6s. 2d., which, as above explained, had been decerned for by the Sheriff as the expenses of the appeal, and for which decree had gone out in name of Mr Garson as agent-disburser. The petition for sequestration was signed by him as the M'Creadies' agent. The Sheriff granted warrant to cite Douglas to show cause why sequestration should not be granted, and meantime appointed Hugh Adair, banker, Stranraer, as judicial factor, with all the powers necessary for the interim preservation of the estate, including the power to recover debts, and granted warrant to the judicial factor to take possession of bank-notes, money, bonds, bills, cheques or drafts, deposit-receipts, or other moveable property belonging to the debtor, and if necessary for that purpose to open lockfast places and search the person and premises of the debtor.

Against this interlocutor an appeal was taken on 2d October to the First Division of the Court of Session, under section 170 of the Bankruptcy (Scotland) Act 1856, for the purpose of having the appointment of the judicial factor recalled, on the ground that the petitioner had no title to present the petition for sequestration. This section is in these terms—"It shall be competent to bring under review of the Inner House of the Court of Session . . any deliverance of the Sheriff after the sequestration has been awarded, except when the same is declared not to be subject to review, provided a note of appeal be lodged with and marked by the Sheriff," &c.

Argued for appellant — The pursuer in the Sheriff Court action had no title to present this application or to get a judicial factor appointed. No notice of this application was given until the appointment had been made. As the sequestration can be successfully opposed, so also can the appointment of a judicial factor.

Argued for respondents—(1) The contention for the appellant was, that as there was no existing debt the appointment should be recalled. The question whether there was a debt or not was a question for the Sheriff. (2) The Sheriff must have been satisfied from information supplied that this estate was in danger, or he would not have appointed a judicial factor.

Authority—*Black* v. *Kennedy*, June 29, 1825, 4 S. 124.

At advising—

Lord President—The oath of the petitioning creditors in this case is in proper form, and it affirms that the bankrupt is resting-owing the sum of £112, 6s. 2d. of expenses, conform to an interlocutor of the Second Division of this Court dated 29th June 1882, and an interlocutor of the Sheriff-Substitute of Wigtownshire, dated 20th July 1882, decerning against him for the sum of £112, 6s. 2d., as authorised by the interlocutor of the Second Division. On the motion of the pursuers decree was allowed to go out in the name of William Ross Garson, agent-disburser, but it was all the same a decree in favour of the pursuers of the action, and that decree fully bears out that the bankrupt is owing them the amount claimed. The only point that I can see in favour of the appellant here is the circumstance of this decree going out in the agent's name, but that does not derogate in the least from what has been done, for the pursuers may recover the amount, and with it make payment to the agent for his services. No doubt if the agent had done diligence after taking out the decree it might have been different. As was observed by Lord Pitmilly in the case of *Black* v. *Kennedy*, "The decree for expenses being in the agents' name, and they having given a charge for them, Black (the petitioner) has no title." But there has been no charge here. Garson, the agent for the pursuers, signs the petition for sequestration, and says the debt is resting-owing to his clients. In these circumstances I am for refusing the appeal.

Lord Mure—In this case decree has been allowed to go out in the agent's name. This is a mere arrangement of the parties, and as no proceedings have been taken on the decree the pursuers of the Sheriff Court action are in no way divested, and I agree with your Lordship in thinking that this appeal must be refused.

Lord Shand—I concur, and have nothing to add on the point to which your Lordships have adverted. It appears to me, however, that in applications of this kind in the Sheriff Court, when interim appointments of the nature in question are craved, the petition should contain a specific averment of the risk which is said to attend the bankrupt's estate, and not a mere general statement that danger would arise if it continued to be left under his control. A judicial factor is apparently appointed without intimation in such cases. Presumably the Sheriff had information warranting him in making the appointment in question, but I desire to say that it should not be done as a matter of course.

Lord President—I concur in what Lord Shand has said as to the importance of the Sheriff being satisfied of the necessity of making such appointments, and that applications of this kind should not be granted as a matter of course.

Lord Mure—I also concur in the observations of Lord Shand.

Lord Deas was absent.

The Court refused the appeal.

Counsel for Appellant — Strachan. Agent—David Milne, S.S.C.

Counsel for Respondents—M'Kechnie. Agent—James M'Caul, S.S.C.