unless he failed to prove his allegation that the rule as to changing tickets was unknown to and not binding on him.

The Court disallowed the bill of exceptions and refused to grant a new trial.

GUTHRIE, for the defenders, now moved the First Division to apply the verdict.

CAMPBELL SMITH, for the pursuer, opposed this motion, on the ground that it should have been made in the Outer House, and that the Lord Ordinary who tried the case should be moved to apply the verdict—*Gardner* v. *Keddie*, June 20, 1866, 4 Macph. 850.

The Court refused the motion on the ground that it should have been made in the Outer House.

Counsel for Pursuer—Campbell Smith. Agent —Daniel Turner, S.L.

Counsel for Defenders—Trayner—Guthrie. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday December 13.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

BELL'S TRUSTEES *v.* BELL'S TRUSTEE.

Bankruptcy—Sequestration — Deceased Debtor—Right of Heir-at-Law to Heritable Estate pending Sequestration.

The heir-at-law of a person deceased whose effects had been sequestrated after his death, but whose trustee had in his hands a large surplus over and above all claims, whether admitted and paid or contested and still outstanding, *held* entitled, while the sequestration was still in subsistence, to be put in possession of, and to have the trustee ordained to convey to him, the heritable estate of the deceased to which he had right as such heir duly served.

John Bell, merchant in Glasgow, died there intestate in March 1880, leaving a large amount of property both heritable and moveable. He was carrying on several large businesses there up to the time of his death. James Bell, letterpress printer, was duly served heir-at-law in general to him in October following. The next-of-kin of the deceased were at his death found to be comparatively poor people, and unable to find the caution required to enable any of them to be decerned executors on the estate. A petition for sequestration was accordingly presented in April 1880 at the instance of certain of Mr Bell's creditors, on which a deliverance was pronounced by the Lord Ordinary in September following, sequestrating the whole estate and effects of the deceased. In this sequestration Alexander Moore, accountant, was appointed trustee. On 7th November 1881 James Bell, the heir-at-law, raised this action against Moore, as trustee on the deceased John Bell's sequestrated estate, to have it found that he was in right of the heritable property under the defender's management which had belonged to the deceased, and to have him ordained to convey it to the pursuer. The pursuer averred that all admitted claims against the deceased's estate had been already paid in full, and that the defender had, besides, in his own hands, or consigned in bank, funds sufficient to meet the whole claims still outstanding, should they be found entitled to a ranking, and in addition thereto a balance of more than £50,000. He also averred that the defender's management of the heritable property was very expensive, and was causing great loss to him. These statements, with the exception of the last, were not disputed by the defender. In particular, the balance of upwards of £50,000 was brought out in a state of the funds of the sequestrated estate prepared by the defender himself as at 29th August 1882. He however resisted the pursuer's claim, averring that there were important questions still unsettled between heir and executor, and that there were two other parties each laying claim to be the heir-at-law of the deceased. The defender also stated that he had not completed any title to the properties in question, and did not intend to do so, his right to them standing on his act and warrant. Before the record was closed the pursuer died, and the action was insisted in by William Bell and others, his testamentary trustees.

The pursuer pleaded—"(1) The pursuer, as heir-at-law duly served to the deceased John Bell, is entitled to decree as concluded for, in respect the whole debts due by the sequestrated estate have been paid or provided for. (3) The pursuers, as in right of the heir-at-law, are entitled to the possession and management of the subjects mentioned in the summons free from the interference of the defender, and they are also entitled to delivery and possession of the whole writs, titles, evidents, and securities thereof."

The defender pleaded—"(1) The present action is unnecessary, and ought to be dismissed, in respect that the sequestration being merely a burden on the radical right to the property of Mr Bell's heir-at-law, such heir can complete his title to any right which Mr Bell would in the present position of the sequestration have had, by recording a notarial instrument on his service, or otherwise, without either conveyances or adjudications as concluded for. (2) It being no part of the defender's duty as trustee to decide as to the respective rights of the heir-at-law and the executors in the sequestrated estates so far as not required to pay the creditors, or as to the parties entitled to be heir and executors respectively, he is only bound to denude under an order of Court in proceedings to which all interested are parties or have been called. (3) Questions having arisen between the heir-at-law and the next-of-kin as to their respective rights in Mr Bell's succession, so far as not required to pay creditors, the defender is not in safety to convey the properties in question without judicial authority, and without all parties interested being called. (4) All parties interested are not called. The next-of-kin, and other parties claiming to be heirs-at-law of the late John Bell, ought to have been called as defenders hereto. (5) In the whole circumstances, this action is incompetent, or at least premature, and ought to be dismissed with expenses."

The Lord Ordinary repelled the defences and decerned against the defender conform to the whole conclusions of the action.

The defender reclaimed, and argued—An attempt like this to take any part of a sequestrated estate out of the *universitas* which was vested in the trustee by statutory title was contrary to the provisions of the Bankruptcy Acts.—Bankruptcy (Scotland) Act 1856, sec. 155; *Anderson*, March 13, 1866, 4 Macph. 577.

Argued for pursuers—If there was no provision in the Bankruptcy Acts for such a proceeding as that proposed by the pursuers here, there was certainly none against it. The pursuers' demand was a reasonable one, and the objections to it were frivolous. The pursuers' case was an appeal to the *nobile officium* of the Court.

At advising—

Lord Justice-Clerk—In this case we have to consider a rather unusual application. The question is one of the highest equity, and I see no reason why it should not be held competent for us to deal with it in the circumstances, which are these—sequestration was made of the property of a deceased debtor, who had left ample funds for the satisfaction of all claims against his estate, and a large surplus besides. The sequestration has been going on for some time, and there is shown to be a balance of about £50,000. The pursuer, who is the heir-at-law of the deceased, asks that the heritable estate to which he is heir, amounting to about £38,000, of course with the burdens upon it, should be given over to him. Now, so far as we can see, the obligations of the estate do not now exhaust or nearly exhaust the estate, nor according to any reasonable probability will they do so. In these circumstances I think there would be great hardship to the heir-at-law if he were kept out of his estate. No reason has been suggested why such a large sum should go on being administered by the trustee in the sequestration when every creditor either is or is certain to be satisfied in full.

Lord Young—I entirely concur. In the ordinary course where a sequestration comes to an end, and any balance remains in the hands of the trustee, he gives it over to the debtor. Of course a balance cannot be handed over to a deceased debtor, but it can to the party who is in right of it, and the person in right of the heritable estate of the deceased here is the pursuer. He produces his service, and that is his position and the foundation of his claim. The trustee objects that the sequestration is not at an end—a number of trifling things remain to be done which will occupy time. But he has in his hands £50,000 of a surplus, and so far as concerns the heritable estate the pursuer says, "I am the party entitled thereto, and there is a surplus, and I want that to which I have right." I assume that the pursuer satisfied the Lord Ordinary as to his true position. In any event the heritable estate will eventually be his, he being the heir-at-law, and the debtor being dead. If so, it is certainly reasonable that he should contend that this heritable property which now belongs to him should not be kept up in the hands of the trustee pending the discussion of claims with which he has no concern, and to await the result of the winding-up of the sequestration. It is conditionally establishing a right according to which this surplus is to go. The interlocutor of the Lord Ordinary has given it to the right party. I think it is reasonable and should be adhered to.

Lord Craighill—I concur. I think this is a reasonable action in the circumstances, and I also think that the Lord Ordinary's judgment is a reasonable judgment upon the action. It would be a cause of great regret if the pursuer were to be kept out of his estate and thus deprived of the advantage of managing his own property to which he has now succeeded, the expenses of doing which would necessarily be much greater in the trustee's hands than in his own. It might have been that there were provisions in the Bankruptcy Act which would have precluded such a claim as is here made, but looking to section 155, which provides that 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, it does not seem to apply, but merely indicates what is to be done with the property after all debts are paid. But here there is enough, and more than enough, for payment of all debts still undischarged. It is therefore clear that the statute does not provide for such a case as this, so it is reasonable and for the interest of all concerned that the demand of the pursuer should be complied with. I think it is right that we should have power to do that which the Lord Ordinary has done, since by such an expedient no one is prejudiced.

Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Dickson. Agent—William Finlay, S.S.C.

Counsel for Defender (Reclaimer)—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Saturday, December 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

LAIDLAW *v.* MILLER (LAIDLAW'S TRUSTEE).

(*Ante*, 14th July 1882, vol. xix. p. 819).

Husband and Wife—Bankruptcy—Wife's Claim in Husband's Sequestration—Interest.

A wife became entitled *stante matrimonio* to certain property exclusive of the *jus mariti* and right of administration of her husband. She conveyed this property in security of loans obtained by her husband for the purposes of his business, and ultimately the loans were repaid out of it *Held* that she was entitled to rank on her husband's bankrupt estate for the amount so paid by her on his account, but that she was not entitled to interest on that sum, since such interest could not have been claimed from her husband if he had remained solvent.

The circumstances of this case are set out in detail in the report of *Newlands* v. *Miller* (*Laidlaw's Trus-*