Counsel for the Complainer — Comrie Thomson — Salvesen. Agents—H. & H. Tod, W.S.

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Tuesday, November 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HOPE *v.* MACDOUGALL.

Bankruptcy—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 26 *and* 30—*Procedure in Sheriff Court Prior to Sequestration—Review.*

In a petition for sequestration presented by a creditor, the Sheriff by his first interlocutor appointed a diet for disposing of a caveat lodged by the debtor. The debtor thereafter lodged a note objecting to the jurisdiction of the Sheriff, and by his second interlocutor the Sheriff allowed a proof on the question of jurisdiction. After hearing the evidence the Sheriff pronounced a third interlocutor repelling the plea to jurisdiction, and *quoad ultra* granting warrant to cite the debtor, and granting diligence against witnesses and havers in the usual form.

Held that the first and second interlocutors of the Sheriff, and that part of his third interlocutor which dealt with the question of jurisdiction, fell to be *recalled* as *incompetent*, in respect that under section 26 of the Bankruptcy Act the Sheriff was bound, on a petition for sequestration being presented, forthwith to pronounce an interlocutor granting warrant to cite the debtor, and that objections to the Sheriff's jurisdiction fell to be dealt with after citation of the debtor.

John Alfred Hope presented a petition in the Sheriff Court of Lanarkshire for sequestration of the estates of Robert Macdougall. The petition prayed the Court in the usual form "To grant warrant, in terms of the Bankruptcy (Scotland) Act 1856, and Acts explaining and amending the same, to cite the defender to appear before the Court to show cause why sequestration of his estates should not be awarded; to grant diligence against witnesses and havers, to recover evidence of the defender's notour bankruptcy and other facts necessary to be established, and thereafter to award sequestration of the estates."

The defender having lodged a caveat, the Sheriff-Substitute (ERSKINE MURRAY) on 5th September 1893 pronounced this interlocutor:—"Appoints the 7th day of September current, at ten o'clock forenoon, within the chambers of the Sheriff-Substitute, Mr Murray, County Buildings, 50 Wilson Street, Glasgow, as a diet for disposing of the caveat lodged by the defenders to-day, with certification."

The defender thereafter lodged the following note of objections—"The said Robert Macdougall objects to the jurisdiction of the Sheriff of Lanarkshire on the ground that he is not subject thereto in terms of the Bankruptcy Statute."

On 7th September the Sheriff-Substitute pronounced this interlocutor:—"Allows the note of objections to be received, and having heard parties' prors., before answer and *primo loco* allows a proof on the question of jurisdiction, and assigns Monday first, at 10·15 a.m., before Sheriff Spens, as a diet."

Proof was accordingly taken, and thereafter the Sheriff-Substitute (SPENS) pronounced this interlocutor:—"Having heard evidence, finds respondent has been carrying on business in Glasgow within the twelve months preceding the date of presentation of this petition, therefore repels the plea of no jurisdiction: *Quoad ultra*, having considered the foregoing petition with the writs produced, grants warrant to cite, in terms of the statutes, the therein designed Robert Macdougall to appear in Court on an *inducice* of seven days from the date of such citation, to show cause why sequestration of his estates should not be awarded; directs intimation of this warrant, and of the diet of appearance on the said *inducice*, to be forthwith made in the *Edinburgh Gazette* in terms of the statute; and grants diligence against witnesses and havers to recover evidence of the notour bankruptcy of the said Robert Macdougall, and of the other facts necessary to be established for obtaining the sequestration, and commission to the Clerk of Court or any of his deputes to take the examinations of witnessess and havers, and to report."

Section 26 of the Bankruptcy Act provides—"When a petition for sequestration is presented without the consent of the debtor, or for the sequestration of a debtor who is dead, without the consent of the successor, the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite the debtor, or if dead his successor, to appear within a specified period . . . to show cause why sequestration should not be awarded, and the Lord Ordinary or the Sheriff shall, if desired, grant diligence to recover evidence of the notour bankruptcy or other facts necessary to be established."

Section 30 provides as follows—"When the petition is not by or with the concurrence of the debtor, or if dead of his successor, and if the debtor, or if dead his successor, do not appear at the diet of appearance, either in person or by his counsel or agent, and show cause why the sequestration cannot be competently awarded, or if the debtor so appearing do not instantly pay the debt or debts in respect of which he was made bankrupt, or produce written evidence of the same being paid or satisfied, and also pay or satisfy, or produce written evidence of the payment or satisfaction of the debt or debts due to the petitioner or to any other creditor appearing and concurring in the petition, the Lord Ordinary

or Sheriff, on production of evidence of the citation and of the foresaid requisites of sequestration, shall award sequestration in manner and to the effect before mentioned." . . .

The defender then appealed to the First Division of the Court of Session, and on 29th September the Lord Ordinary on the Bills (TRAYNER) dismissed the note of appeal, affirmed the deliverance of the Sheriff appealed from, and remitted to the Sheriff to proceed in terms of the statute.

The defender reclaimed, and argued—(1) The petitioner had failed to show that the defender carried on business in Glasgow, and it was admitted he did not reside in the sheriffdom. The Sheriff had therefore no jurisdiction to award jurisdiction. (2) The Sheriff had, however, acted quite competently in allowing a proof, and the defender who through missing his train had failed to attend the proof, should be allowed an opportunity to produce evidence in support of his note of objection. Before awarding sequestration the Sheriff had to be satisfied that he had jurisdiction—sections 18 and 30. That question could not be determined in many cases without proof. (3) An appeal prior to the awarding or refusing of sequestration was quite competent—*Cuthbertson* v. *Gibson*, May 31, 1887, 14 R. 736. If the right of appeal was not expressly excluded by the statute, it existed —*Marr & Sons* v. *Lindsay*, June 7, 1881, 8 R. 784; *Scott* v. *Roy*, January 17, 1885, 22 S.L.R. 346.

The petitioner argued—(1) The Sheriff had come to a right conclusion in sustaining his jurisdiction. (2) He had, however, not acted in terms of the statute in entertaining the defender's objection to the jurisdiction at the date he did. On the petition being presented he should have granted warrant for citation of the debtor, and diligence for the recovery of evidence of the facts necessary to be established, and, *inter alia*, of the fact that he had jurisdiction—section 26. At the diet of appearance it would have been his duty, on production of evidence of the debtor's citation and of the requisites of sequestration, to award sequestration—section 30. (3) The appeal was incompetent. No appeal was allowed against the interlocutor awarding sequestration—section 31; and there was an express provision authorising appeals against interlocutors pronounced after the award of sequestration—section 170. The necessary inference was that there was in the general case no right of appeal against interlocutors pronounced prior to sequestration. In *Cuthbertson's* case, which was the only case quoted by the defender of an appeal taken prior to sequestration, the appeal was against an interlocutor appointing a judicial factor under section 16 for the *interim* preservation of the estate, and appeal was expressly authorised by that section. The defender could derive no benefit from the fact that he had lodged a caveat, for that was a proceeding entirely unwarranted by the statute.

At advising—

LORD ADAM—In this case a petition was presented in the Sheriff Court of Lanarkshire by John Alfred Hope against Robert Macdougall, for sequestration of the estates of the latter under the Bankruptcy Acts. It prayed the Court in the usual way "to grant warrant . . . to cite the defender to appear before the Court to show cause why sequestration of his estates should not be awarded, to grant diligence against witnesses and havers to recover evidence of the defender's notour bankruptcy, and other facts necessary to be established." It appears that the alleged bankrupt lodged a caveat on 5th September, and in consequence the Sheriff-Substitute appointed the 7th day of September as a diet for disposing of this caveat. The parties met on that day, but apparently the defender had previously lodged a note of objections to the jurisdiction of the Sheriff of Lanarkshire on the ground that he was not subject thereto in terms of the Bankruptcy Statutes. After hearing parties the Sheriff-Substitute before answer allowed a proof on the question of jurisdiction. That proof was led on the 11th, and then the Sheriff-Substitute pronounced this interlocutor—[*His Lordship then quoted the Sheriff-Substitute's interlocutor of 11th September*].

Now, it appears to me that the Sheriff-Substitute in pronouncing the two interlocutors of 5th and 7th September and the first part of the interlocutor of 11th September acted altogether *ultra vires*. His jurisdiction is entirely statutory and in no way under the common law, and he must therefore proceed as the statute directs and not otherwise. Now section 26 of the Bankruptcy Act of 1856 points out what the Sheriff should do when a petition for sequestration presented without the debtor's consent comes before him for the first time. That section provides "when a petition for sequestration is presented without the consent of the debtor . . . the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite the debtor . . . to appear within a specified period, if he be within Scotland." The section next deals with the mode of citation, and then provides—"And the Lord Ordinary or the Sheriff shall, if desired, grant diligence to recover evidence of the notour bankruptcy or other facts necessary to be established." One of these other facts is the fact that the debtor is subject to the jurisdiction of the Sheriff by having resided or carried on business within the sheriffdom for the year preceding the date of the petition. The further procedure is provided for by section 30, which is to this effect—"Where the petition is not by or with the concurrence of the debtor . . . and if the debtor . . . do not appear at the diet of appearance, either in person or by his counsel or agent, and show cause why the sequestration cannot be competently awarded, or if the debtor so appearing do not instantly pay the debt or debts in respect of which he was made bankrupt, or produce written evidence of the same being paid or satisfied, and also pay or satisfy or produce written evidence of the payment or

satisfaction of the debt or debts due to the petitioner or any other creditor appearing and concurring in the petition, the Lord Ordinary or Sheriff, on production of evidence of the citation and of the foresaid requisites for sequestration, shall award sequestration in manner and to the effect before mentioned." . . . . The petitioner, therefore, cannot succeed in obtaining sequestration of the estates of his debtor unless he produces evidence of the debtor's citation and of the requisites of sequestration previously mentioned in the Act. If the debtor says that he has not resided or carried on business within the sheriffdom for the year preceding the application, and the petitioner has not evidence ready upon that point, proof may be required, but that is the stage at which it must be produced. What the Sheriff has done in this case is to divide the matter before him into two parts, and to take a separate proof on the question of jurisdiction at the first stage in the process. It appears to me that this proceeding on the part of the Sheriff-Substitute is incompetent and *ultra vires*.

The next question is what we are to do now to put the matter in the proper form. Your Lordships will observe that part of the last interlocutor of the Sheriff is quite competent, and should have been pronounced at the beginning of the process. I think there is authority for what we should do in the case of *Reid* v. *Strathie*, June 29, 1887, 14 R. 847. In that case there was a competition for the office of trustee. The Sheriff-Substitute sustained some objections to votes and repelled others, but with regard to one he allowed a proof at large. On appeal the Court were of opinion that the interlocutor of the Sheriff-Substitute was final as regarded the objections which he had sustained or repelled, and that it was quite incompetent for him to allow a proof at large in order to determine the validity of objections to votes given in the election of a trustee. Lord President Inglis then says—"The Sheriff-Substitute heard parties upon these objections, and pronounced the interlocutor of 19th May 1887, which is now before us. That interlocutor disposes of various objections which were stated, and it is in the usual form and in terms of the statute down to and including that part of it which repels the objection to the vote of Ross Robertson, Auld, and others. But then it deals with one objection stated by Reid to the vote of Thomas Anderson, merchant, Glasgow, which objection he was not able instantly to verify. In these circumstances the Sheriff-Substitute, instead of repelling the objection as he ought to have done, allows Mr Robert Reid a proof of his averments, and to Mr David Strathie a conjunct probation. Now it has been decided in several cases to which I need not separately refer, that such allowance of proof is incompetent, and having in view those authorities that part of the interlocutor is beyond the power and jurisdiction of the Sheriff, and is not within the statute. That error being before us, I think our course is to quash that part of the interlocutor *ante omnia*. It is obvious that if the Sheriff-Substitute had not fallen into the mistake of allowing a proof he would have proceeded in ordinary course to declare one of the candidates duly elected, and we ought, therefore, to send back the case to the Sheriff-Substitute to complete the interlocutor."

I am of opinion that we should follow the course there recommended, and quash the interlocutors of the Sheriff-Substitute which are *ultra vires* and irregular. Accordingly, it will be proper to recal the Sheriff-Substitute's interlocutors of 5th and 7th September, and his interlocutor of the 11th in so far as it deals with the question of jurisdiction, but *quoad ultra* to affirm that interlocutor. I do not in the least mean to say that I should differ from the result at which the Sheriff has arrived if it had been competent for him at that stage to pronounce a finding on the question of jurisdiction. On the contrary, I should agree in that result.

I should add that in addition to recalling the interlocutors of the Sheriff of 5th and 7th September, and part of his interlocutor of the 11th, it will also be necessary to recal the interlocutor of the Lord Ordinary.

LORDS M'LAREN, KINNEAR, and the LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for the defender Robert Macdougall against the interlocutor of Lord Trayner dated 29th September 1893, and heard counsel for the parties, Recal the said interlocutor: Further, recal as incompetent the interlocutors of the Sheriff-Substitute dated 5th and 7th September 1893, and also the interlocutor of the Sheriff-Substitute dated 11th September 1893 in so far as it 'finds respondent has been carrying on business in Glasgow within the twelve month preceding the date of presentation of this petition,' and 'repels the plea of no jurisdiction:' *Quoad ultra* adhere to said last-mentioned interlocutor, and decern: Find the respondent (petitioner) entitled to expenses, and remit the account thereof to the Auditor to tax and to report to the Sheriff, and remit to the Sheriff to proceed, with power to decern for the taxed amount of said expenses."

Counsel for the Petitioner—MacWatt. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender—Craigie—W. Thomson. Agent — Thomas M'Naught, S.S.C.