Wednesday, November 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

AITKEN *v.* KYD (AITKEN'S TRUSTEE).

Sequestration—Recal of Sequestration.

The Court will not recal a sequestration on the ground that sufficient evidence of the debtor's insolvency was not laid before the Court which awarded sequestration, but only if satisfied, on a consideration of the facts proved in the application for recal, that the debtor was at the time of being made bankrupt in a position to meet his current obligations, and would be able on a realisation of his estate to pay his creditors in full.

Opinion by Lord Kincairney—(1) that a decree in absence is *prima facie* a sufficient voucher for the debt of a creditor petitioning for sequestration; (2) that if it were proved that no debt was due to the party on whose petition a sequestration was awarded, that might be a ground for considering whether the sequestration should be recalled.

J. W. Aitken carried on business as a horse-dealer for several years in Perth. He had frequent and extensive transactions with Hay & Kyd, auctioneers in Perth, and the account between them stood unsettled for several years prior to 1888, but in the autumn of that year they began to press him for payment, and ultimately put the matter in the hands of their law-agent, who wrote to Aitken on 3rd October threatening legal proceedings if the account was not immediately settled.

While Hay & Kyd were thus pressing Aitken for payment of their account, he was converting his stock of horses into Clydesdales, with the intention of taking them to Canada for sale. He was at this time considerably in debt, and there were several actions depending against him Notwithstanding these facts, and that he was threatened with an action by Hay & Kyd, Aitken sailed for Montreal on 12th October, taking five horses with him. Just before he sailed Kyd, a partner of Hay & Kyd, applied for and obtained in the Sheriff Court at Perth a *meditatione fugæ* warrant against Aitken, but failed to have him apprehended. Hay & Kyd also raised an action against him in the same Court for £273, being the alleged amount of their account, and on the dependence of this action they arrested five horses which were on their way to Glasgow to be shipped to Montreal.

The report of the proceedings which had been taken against Aitken spread rapidly in Perth and the vicinity, and various actions were immediately raised against him in the Sheriff Court.

In the action by Hay & Kyd appearance was entered for Aitken, but no defence was lodged. On Friday 26th October the Sheriff-Substitute allowed him to lodge defences by the following Tuesday, but ordained him on that day to sist a mandatory. On 2nd November a minute was lodged for Aitken, craving a sist of the action for a month. It was stated that Aitken had gone to Canada with a consignment of horses, intending to return whenever he had sold them; that he disputed the claim of Hay & Kyd, and had left general directions for the defence of the action, but had not had time to give his agent full information for the statement of a complete defence, and that he had property in Perth and had left money in bank.

The Sheriff-Substitute, by interlocutor of 6th November, refused the crave, and Aitken's agent thereupon minuted on the interlocutor-sheet his resignation of the agency; and the Sheriff-Substitute, by interlocutor of 9th November, granted decree in respect of the failure of the defender to sist a mandatory or to lodge defences. By an interlocutor dated 13th November he gave decree for expenses and allowed immediate extract. A similar course was followed in the other actions which had been raised against Aitken.

Hay & Kyd extracted their decree, and gave a charge thereon, and on 22nd November they, with the concurrence of James Scott, another creditor who had obtained a decree against Aitken for £126, presented a petition for sequestration. Service was ordered on 22nd November, and on 13th December the Sheriff-Substitute, after hearing parties' procurators on a caveat, awarded sequestration, and thereafter Kyd was elected and confirmed trustee on the sequestrated estate.

On Aitken's arrival at Montreal the five horses which he had taken with him were arrested at the instance of Macdonald & Fraser, auctioneers in Perth, who had also obtained a decree against him. After getting these arrestments loosed, and selling the horses, Aitken returned to this country, reaching Liverpool on 7th December 1888.

On 16th January 1889 Aitken presented the present petition for recal of his sequestration, on the grounds, *inter alia*, (1) that no *prima facie* case of insolvency had been laid before the Sheriff, and (2) that at the date of the sequestration he was not insolvent, and that he could still pay his creditors in full.

Answers were lodged by Kyd, the trustee in the sequestration.

A number of Aitken's creditors lodged minutes consenting to the recal of the sequestration, on the ground that it had been brought about by the false idea that he intended to abscond.

Proof was led on 13th March. It appeared that the evidence of insolvency on which the Sheriff had awarded sequestration consisted only of the decrees obtained by Hay & Kyd and Scott, with the expired charges thereon. Aitken not only deponed that Hay & Kyd's account was grossly overcharged, but made a counter claim against them, which brought out a balance in his favour. His evidence on this point was unsupported. It was admitted by Kyd,

the respondent, and the bookkeeper of the firm of Hay & Kyd, that the account had been inadvertently overcharged to the extent of £59, but they asserted that the balance of the account was due by Aitken. Aitken also led evidence to show that he was solvent at the date of his sequestration, and that his estate was fully able to meet all claims against it, but failed to satisfy the Court on these two points. The value of his estate depended chiefly on the value of book-debts due to him, and the value of certain heritable property belonging to him in Perth. In the last stage of affairs lodged by the respondent, the trustee in the sequestration, it was estimated that the bankrupt's estate, which was still unrealised, would pay about 5s. in the pound.

On 5th August the Lord Ordinary (KINCAIRNEY) found that no sufficient grounds had been established for recalling the sequestration, therefore refused the petition, and decerned.

"*Opinion.*—[*After a review of the facts*]—Two very opposite views of Aitken's conduct were submitted as resulting from the evidence. It was maintained for the respondent that Aitken had really absconded from his creditors, and it was maintained for the petitioner not only that he had not done so, but that the respondent never thought that he had, and had applied for his apprehension in bad faith, and that his whole proceedings amounted to an unjust, wrongous, and oppressive misuse of diligence.

"Without attempting an examination of the evidence of these points, it may be enough that I should express the opinion that the evidence does not justify either of these positions.

"Aitken's conduct was extremely suspicious, and open, supposing it to be honest, to the gravest misconstruction. He was considerably in debt; he was defender in depending litigations; he had been threatened with an action by Hay & Kyd, and being in that position he removed from Perth, not the whole, but almost the whole, of his moveable property, and he certainly did not leave within the reach of his creditors nearly enough to pay his debts. His business premises had the appearance of being permanently abandoned. He seemed so eager to get away that he left behind him five of his horses without making any attempt to recover them. At first sight his behaviour seemed that of a man absconding from his creditors. Nevertheless, the impression which the proof has produced on me is, that he really did not intend to abscond, and had in fact no dishonest intent at all. I think so, because I thought he was speaking the truth when he said so as a witness; because he left money in bank; because he had mentioned his intention to several people though not to Hay & Kyd, because his affairs, though not in a good way, were by no means desperate, and because he in fact did return when he found that no more was to be done in Canada.

"On the other hand, I have not the slightest doubt that Kyd believed that Aitken intended to abscond, and did in fact abscond from his creditors. From his point of view, and seeing that he had never heard a word from Aitken (as I think he had not) of his intention to leave the country, it was hardly possible that he could have thought anything else, and I see no reason at all to question the truthfulness of the oath which he emitted in support of his application for a *meditatione fugæ* warrant. He may have been harsh, and afterwards I think he was hasty, but I do not doubt that he acted with the object of protecting what he believed to be his rights, and not with the object of injuring Aitken.

"These are the circumstances in which the question has arisen whether this sequestration ought to be recalled. I have found the case attended with much difficulty, and it is only with considerable hesitation and doubt that I have come to the conclusion that the sequestration should be allowed to proceed. . . .

"It was further maintained that the claims of the petitioning and concurring creditors were not sufficiently vouched. They were vouched by decrees of the Sheriff Court. It was said that they were not better than decrees in absence, and I do not know that they were. But I am not aware that a decree in absence is not *prima facie* a sufficient voucher for the debt of a petitioning creditor. On this point the petitioner referred to *Dow* v. *The Union Bank of Scotland*, February 23, 1875, 2 R. 459, and *Fleming* v. *Yeaman*, December 1, 1883, 21 S.L.R. 164, and 9 App. Cas. 966. But these cases appear to me to be special, and to have no application. I think it tolerably clear that there is no good objection to the sequestration on the face of the proceedings.

"But I understood it to be contended that the sequestration should be recalled, because it appeared from the proof that Aitken was not notour bankrupt at the date of the sequestration, because he was not then insolvent. There is a good deal of evidence bearing more or less directly on this point which I do not stay to examine. But I am of opinion that it does not show that the petitioner was then solvent, but, on the contrary, that he was insolvent in the sense of the Bankruptcy Statutes—that is to say, that he was not then in a position to pay his debts—*M'Nab* v. *Clarke*, March 16, 1889, 16 R. 610. Whether he could have done so by selling his heritable property is a different question. That is necessarily problematical. But I am not at all satisfied on the proof that he could. . . .

"It was further maintained—and this was the part of the petitioner's case which seemed to present the greatest difficulty—that whether the decree in favour of Hay & Kyd was *prima facie* a sufficient voucher or not, it did not, when it was examined, support their claim of debt (1) because it ought not in the circumstances to have been pronounced, and also (2) because the sum brought out in the account libelled in the summons, for which decree had been given, was not due.

"It was maintained that Aitken should not have been ordained to sist a mandatory,

and that at all events his agent ought to have been allowed time to procure the authority of his client to do so. It was said that he could not sist a mandatory without Aitken's written mandate, and that it was a sheer impossibility to comply with the Sheriff-Substitute's order within the time allowed — *Gunn & Company* v. *Cooper*, 22nd November 1871, 10 Macph. 116.

"I think there is no good objection to the Sheriff-Substitute's order on Aitken to sist a mandatory. That was within his discretion, and in the very special circumstances I think it impossible to say that that order ought not to have been pronounced. But it is not clear to me why the process was not sisted in compliance with the minute which was lodged by the agent. I do not see the reason for the hurry, and must say that I think it would have been much better had the crave been granted. But then it is to be observed that there is no statement in the minute that Aitken's agent had no authority to sist a mandatory. He ought to have been provided with that authority, for Aitken was defender in depending processes. He was in communication with his law agent before he left, and it cannot be supposed that he had not recognised the possibility of the action being raised by Hay & Kyd which had been formally threatened, and he might have foreseen that an order for a mandatory was at least possible. If the agent really stood in need of Aitken's authority to sist a mandatory, and believed he had a good defence, there was no reason why an appeal to the Sheriff should not have been entered whereby time to communicate with Aitken could have been secured, or even after the decree had been extracted the charge on it might have been suspended. On this point I do not see that any valid objection can be taken to the Sheriff-Substitute's judgment, although my own impression is that it would have been very much better had the action been sisted.

"But still further, the petitioner objected to the items of the account libelled in the action, and maintained that the decree could not be held to instruct the debt, because it was admittedly erroneous in respect there were two sums, amounting together to £59, 10s., for which Aitken was entitled to credit, and for which credit had not been allowed, and because, in fact, no debt at all was really due to Hay & Kyd, but there was a balance on the other side.

"On this point I think that if it were clearly proved that no debt was due to Hay & Kyd, that might be a ground for considering whether the sequestration should be recalled—*Lockhart* v. *Mitchell*, 1849, 11 D. 1341; *Ballantyne* v. *Barr*, 1867, 5 Macph. 330.

"Now, it cannot, I suppose, be said that the decree could be accepted as proof of debt to its full amount, because it was admittedly in excess to a certain amount. But the defender contended that the debt was due under the deduction of the omitted items of credit.

"Evidence has been offered on both sides on this point, but it is, I think, singularly unsatisfactory and incomplete. The respondent and his bookkeeper depone to the correctness of the account, with the exception of the two omitted items, and they explain intelligibly enough how the mistake as to these two items arose. The petitioner, on the other hand, has produced an account which he depones to be correct, and which brings out a balance in his favour. But the petitioner has left this important part of his case to depend entirely on his own evidence, and he has not sought to corroborate it by the evidence of the parties connected with the transactions to which he refers. It is to be noticed also that the main differences between the two accounts are as to items dated before April 1886, at which date a detailed account had, I understand, been rendered, and had not been objected to during these years. With regard to this part of the case, it appears to me that the question of the indebtedness of Aitken to Hay & Kyd is left in doubt.

"The account libelled in the Sheriff Court action has not, to my mind, been satisfactorily proved in this case. Evidence has been led in support of it, but in an incomplete and perfunctory manner. Neither, on the other hand, has it been disproved. If in a petition for recal of a sequestration it be enough to say that a petitioning creditor's claim of debt has not been fully proved in the process for recal, it appears to me that up to that point the petitioner has been successful. I am not satisfied one way or the other on that matter. But then no authority for this position has been quoted. It would rather appear that the burden of proof is, at least in this case, thrown on the present petitioner Aitken, and if that be so, that burden has not in my opinion been discharged.

"I do not see at what point it can be said that Hay & Kyd went wrong, unless it was in making a mistake in making up their account, and in insisting on a decree in Aitken's absence. I think, on the whole, that the partial proof which has been led on this point does not afford a sufficient ground for recal of the sequestration. I do not see that the petitioner can suffer any substantial disadvantage from allowing the sequestration to proceed, for he can always have his remedy if he considers himself treated unjustly by the trustee.

"It has been said that Aitken is even now able to pay his debts in full. But it is impossible to take that on the petitioner's bare statement. If he is, there can be no reason why this sequestration should not be brought to a speedy conclusion. There could, I think, be no difficulty in placing in the hands of the trustee funds sufficient to pay the whole claims, reserving all objections to those claims which are disputed, and all other claims which the petitioner may think he has. Indeed, I apprehend that he has been, since this petition was presented, under obligation to place his estate in the hands of the trustee, because, under section 33 of the statute the proceedings in the sequestration ought to have been going on notwithstanding the petition for recal.

"I observe that a considerable number of Aitken's creditors are of opinion that the sequestration should be brought to an end, because they think it has been brought about by the false idea which had gone abroad that he had absconded, for which, however, I think Aitken has himself to blame. I have considerable sympathy with that view, but no power to give effect to it. If the petitioner can persuade nine-tenths of his creditors in number and value to take that view, he may again petition for recal under the provisions of the 32nd section of the Act."

The petitioner reclaimed, and argued—The Sheriff should have allowed time to make it possible for the petitioner to have sisted a mandatory—*Sandilands* v. *Sandilands*, May 31, 1848, 10 D. 1091. In the circumstances in which they were granted, the decrees on which sequestration had been awarded were no better than decrees in absence, and were not sufficient vouchers for the claims of the petitioning and concurring creditors—*Dow* v. *The Union Bank*, February 23, 1875, 2 R. 459; *Fleming* v. *Yeaman*, December 1, 1883, 21 S.L.R. 164, and 9 App. Cas. 966. The nature of the decrees appeared on their face, and no sufficient evidence of the petitioner's notour bankruptcy had been laid before the Sheriff. The award of sequestration was accordingly contrary to the statute, and should be recalled—*Elder* v. *Thomson, Elder, & Brown*, June 12, 1850, 12 D. 994; *Campbell* v. *Myles*, May 27, 1853, 15 D. 685; *Macnab* v. *Clark*, March 16, 1889, 16 R. 610; *Ballantyne* v. *Barr*, January 29, 1867, 5 Macph. 330; Goudy on Bankruptcy, pp. 67, *et seq.* Further, the result of the evidence was to show not only that Hay & Kyd's account was grossly overcharged, but that on an accounting between them and the petitioner there would be a balance in favour of the latter. The evidence also established that the petitioner was not insolvent at the date of his sequestration, and that his estate was fully able to meet all the claims against it. The sequestration should therefore be recalled.

Argued for the respondent—An expired charge on a decree was sufficient *prima facie* evidence of a debtor's insolvency, and the award of sequestration was therefore quite regular. Further, the petitioner had failed to prove that the bulk of Hay & Kyd's account was not due. Even if he had succeeded in reducing that account to a very small figure, the claim of the concurring creditor Scott still remained, and was quite a sufficient ground for the award of sequestration. The result of the proof was to show that the petitioner was not in a position to pay his debts at the date of the sequestration, and that his estate when realised would not nearly satisfy the claims of his creditors.

At advising—

LORD M'LAREN—In this case, which is a petition under the Bankruptcy Act for a recal of the sequestration of the petitioner's estate awarded by the Sheriff of Perthshire on 13th December 1888, the Lord Ordinary, after a proof, found that no sufficient grounds had been established for recalling the sequestration, and he accordingly refused the prayer of the petition.

In the argument addressed to us on behalf of the petitioner various objections were urged affecting the regularity of the proceedings, but of these only two appeared to us to call for an answer. These objections were—(1) that no *prima facie* case of insolvency was laid before the Sheriff; and (2) that the evidence adduced to the Lord Ordinary does not prove that the petitioner was or is in fact insolvent.

In the case of an application for sequestration by a creditor or creditors it is of course necessary that the debtor should be shown to be notour bankrupt, and under the 7th section of the statute the state of notour bankruptcy is declared to be constituted by insolvency concurring with the execution of ultimate diligence in one of the forms there prescribed.

In the present case the debtor was in America at the time when the petitioning creditors took action for the purpose of rendering him bankrupt. In the action by Hay & Kyd decree was given against the debtor in respect of his failure to sist a mandatory on 9th November, and on 22nd November a petition for sequestration was presented founding on this decree and a charge which had been given thereon. On this evidence sequestration was awarded.

Now, in the ordinary class of cases the decree itself, followed by an especial charge, may be sufficient evidence of insolvency to justify an award of sequestration if the debtor does not appear and give a satisfactory explanation of his failure to meet his legal obligations. Under the 30th section of the statute the burden is laid on the debtor in such circumstances either to show cause or to make instant payment of the debt. But in the present case it is objected that the debtor was in Canada; that he did not and could not know that he had been appointed to sist a mandatory, because the time allowed was insufficient for the purpose of enabling his agent to communicate with him, and therefore the fact of decree having gone against him by default was no evidence of the debtor's inability to meet his obligations.

It is very likely that if this circumstance had been brought to the notice of the Sheriff the sequestration would not have been awarded, at least until time had been allowed for further communication with the debtor.

But it must be kept in view that there is no appeal to this Court from the Sheriff's deliverance awarding sequestration. The debtor's only remedy is by an application for a recal of the sequestration. The conditions of success in an application for recal are evidently quite different from the conditions under which the merits of the Sheriff's deliverance would be considered in an appeal. In an appeal we should have to consider only the evidence that was before the Sheriff, and to say whether that evidence was sufficient to support the award. But an application for a recal is substan-

tially a re-hearing of the case on fresh evidence, and the question now is, whether in the light of the facts proved the creditors were and are entitled to have their debtor's estate made available to them for payment of their claims?

It was no doubt in the view of the Legislature that in such cases the court of first instance must proceed on a *prima facie* view of the case, and to allow the Sheriff's deliverance to be appealed from under the ordinary conditions an appeal would in many cases enable the debtor to defeat the main object of the statute, and to gain that while his creditors were left unpaid. But if the debtor really is solvent, and if the award of sequestration has been improperly obtained, the remedy of a recal of the sequestration is open to him provided he is able to satisfy the Court that he ought not to be deprived of the administration of his estate.

It appears to me that it would be against the policy of the statute if we were to interfere with the sequestration merely on the ground that the debtor was not proved to be insolvent in the application to the Sheriff. We have, then, to consider what is the import of the evidence taken before the Lord Ordinary on this subject. The greater part of the evidence has indeed very little bearing on this question. There are two ways of looking at the question of solvency or insolvency. There is the consideration whether the debtor at the time of being made bankrupt was in a position to meet his current obligations, which I think is the true and only proper test of solvency in an application for recal, and there is also the question whether on a realisation of the debtor's heritable and moveable estate the proceeds will be sufficient to pay all his obligations in full.

Now, as to the first point, if a debtor be able to meet his current obligations, he will in general have no difficulty in proving his ability to do so, because he has only to come with the money in his pocket and to tender payment. But of course it may be that the sequestration has affected the debtor's credit, and that he cannot immediately find the required sum, and yet he may be able to show that up to the time of the presentation of the petition for sequestration he was in good credit and able to pay his way.

In the present case I am of opinion that the debtor has failed to displace the presumption of insolvency arising in the circumstances already referred to. It is true that he was abroad when the decrees went out against him whereon he was made bankrupt. But when a trader goes abroad, carrying with him the chief part of his stock-in-trade, he ought to leave money to pay his debts, or at least enter into arrangements which would make it unnecessary for his creditors to look to their own protection. It is plain that in this case the ability of the debtor to meet his obligations as they matured depended entirely on the sale of his horses in Canada. He has not shown that he had any available credit in this country except his heritable property, and so far as I can see, even if he had returned from Canada before the expiration of the petitioning creditors' charges, he was not in a position to pay such part of the petitioning creditors' claims as might be found to be justly due.

But it is the less necessary to consider this view of the case very critically, because I am satisfied that the debtor is insolvent in the sense of being unable to pay 20s. in the pound on a winding-up of his estate. We have various views of his affairs in the printed paper, but in none of them do the assets equal the liabilities, and according to the best estimate which the trustee can make the probable dividend will not much exceed 5s. in the pound. This estimate is made without taking account of the expenses of this litigation. I am accordingly of opinion that the Lord Ordinary's interlocutor should be affirmed, and while agreeing with his Lordship that the petitioner has cause to complain of the somewhat hasty and harsh pressure which his creditors originally used towards him, I consider that the best thing that can happen to him is that he should get a discharge of his liabilities, and be as soon as possible put in a position to make a living for himself.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Petitioner—Kennedy. Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondent—Chisholm. Agent—David Milne, S.S.C.

Friday, November 21.

FIRST DIVISION.

SIMONS *v.* NEILSON AND OTHERS.

Husband and Wife—Married Women's Property Act 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 6—*Marriage Prior to the Act—Exclusion of Jus Mariti by Antenuptial Contract of Marriage—Jus Relicti where Wife's Estate Burdened with a Liferent.*

By antenuptial contract of marriage a wife had in 1862 conveyed her whole estate to trustees for payment of the yearly income to herself during her life exclusive of the *jus mariti* and right of administration of her husband, and upon her death to her husband as income alimentary—in both cases the income to be unassignable and unattachable by the diligence of creditors, and in the husband's instance to cease upon second marriage. On termination of these liferents the capital was to be conveyed or paid to the issue of the marriage (if any) according to appointment, or equally; but if there were no issue, then in the event of the husband's predecease the said capital was to be paid over or be conveyed to the wife; and in the event of the wife's prede-