Tuesday, December 8.

FIRST DIVISION.

[Lord Pearson, Ordinary.

DUKE, PETITIONER.

Bankruptcy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 86—*Claim of Retired Trustee Against Trustee in Office—Claim for Payment—Competency.*

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 86, enacts—"The judicial factor, the trustee, and the commissioners shall be amenable to the Lord Ordinary . . . at the instance of any party interested, to account for their intromissions and management, by petition served on them." . . .

A trustee on a sequestrated estate, who had resigned office, presented a petition, calling the trustee who had been appointed in his place as the sole respondent, and craving the Court, under section 86 of the Bankruptcy (Scotland) Act 1856, to ordain the respondent to account for his intromissions as trustee with the balance handed over to him by the petitioner, and to pay to the petitioner the sum of £861, 13s. out of the funds of the sequestrated estate The petitioner stated that in the course of his management of the sequestrated estate he had found it necessary to employ certain law-agents; that the business accounts incurred to them were duly taxed at £861, 13s. in presence of the agents of the respondent, as against the sequestrated estate, by the Auditor of the Court of Session; and that he duly accounted to the respondent for his whole intermissions and handed over the whole moneys in his hands, including the amount which had been retained to meet the legal expenses incurred.

The Court *dismissed* the petition in respect that it was incompetent, and that the petitioner's averments were irrelevant.

Guy Duke, estate office, Braehead, Kilmarnock, formerly judicial factor and trustee in sequestration on the estate of James Somervell, of Sorn, presented this petition in the Bill Chamber, craving the Court to ordain the respondent Francis More, chartered accountant, Edinburgh, trustee on the said estate, "to account for his intromissions as trustee foresaid with the said balance handed over to him by the petitioner, and to pay to the petitioner the sum of £861, 13s. out of the funds of said sequestrated estate, all in terms of sec. 86 of the Bankruptcy (Scotland) Act 1856."

The petition set forth, *inter alia*, as follows:—On November 23, 1900, the petitioner was appointed judicial factor, under sec. 16 of the Bankruptcy (Scotland) Act 1856, upon the estates of James Somervell, Esquire of Sorn, in the county of Ayr, and thereafter he was appointed trustee on the sequestrated estates of the said James Somervell, conform to act and warrant in his favour, dated 6th March 1901. The petitioner resigned the said office of trustee, and his resignation was accepted at a meeting of creditors held on 14th June 1902. At a meeting of creditors held on 25th June 1902, Francis More, chartered accountant, Edinburgh, was elected trustee in room of the petitioner, and his election was thereafter confirmed, conform to act and warrant, dated 30th June 1902. In the course of his managemen t of the said estate the petitioner found it necessary to employ certain law-agents. The business accounts incurred to these law-agents were duly taxed in the presence of the agents of the said Francis More, as against the sequestrated estate, by the Auditor of the Court of Session, conform to reports by him dated 12th February 1903, 27th March 1903, and 4th May 1903. The amount of the taxed accounts incurred up to the date of the petitioner's resignation was £861, 13s. The petitioner duly accounted to the said Francis More, as trustee foresaid, for his whole intromissions, and handed over the whole moneys in his hands, including the amount which had been retained to meet the legal expenses incurred. The petitioner stated that he did so upon the footing that the said Francis More would at once pay these expenses so soon as the accounts thereof had been taxed, but the said Francis More, in spite of repeated application by the petitioner, refused to account to the petitioner for the amount of said legal expenses, and further had stated his intention of using the moneys at present in his hands as trustee on said sequestrated estates in payment of costs of recent litigation incurred by him as trustee foresaid, to the prejudice of the petitioner's right to have said balance handed over by him to the said Francis More applied primarily in payment of the legal expenses incurred by the petitioner.

The respondent lodged answers in which he admitted that the petitioner in the course of his management of the estates employed the law-agents named and that their accounts were taxed on the dates stated. He also stated that objections to their accounts had been lodged in answer to the petitioner's petition for discharge, pending in the Bill Chamber, and that he declined to pay the full amount of the accounts until these objections were disposed of and the approval of the Court obtained to the expenditure objected to. He also admitted that the petitioner handed over to him the whole moneys in his hands at the date of his resignation.

On August 12, 1903, the Lord Ordinary officiating on the Bills (PEARSON) dismissed the petition as irrelevant.

The petitioner reclaimed, and argued—The petitioner was a "party interested," and the dealings of the respondent with the moneys handed over to him were "intromissions" and acts of "management," within the meaning of sec. 86 of the Bankruptcy Act 1856. Accordingly the petition was competent—*Burt* v. *Bell*, February 3, 1863, 1 Macph. 382, *per* L. J. C.

Inglis, at p. 385; *Bell* v. *Gow*, November 28, 1862, 1 Macph. 84; *White* v. *White's Trustee*, March 19, 1879, 6 R. 854, *per* L. P. Inglis, at p. 857. The law-agents' accounts were charges against the sequestrated estate, and the specific act of management complained of by the petitioner was the omission of the respondent to pay these accounts. The petitioner's averments were relevant to base a claim by him that the respondent should account for the specific moneys handed over to him by the petitioner—these moneys being in part earmarked in the hands of the respondent for payment of the law accounts in question.

Argued for the respondent—The petition was incompetent and irrelevant. It was only in respect of a right of relief that the petitioner was entitled to demand payment of this sum, and he had not set forth—as was necessary to base a right of relief—that the sum had been demanded. What the petitioner craved was not merely an account of the moneys handed over by him—over which he had a right of retention while they were in his possession—but payment out of the whole estate, and such a claim could be made good only by ordinary action. The procedure by petition under sec. 86 of the Bankruptcy Act was incompetent, as the purpose of that section was merely to bring under the review of the Court intromissions or acts of management of a trustee which were of the nature of acts of malversation—*Henderson* v. *Henderson's Trustee*, November 22, 1882, 10 R. 188, *per* L. J. C. Moncreiff, at p. 191, 20 S.L.R. 145; *M'Adam* v. *Martin's Trustee*, December 18, 1884, 12 R. 358, 22 S.L.R. 235.

Lord President—The question which we have to decide is whether the petition is a competent proceeding under sec. 86 of the Bankruptcy Act, in view of the statements by which it is supported.

The petitioner was, on 23rd November 1900, appointed judicial factor on the estates of Mr Somervell of Sorn, and he was afterwards appointed trustee on that gentleman's sequestrated estates, conform to act and warrant in his favour dated 6th March 1901. The petitioner resigned his office of trustee, and his resignation was accepted at a meting of creditors held on 14th June 1892. Subsequently on 25th June 1902 Mr Francis More, chartered accountant, Edinburgh, was elected trustee in room of the petitioner, and his election was thereafter confirmed, conform to act and warrant dated 30th June 1902.

The petitioner alleges that in the course of his management of the sequestrated estate he found it necessary to employ certain law-agents, and that the business accounts incurred to them were duly taxed in presence of the agents of the new trustee as against the sequestrated estate by the Auditor of this Court, the amount of the taxed accounts being £861, 13s.

The petitioner does not bring an action for this sum, nor does he institute any proceedings for the recovery of it as a debt. He presents a petition calling the present trustee as the sole respondent, and craving the Court to ordain him (the present trustee) to account for his intromissions as trustee with the balance handed over to him by the petitioner, and to pay the petitioner the sum of £861, 13s. out of the funds of the sequestrated estate.

The petition bears to be founded on sec. 86 of the Bankruptcy Act. That section is in these terms [*His Lordship quoted the section*].

The petitioner maintains that as a "party interested" he can bring this petition to compel the trustee to account for his intromissions and management. The position of the petitioner is peculiar. He voluntarily handed over the whole funds in his hands to Mr More, without retaining a sum to meet the legal expenses incurred by him. He thus put himself in the position of having no security resulting from possession, and became a creditor who would require to enforce his claim by action. The short question is whether a person holding this position can take advantage of the provisions of sec. 86 to recover his debt, and I can find no warrant in the section for its being applied by petition to effect such a purpose as the present. There is no allegation that the present trustee is not quite properly administering the bankrupt estate, and that if the petitioner can show good cause for such preferable payment as he asks his claim will not receive effect. He has not, as I understand, made any claim in the sequestration. I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

Lord Adam—This petition is brought at the instance of a former trustee on the sequestrated estate of Mr Somervell. The petitioner resigned the office of trustee, and has been discharged, and he now brings this petition to recover payment by a summary process of £861, 13s. from the present trustee out of the funds of the sequestrated estate.

The position is that certain accounts were incurred by the petitioner while he was trustee on the estate to law-agents. He did not pay these accounts, but instead of paying them or retaining funds for the payment of them he handed over the whole moneys in his hands to the new trustee. The petitioner may have a perfectly good claim, but the question is whether by a summary procedure under section 86 of the Bankruptcy Act he can recover payment from the new trustee of this sum of £861, 13s.

Section 86 merely authorises a party interested to secure by petition that a trustee shall account for his intromissions and management. That furnishes no warrant for a Court granting decree *de plano* for the payment of this sum, which is what the petitioner proposes. It is said that what is wanted is the payment of this sum out of moneys handed over by the petitioner, and that therefore the petitioner is entitled to call the trustee to account for the money. It is obvious that section 86 does not apply to every act of management. In the cases in the Second Division to which

we were referred, it was held that the section only applied to cases where malversation in office was alleged. I should be quite willing to adopt that view provided a liberal interpretation was put on the word "malversation." The section contemplates, in my view, something in the nature of mismanagement. In this petition there is no act of that character alleged, and therefore I think the petition is both incompetent and irrelevant.

LORD M'LAREN—I do not think it necessary to go into all the circumstances of this case. I think the most direct way of approaching the question is to consider what right the petitioner had when trustee, or had he continued in the office of trustee, as regards payment of the accounts incurred by him to the law-agents.

The Bankruptcy Act 1856 contains provisions necessary to safeguard creditors against a trustee embarking on unwise litigation. In particular, under section 165 no law-agent's account can be paid before audit in the manner directed by a general meeting of creditors. Accordingly, the petitioner could not have paid the law-agent's account without an audit so as to make it a charge against the estate, although of course he himself was personally liable to the agents.

I can find no provision in the statute for payment of debts which a retired trustee may have incurred in the administration of the estate. His claims are left to be made good by ordinary methods. The new trustee may call the original trustee to account, but there is no provision by which the original trustee can make good a claim against the trust estate in the hands of the new trustee after he himself has ceased to hold the office and has been discharged.

While it may be true that the petitioner gave up his lien over the trust estate when he resigned the office of trustee and paid away the fund to his successor, he did not, of course, give up his right to obtain payment against the estate. The new trustee was in a delicate position, as he knew nothing of the circumstances in which the accounts had been incurred, and he had received no instructions from the creditors as to the way in which they desired them to be audited. His proper course was probably in these circumstances to ask for instructions from a general meeting of creditors, or to call on the old trustee to constitute his claim. This course would be particularly appropriate if, as in this case, the bankrupt challenged the necessity for incurring these expenses. The bankrupt has the right to the reversion of the trust funds, and the new trustee would not have been in safety to make a payment of a debt which the bankrupt disputed, and of which he knew nothing. The natural solution of the difficulty would have been for Mr Duke to constitute his claim by an action in which the new trustee and the bankrupt were called as defenders. Supposing such a decree obtained, and that the new trustee still refused to make payment, Mr Duke could have enforced his claim by diligence. If the trustee waited until diligence was used I could understand that this would constitute a case of faulty management for which he might be called to account by proceedings under section 86.

It is a very different thing to say that section 86 applies if he does not pay an account without inquiry, and where there is no relevant averment of faulty management.

I also think that the petition is incompetent, because it concludes for payment of money. The 86th section appears to authorise procedure which has the effect of increasing the fund in the hands of the trustee available for distribution amongst the general body of creditors, but it does not authorise procedure for payment of a debt alleged to be due to an individual creditor.

I therefore agree that the application should be refused.

LORD KINNEAR—I agree with your Lordships. I think in this case the questions of relevancy and competency run into one another too much to make it necessary or convenient to distinguish between them in formulating the ground of judgment, and I should therefore be quite content to adhere to the Lord Ordinary's interlocutor as it stands without expressly sustaining the objections to the relevancy of the petition.

A petition under section 86 is no doubt a competent proceeding in itself, and the question whether the petitioner is making a competent use of the process must depend upon the specific character of the claim and the facts averred in support of it. Therefore the questions both of relevancy and of competency cannot be determined otherwise than by reference to the petitioner's statement.

I think that the conclusion of this petition is really equivalent to a conclusion for payment of a sum of money. It is not necessary to define the cases which would fall within the scope of the section, although I may say I agree with all that has been said by Lord Adam, and in the cases cited to us decided in the Second Division. But whatever cases may fall within the scope of the provision, a summary action for payment is not in my opinion one of them, and, as I have said, the only operative conclusion is that the present trustee should pay a sum of £861 to the petitioner. The character of the decree asked is not qualified by the statement of the circumstances under which it arises in the petition. The petitioner states that he handed over the whole moneys in his hands belonging to the trust estate, including the amount which had been retained to meet the legal expenses incurred. This shows that no distinction was drawn at the time when the funds were handed over between the sum retained to meet the legal expenses and the other sum handed over to the new trustee. Mr Macphail argued that the money retained for that purpose was earmarked in the hands of the new trusete. It is proverbial that money has no earmark, and nothing is set out in this petition

to except the sum now claimed from the general rule. However that may be, the conclusion of the petition is not for a particular sum of money in the hands of the respondent, but for payment of a sum of specified amount out of the general funds of the sequestrated estate. I think there is no authority for proceeding under section 86 for such a purpose.

There is a minor objection which would be equally good if this had been an action for payment at common law. The objection is that the action is essentially a claim for relief concluding for payment to the person primarily liable, while there is no statement that he has paid the sum in question or been distressed for payment. Such a statement is essential in an action for relief, and I can find nothing here in the way of a statement of that nature to support the present claim. I think we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Petitioner — Macphail—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Blackburn. Agents—Dundas & Wilson, C.S.

Friday, December 18.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

CLELAND TRUSTEES *v.* DALRYMPLE.

Bankruptcy—Vesting of Bankrupt Estate—Preferable Claims—Assignations ex facie in Security Duly Intimated—Right of Trustee in Bankruptcy to Administer Estate and Give Effect to Preferences by Ranking—Multiplepoinding—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c* 79), *sec.* 102.

In a multiplepoinding the fund *in medio*, consisting of the accumulated income of moveable estate in the hands of trustees, was claimed by the beneficiary entitled to the income under the trust, and by a number of persons to whom at various dates the beneficiary had assigned his interests in security of debts, the assignations being duly intimated. After the record was closed the beneficiary was sequestrated, and intimation being made to the trustee on the sequestrated estate, the trustee claimed "to be ranked and preferred to the whole fund *in medio* for the purpose of administering the same as part of the bankrupt estate, without prejudice to such preferences as may be established in the bankruptcy proceedings."

The Court *sustained* the claim of the trustee in the sequestration, on the ground that, under sec. 102 of the Bankruptcy (Scotland) Act 1856, the *universitas* of the estate of the bankrupt vested in the trustee, and that the proper mode of giving effect to preferable claims existing at the date of the sequestration was by the trustee giving the creditors holding securities a preferable ranking in the sequestration, and not by the Court in the process of multiplepoinding deciding questions as to the rights and preferences of creditors.

This was a multiplepoinding, brought of date September 8, 1902, in which the pursuers and nominal raisers were the trustees of the Cleland Trust, and the real raiser was Roland Barnett, 3 Duke Street, London.

The Cleland Trust was created under the testamentary writings of the ninth Earl of Stair, and an act and decree of the Court of Session, dated December 7, 1899, and March 20, 1900. The original object of the trust, as created by the ninth Earl of Stair, was the purchase of land to be settled under strict entail. The trust came into operation in 1864. No land had been entailed or purchased between that date and 1899. In the latter year the Hon. George Grey Dalrymple, who would have been heir in possession if an entail had been executed, presented a petition to the Court under the Entail (Scotland) Act 1882 for the purpose of having the funds vested in trustees under secs. 23 and 26 of the statute. Thereupon the testamentary trustees of the ninth Earl of Stair brought an action of multiplepoinding. Under those proceedings the funds were made over to the pursuers as the Cleland Trustees, to be held as entailed money in terms of the Entail (Scotland) Act 1882 in trust for the Hon. George Grey Dalrymple, and the heirs whatsoever of his body, whom failing for the other heirs who would or might have become heirs in possession if an entail had been executed. The Hon. George Grey Dalrymple was the person first entitled to the income of the funds of the Cleland Trust. He died on 30th November 1900. His son George North Dalrymple was, at the date of the present action, the person entitled to the income of the trust, subject to (1) the various securities and interests created by himself, and (2) the provisions in favour of the widow and younger children of the Hon. George Grey Dalrymple so far as not already satisfied.

The fund *in medio* consisted (1) of the income of the Cleland Trust funds and estates from November 30, 1900, to September 8, 1902, so far as falling to George North Dalrymple or those deriving right from him, and amounting, subject to certain payments, to £3247, and (2) the additional free income which had accrued or would accrue on the Cleland Trust funds from September 8, 1902, until the present action was finally disposed of, or until the death of George North Dalrymple, whichever of these events should first happen.

The real raiser claimed to be ranked and preferred on the fund *in medio* to the extent of £4579, with interest at 5 per cent., in respect of bonds and assignations in security granted by George North Dal-