protection at all; if the beneficiary is in such a position that the fund can be sold or assigned then the exclusion of creditors will not be effectual.

Accordingly, where, as here, you have not only no express provision to the effect that the revenue is to be alimentary, but also a clause so expressed that the beneficiary can at once dispose of and alienate the income in question, I think it is idle to suggest that the attempt to prevent creditors from using diligence so as to enable them to get the benefit of the fund has been effectively carried out. Therefore in my opinion the judgment of the Lord Ordinary in sustaining this arrestment and furthcoming is right and ought to be adhered to.

LORD DUNDAS—I agree with your Lordship and with the Lord Ordinary. I think this case is really covered by the tenour if not by the terms of previous decisions.

LORD SALVESEN—The general rule of the law of Scotland is that it is impossible for a person, male or female, by any deed or any contract so to settle money as to secure the income to himself or herself and put it beyond the reach of his or her creditors. The law is so stated by Lord President Inglis in the case of *Corbet* v. *Waddell*, (1879) 7 R. 200, 17 S.L.R. 106. To that rule there has been admitted one single exception, that in the case of a married woman who has by antenuptial contract settled her property in such a way that during the subsistence of the marriage she has debarred herself from any right to it except the right of drawing the income. But in order effectually to protect such income against creditors the clause must be expressed in language that clearly shows its purpose to be alimentary, and in addition deprives her of the right of dealing by way of assignation or otherwise with the income. In the case of *Dewar's Trustees*, to which we were referred, it was held that the income of a fund settled by a wife on her husband after the dissolution of the marriage on the footing that it should not be assignable and should not be subject to the debts or deeds of the liferenter nor open to the diligence of his creditors, was an alimentary provision, and was effectually protected against creditors although neither the word "alimentary" nor any equivalent language had been used. But there is admittedly no case in which protection has been given to the liferenter where, as here, the right of assignation remained unimpaired in his person.

It seems to me that if the liferenter has a power to assign it necessarily follows that any attempted exclusion of creditors is invalid. An arrester who follows up his arrestment by a process of furthcoming is a legal assignee. So is a trustee in bankruptcy. The test was put by Lord M'Laren I think very concisely and forcibly when he said that if the subject is one that can be sold it is also a subject that can be adjudicated. In short, you cannot have a liferenter in the position of having all the privileges of an owner and in addition the privilege of defeating her creditors if she chooses.

Accordingly I am of opinion with your Lordships that this case has been rightly decided in favour of the pursuer.

LORD GUTHRIE—I agree. The reason of the exceptional favour which the law has accorded to a woman entering into a marriage contract, where she is dealing with her own free estate, seems to be that she ought to be entitled out of that estate to secure herself against want during the subsistence of the marriage. That does not involve the use of the word "alimentary," but it does involve the existence of two conditions, namely, first, exclusion of her own right to deal with the money so as to put it beyond her alimentary use, and second, exclusion of the rights of her creditors. Here we have only got one of these conditions, and therefore the whole view on which this very exceptional provision of law is founded would be swept away if we gave effect to the plea which the Lord Ordinary has rightly negatived.

The Court adhered.

Counsel for the Reclaimers (Defenders)—Constable, K.C.—Dykes. Agents—Haggart & Burn Murdoch, W.S.

Counsel for the Respondents (Pursuers)—Chree, K.C.—W. Mitchell. Agents—J. Douglas Gardiner & Mill, S.S.C.

Friday, November 19.

FIRST DIVISION.

[Lord Anderson, Ordinary.

MENZIES *v.* POUTZ.

Bankruptcy — Sequestration—Succession—Competing Sequestrations—Sequestration of Heir followed by Sequestration of Ancestor—Recal—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 11, 30, *and* 97.

A succeeded to B as universal successor in heritage and moveables; made up a title to the heritage and confirmed to the moveables; and, within three years after B's death, was sequestrated, a trustee being elected and confirmed. Creditors of B having applied for and obtained sequestration of B's estates, a petition for the recal of this sequestration was presented. *Held* (*rev.* Lord Anderson) that B's sequestration was incompetent and recal *granted.*

Bankruptcy—Administration of Justice—Sequestration—Recal of Sequestration—Duty of Lord Ordinary in Petition for Recal—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 30.

The facts and arguments stated in opposition to a petition for sequestration were fully considered by the Lord Ordinary on the Bills in Vacation, who thereafter awarded sequestration, In a petition for the recal of the sequestration the same facts and arguments were founded on, and the Lord Ordinary on the Bills holding that it was not

proper or seemly for him to reconsider the arguments which had already been considered in the petition for sequestration, and to review the judgment of a judge of co-ordinate jurisdiction, refused the petition for recal.

Opinion per the Lord President that the Lord Ordinary was bound in the petition for recal to reconsider the arguments and to form an independent judgment.

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) enacts—Section 11—"Sequestration may be awarded of the estate of any person in the following cases . . . 2nd. In the case of a deceased debtor who at the date of his death was subject to the jurisdiction of the Supreme Courts of Scotland. . . . (*b*) On the petition of a creditor or creditors qualified as hereinafter mentioned." . . . Section 30—"The deliverance awarding sequestration shall not be subject to review; but . . . any creditor . . . may, within forty days after the date of such deliverance, present a petition to the Lord Ordinary setting forth the grounds for recal, and praying for recal . . . and the Lord Ordinary shall . . . order a copy of the petition for recal and of his deliverance to be served on the parties who petitioned or concurred in the petition for sequestration. . . . and shall require them to answer within a specified short time, . . . and on the expiration of the time so fixed he shall proceed to pronounce judgment. . . ." Section 97—"The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer and vest in him . . . the whole property of the debtor to the effect following:—(1) The moveable estate and effects of the bankrupt wherever situated, so far as attachable for debt or capable of voluntary alienation by the bankrupt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible. (2) The whole heritable estate belonging to the bankrupt in Scotland to the same effect as if a decree of adjudication in implement of sale as well as a decree of adjudication for payment and in security of debt subject to no legal reversion had been pronounced in favour of the trustee and recorded at the date of the sequestration. and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration and are not null and reducible. . . . Provided always that such transfer and vesting shall have no effect upon the rights of the superior . . . nor upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence). . . ."

Egidia Charlotte Menzies, sometime residing at Camserney Cottage, Aberfeldy, now at 23 Royal Avenue, Chelsea, London, W., and Henry Atkin, Limited, gun and rifle manufacturer, 41 Jermyn Street, St James', London, both creditors for over £50 of the deceased Sir Neil Menzies, Bart., *petitioners*, with the consent and concurrence of John Hamilton Buchanan, C.A., Edinburgh, trustee on the sequestrated estates of Dame Susan Harriet Menzies, widow of the said Sir Neil Menzies as his successor, *concurrer*, presented a petition for the recal of the sequestration of the estates of the said Sir Neil. Mrs Elizabeth Jane Poutz, widow, carrying on business under the name of Elisa Poutz, Court milliner, at 27 Dover Street, Piccadilly, London, and seven others, all creditors of Sir Neil for over £50, *respondents*, lodged answers.

Sir Neil Menzies died on 21st December 1910. By his will, dated 15th July 1909 he appointed his widow, Dame Susan Harriet Menzies, his executrix and universal disponee and legatee. He left at his death estate both heritable and moveable. His heritable estates consisted of the lands and barony of Menzies, the lands and barony of Rannoch, and the lands of Foss, in the county of Perth. To all of said heritable estates Lady Menzies took right under the will, having a vested personal right to the same at and from the death of Sir Neil. She entered and completed heritable title by virtue of notarial instrument, dated and recorded in the General Register of Sasines 20th March 1911. These estates were thus taken out of the *hereditas jacens* of Sir Neil. To the whole moveable estate his said widow took right by virtue of the universal legatory clause of his will, and as executor-nominate she confirmed thereto by virtue of confirmation in her favour dated 24th April 1911. Thereafter Lady Menzies entered into personal possession and enjoyment of the heritable and moveable estates. Within one year after Sir Neil's death Lady Menzies created heritable debt by bonds and dispositions in security upon the estates of Menzies, Rannoch, and Foss. One of these bonds was granted by Lady Menzies on 11th July 1911 for £26,750 in favour of the National Guardian Investment Company, Limited, carrying compound interest at 20 per cent. per annum. Lady Menzies granted a voluntary trust deed for creditors in favour of the concurrer, dated 10th December 1912 and recorded 8th March 1913. She was sequestrated on 26th November 1914 upon her own petition, and the concurrer was elected and confirmed trustee on her estate.

On 29th August 1912 the respondent Mrs Poutz raised an action against Lady Menzies as executrix of Sir Neil and as an individual for £2672, being a debt due to her by Sir Neil at the date of his death. Decree therein was obtained on 5th March 1913 and extracted on 28th May 1913. By decree dated 26th November and extracted 10th December 1913 she obtained adjudication directed against, first, Lady Menzies, and, second, the concurrer as trustee under the said trust deed. The extract decree was registered in the Register of Sasines on 13th December 1913.

On or about 2nd February 1915 the said Mrs Poutz presented a petition for sequestration of the estates of the said Sir Neil Menzies, founding upon the debt of £2672 already referred to. The said petition was

opposed by the concurrer as trustee on the sequestrated estates of the said Lady Menzies.

On 9th April 1915 the Lord Ordinary on the Bills in Vacation (ORMIDALE) granted sequestration of the estates of the said Sir Neil Menzies, and upon 13th May John Stuart Gowans, C.A., Edinburgh, was elected and confirmed trustee thereon.

Opinion.—". . . . There being no failure in respect of any of the statutory requisites, and there being no tender of payment of the debt due to the petitioning creditor, the petitioner maintains that the Court has no discretion in the matter, and that sequestration must be awarded—*Joel* v. *Gill*, 1859, 21 D. 929; *Stewart* v. *Stewart & Macleod*, 1891, 19 R. 223, 29 S.L.R. 199. That this is so in the case of a living debtor is certain, but it is more doubtful in the case of a deceased debtor. The respondent referred to the cases of *Milne & Company* v. *Milne*, 1850, 12 D. 1007, and *M'Letchie* v. *Angus Brothers*, 1899, 1 F. 946, 36 S.L.R. 757. *Milne* was decided prior to *Joel* v. *Gill* at a date when there appears to have been a fluctuation in opinion as to whether even in a case of a living debtor the Court had a discretion or not. In *M'Letchie*, while the proceedings were for the recal of sequestration, the considerations distinguishing the sequestration of a living from that of a dead debtor noted both by Lord M'Laren and Lord Kinnear, would appear to apply with equal force to the petition for sequestration itself. Lord Pearson in *Petn. Arthur*, June 31, 1903, 10 S.L.T. 550, thought that in awarding sequestration in the case of a deceased debtor the Court had no discretion, but *M'Letchie's* case does not appear to have been cited to his Lordship. Assuming, however, without deciding that the question is one of expediency, I cannot hold that the respondent has stated any good ground why I should refuse the petition. The sequestration of Lady Menzies is not a simple process for the distribution of Sir Neil's estate among his creditors, but a process in the main at anyrate for the distribution of her own estate among her own creditors. Her trustee is not at all in the position of the petitioner for recal in *M'Letchie's* case, namely, an executor on the deceased's estate, nor does he aver that he has sufficient funds wherewith to pay the creditors of Sir Neil. It is obvious, moreover, that Lady Menzies' own proper creditors, and her trustee as representing them, have a different interest from the creditors of Sir Neil, for example, with regard to the realisation of the barony of Menzies. Her trustee has not taken up that estate, the bond granted by Lady Menzies in favour of the National Guardian Investment Company, Limited, being for so large a sum as to extinguish all possibility of any reversion for the other creditors of Lady Menzies. But that bond having been granted within year and day of Sir Neil's death in no way affects Sir Neil's creditors, and it is quite possible that the estate could be sold at such a price as would, after satisfying the bonds granted by Sir Neil himself, leave a surplus for distribution among his proper creditors.

"It is not unlikely that difficult and delicate questions may arise between the respondent and any trustee appointed on Sir Neil's estate. The action of declarator raised by the respondent makes that clear, but that is no good reason for refusing to award sequestration. The raising of the action also indicates that they are not questions which can be satisfactorily disposed of in Lady Menzies' sequestration. Some of them may be obviated if a trustee is appointed on Sir Neil's estate. Accordingly in my opinion the present petition would in no event fall to be refused on the ground of expediency.

That being so, the respondent must show that although all the statutory requisites are satisfied the petition is still incompetent. He points out that in the cases of *Royal Bank* v. *Scott, Smith, Stein, & Company*, January 20, 1813, F.C., and *Goetze* v. *Aders, &c.*, 1874, 2 R. 150, 12 S.L.R. 121 (*cf. Galbraith* v. *Grimshaw*, 1910 A.C. 508), although all the requisites were present, sequestration was refused. That was on the ground that where an effectual sequestration of a debtor's estates has already been awarded it is incompetent to grant a second award of the same estate. The respondent maintains that that is exactly the position of matters here; that what were the estates of Sir Neil on his death became the property of his widow, who was his universal legatory and executrix, and that the sequestration of Lady Menzies' estate has therefore vested in him the whole estates of Sir Neil. In my opinion that is not so, to the effect at anyrate of rendering sequestration of Sir Neil's estate for distribution among Sir Neil's creditors incompetent. The authorities on which the respondent relies, beginning with the case of *M'Lachlan* v. *Bennet*, 4 S. 717, 3 W. & S. 449, no doubt establish that on the sequestration of an heir's estates the general adjudication of these estates under the Bankruptcy Statutes in favour of the trustee, if the sequestration takes place within three years from the ancestor's death, operates complete diligence in favour of the creditors of the ancestor so as to give them a preference over the creditors of the heir. Effect is given in this way to the Act 1661, cap. 24, to which I refer. There was no express statutory provision bringing about this result in the Bankruptcy Act in force at the date of *M'Lachlan's* case, but in the Bankruptcy Act of 1839 (2 and 3 Vict. cap. 41), sec. 79, dealing with the vesting of the heritable estate in the trustee, there is the following clause—'(4) Provided always that such transfer and vesting of the heritable estate shall have no effect . . . upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence).' That provision has been repeated in the Bankruptcy Statutes of 1856, sec. 102, and 1913, sec. 97.

"In his Commentaries on the Act of 1839 Professor Bell makes this observation (p. 168)—'The act and warrant in favour of the trustee operates by this section as complete diligence in favour of the creditors of the ancestor who shall claim in the sequestration in any question with the creditors

of the heir relative to land. The reason and principle of this rule would seem to extend it to the case of moveables also.'

"Mr Alexander in his Digest (p. 92) puts it thus—'To remove the doubt that occurred under the former statute whether creditors of the ancestor of a bankrupt could found upon the trustee's confirmation if within three years of the ancestor's death as equivalent to an adjudication in their favour, and thus give them the preference provided to them by the Act 1661, cap. 24, it has been expressly provided,' &c., and he then refers to section 79.

"No case has occurred in which the precise effect of the provision has been decided, but I take it to be the law that if any creditors of the ancestor in fact claim in the sequestration of the heir their right to a preference in a question with the heir's creditors over so much of the heir's estates as he has succeeded to is undoubted. It seems to me at the same time to show that while the ancestor's creditors become the heir's creditors to some extent they do not do so in an absolute sense. The heir becomes liable to pay their debts, not to the exhaustion of his whole estate, but only so far as his estate includes what was his ancestor's estate. Prior to the Act of 1839 it must always have been, if not the only, at least the most convenient course for the ancestor's creditors to follow in order to make good their preferences, because sequestration of a deceased debtor's estate was up to that date not possible, and it may be that it will prove in the present case that it would have been a sufficient and appropriate proceeding for the petitioner to take. But I cannot hold that the petitioner is bound to rest satisfied with lodging a claim in Lady Menzies' sequestration. I cannot hold at this stage that there is such complete identity of Sir Neil's estates with Lady Menzies' estates as to bring the present case within the principle of the decision in *Goetze* v. *Aders*, *&c.*

"The case of *Christie* v. *Royal Bank*, 1839, 1 D. 745, to which I was referred, was concerned with somewhat special questions as to limitations imposed by the Act 1661, cap. 24, on an heir's right to grant dispositions. *Hoskins* v. *Christie*, 1845, 8 D. 167, while not a decision on any point of law, undoubtedly contains many dicta very clearly ascertaining the liability of a bankrupt heir for his ancestor's debts and the consequent liability of his trustee in distributing the estate vested in him to give effect to preferences secured by the ancestor's creditors. The question in the case was whether certain creditors on the sequestrated estates of the heir were entitled to the character of ancestor's creditors, and therefore to the preference admittedly attaching to that character by virtue of the Act 1661, cap. 24. In considering that question it is the assumption of the opinions that the question fell to be determined in the sequestration, that the trustee represented creditors of the ancestor as well as creditors of the heir, and that the heir's estate included not only estate acquired by himself but also the estate which he had taken by representation from his ancestor. It does not appear to me that anyone disputed these propositions, or that anyone had an interest so to do; but they do not establish such complete and absolute identity of the heir's estates with the ancestor's estates as to make the sequestration of the former render incompetent the sequestration of the latter. On the contrary, while it was doubtful whether, the ancestor having died before the Act of 1839 came into operation, his estates could be sequestrated, I note that Lord Murray (p. 211) seems to have thought that such a sequestration might have tended to clear up what he describes as a difficult and intricate case. Lord Fullerton in *Menzies* v. *Murdoch*, 1841, 4 D. 257, at p. 264, says—'The object of the statute' (1661, cap. 24) 'was to render the estate of the ancestor available exclusively to the creditors of the ancestor. . . . The object and effect of the statute is to separate the estate of the ancestor from that of the heir and to render the former the subject of division exclusively among the creditors of the ancestor, leaving only the residue to the creditors of the heir.' Now that was said, no doubt, with reference to the sequestration of the heir at a time when the deceased ancestor's estate could not be sequestrated. But it appears to me at least to justify, now that it is competent to sequestrate the ancestor's estate, the view that the present sequestration is not only competent but convenient.

"Under the Act 1661, cap. 24, the petitioner having within three years of her debtor's death executed against his estate an effectual adjudication, is in no way, it seems to me, benefited by section 97 of the 1913 Act. Her diligence was complete without the aid of the statutory adjudication. Moreover, the sequestration of Lady Menzies' estates is more than three years subsequent to the death of Sir Neil, and as I read the case of *M'Lachlan* v. *Bennet* it may well be argued does not therefore effect the complete diligence in favour of the ancestor's creditors which gives them a preference in the heir's sequestration over the creditors of the heir. That is not a point, however, falling to be determined at this stage.

"Section 103, which provides that sequestration is to be equivalent to a decree of adjudication, and that when the sequestration is dated within year and day of any effectual adjudication the estate is to be disposed of in the sequestration, deals, it seems to me, with adjudications of the estates of the bankrupt at the instance of the heir's creditors, and not with adjudications of the ancestor's estates by creditors of the ancestor.

"Section 102 of the 1856 Act, which is section 97 of the 1913 Act, was considered in the case of *Millar's Trustees* v. *Horsburgh*, 1886, 13 R. 543, 23 S.L.R. 363, and while the Lord President and Lord Shand took different views (which were expressed merely *obiter*) of the meaning and effect of the clause—'except that the act and warrant of confirmation shall operate in their favour as complete diligence'—the former, as matter of decision, construed the clause immediately preceding it as safeguarding

to creditors of the ancestor not only all their rights—to the effect that they are to stand exactly in the same position as they would have done if the estate had not been vested in the trustee in the sequestration—but also all their remedies by way of diligence. If that be so, then the right of the creditor of the ancestor to have the estates of his proper debtor sequestrated remains unaffected by the vesting of the heir's estates in the trustee in his sequestration.

"Provision is made (section 101) where the heir has completed his title to any part of his ancestor's estate for the transfer of such estate to the trustee on the sequestrated estates of the deceased ancestor. After all what truly passes to the heir is not the whole estates of his ancestor, but only the reversion of them, and there is authority for the proposition that executry funds are not the executor's private property, but remain the ancestor's funds until the latter's debts are paid—*Rough's Trustees* v. *Miller*, 1857, 19 D. 305, Lord Neaves, p. 309. To that limited extent the executor, being *eadem persona cum defuncto*, is a trustee for the ancestor's creditors. There is, or may be, estate in existence which is still earmarked as the estate of the ancestor. I cannot assume at this stage that there is not.

"On the whole matter the respondent has, in my judgment, failed to show that it is incompetent to award sequestration of the deceased Sir Neil Menzies' estate, and I shall therefore grant the prayer of the petition to that extent."

The petitioners and concurrer now presented this petition for recal of the sequestration of the estates of the said Sir Neil Menzies. The said John Stivan Gowans appeared by minute stating that he intended to watch the case.

On 30th June 1915 the Lord Ordinary on the Bills (ANDERSON) refused the petition for recal.

Opinion.—". . . It seems to me that the proper way in which I should discharge my duty in a question of this sort, where I am really asked to review the decision of a brother Judge exercising co-ordinate jurisdiction with myself, is this—If Mr Mackay had been able to come forward and say that since Lord Ormidale's judgment some circumstances had emerged which put a new complexion upon the case, but which were not before Lord Ormidale, then I should have had no difficulty if the circumstances were sufficiently clamant in giving effect to the change of situation and recalling the decision of Lord Ormidale. In the next place, if since Lord Ormidale decided the case a decision of the Inner House of this Court had been pronounced conflicting with the views expressed by Lord Ormidale, I should of course have given effect to the decision in the same way. Probably, in the third place, if it were pointed out to me that a decision of the Inner House of this Court touching the question which Lord Ormidale decided, and laying down law differing from that to which he had given effect, had not been cited to Lord Ormidale, it might very well be that I should have taken that into account and have decided the question in the way suggested by the petitioners.

"But it is the case that I have had submitted to me just the same questions which were submitted to Lord Ormidale, supported by the same arguments and buttressed by the same decisions. It is true that Mr Mackay quoted a few additional authorities, but they are of no different effect from those upon which Lord Ormidale proceeded. Accordingly, while it may be competent for me to reconsider those questions, those arguments, and those decisions, and to reach a conclusion different from that of Lord Ormidale, I do not think it is proper or seemly that I should do so. Without, therefore, expressing any opinion on the questions—difficult and important questions—which are here raised, I shall in order to allow Mr Mackay to go to the Inner House—for it is a necessary step to that end that this process should pass before me in this form—refuse the petition, and shall find the respondents entitled to expenses and the minuter entitled to a watching fee."

The petitioners and concurrer reclaimed, and argued—The ancestor's sequestration was incompetent. Sequestration of a dead debtor's estates was allowed under the Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), secs. 11 and 12, but it was peculiarly open to abuse, and slight inexpediency or the prior existence of another means of working out the distribution of the estate would justify refusal or recal—*Elder* v. *Thomson*, 1850, 12 D. 994, *per* Lord President Boyle at pp. 998, 999. The whole policy of the Bankruptcy Act was against double sequestration—section 16. There was a complete remedy here in the heir's sequestration. It was not obligatory in the case of a dead debtor to grant sequestration when the statutory requisites concurred. The contrary was not decided in the *Commercial Bank of Scotland* v. *Scott's Executrix* (quoted in M'Laren's Bill Chamber Practice at p. 258), and the dicta of Lord M'Laren (at p. 948) in *M'Letchie* v. *Angus Brothers*, 1899, 1 F. 946, 36 S.L.R. 757, were contrary to the dicta in the *Commercial Bank* case. In the case of a dead debtor, when there was not and could not be any estate to sequestrate, sequestration might and ought to be refused even although the statutory requisites concurred. Here the whole estate of the ancestor had passed to the heir, and had vested in her on a statutory title, and that could not be superseded now—*Royal Bank of Scotland* v. *The Assignees of Stein, Smith, & Company*, F.C., January 20, 1813; *Goetze* v. *Aders*, 1874, 2 R. 150, 12 S.L.R. 121; *Galbraith* v. *Grimshaw*, 1910 A.C. 508. *Gardner* v. *Woodside*, 1862, 24 D. 1133, was not in point, for it was not clear, as it was here, that there was not and could not be any estate to sequestrate. In any event, while the Court might not have a discretion in awarding sequestration, it certainly had in a petition for recal—*Blair* v. *North British and Mercantile Insurance Company*, 1889, 16 R. 325, *per* Lord Shand at p. 331 and Lord Adam at p. 332, 26 S.L.R. 213—and would recal a sequestration if no one's rights were prejudiced thereby. Here the creditors of the

ancestor had as complete protection under the heir's sequestration as they could get if both sequestrations were allowed to stand. None of the ancestor's assets were outwith the heir's sequestration, and the only questions were of ranking and were within the heir's sequestration. Thus the heir was not a trustee for the ancestor's creditors, and the ancestor's estate was not a trust estate outwith the heir's sequestration — Bell's Comm., i, 769; *Globe Insurance Company* v. *Mackenzie*, 1850, 7 Bell's App. 296, *per* Lord Brougham at p. 319; *Taylor & Ferguson, Limited* v. *Glass's Trustees*, 1912 S.C. 165, *per* Lord President Dunedin at p. 169, 49 S.L.R. 78; *Bank of Scotland* v. *Liquidators of Hutchison, Main, & Company, Limited*, 1914 S.C. (H.L.) 1, *per* Lord Kinnear at p. 5 and p. 7, *per* Lord Shaw at p. 15, 51 S.L.R. 229. The diligences of the ancestor's creditors were preserved, leaving only a question of ranking—*M'Lachlan* v. *Bennet*, 1826, 4 S. 712 [N.E. 717], 3 W. & S. 449; *Hoskins* v. *Christie*, 1845, 8 D. 167; *Millar's Trustees* v. *Horsburgh*, 1886, 13 R. 543, 23 S.L.R. 363; *Athole Hydropathic Company* v. *Provincial Assurance Company*, 1886, 13 R. 818, 23 S.L.R. 570; *Traill's Trustees* v. *Free Church of Scotland and Others*, 1915 S.C. 655, 52 S.L.R. 524; *Campbell* v. *Edinburgh Parish Council*, 1911 S.C. 280, 48 S.L.R. 193—and the only questions raised were of ranking. The Bankruptcy (Scotland) 1913, sec. 97, did not apply to the ancestor's creditors' "rights" to sequestrate. "Rights" in that section referred to particular pieces of property. That was shown by sections 103 and 114. The National Guardian bond was ineffectual as against the ancestor's creditors under the Act 1661, cap. 24, and effectual against the heir's creditors, but the trustee in the heir's sequestration must give effect to that Act. That involved no conflict of interest in him foreign to his office; he must act judicially, subject to a cheap and expeditious right of appeal on the part of a dissatisfied creditor. Realisation and distribution were equally facile in either sequestration. The double sequestration involved additional expense, waste of expense already incurred by the heir's trustee, and conflict of jurisdiction between the two trustees.

Argued for the respondents—The ancestor's sequestration was competent. The statutory requisites having concurred there was no discretion in the Court to refuse sequestration or to consider questions of expediency — *The Commercial Bank of Scotland, Limited* v. *Scott's Executrix*, 1911 (reported in M'Laren's Bill Chamber Practice at p. 258). The absence of apparent estate was not sufficient to render sequestration incompetent — *Gardner* v. *Woodside* (*cit.*). In any event there was estate to sequestrate, for the National Guardian Investment Company would have to value and deduct the value of their security in the heir's sequestration, while since their bond was ineffective in the ancestor's sequestration there must be estate in the ancestor to the amount of their security. Further sequestration of the heir did not deprive the ancestor's creditors of any of their rights. These rights included the right to sequestrate—Bankruptcy Act 1913, section 97; *Miller's Trustees* v. *Horsburgh* (*cit.*). The ancestor's sequestration was highly expedient. The ancestor's creditors' rights were not preserved in the heir's sequestration alone. *M'Lachlan* v. *Bennett* (*cit.*) and *Hoskins* v. *Christie* (*cit.*) were not in point, as sequestration of a dead debtor was not competent when they were decided, and there were dicta in *Rough's Trustees* v. *Miller*, 1857, 19 D. 305 (*per* Lord Neaves at p. 309) contrary to the dicta in these cases. The respondents would be prejudiced if the ancestor's sequestration were recalled. *Quoad* moveables of the ancestor to which he had confirmed and which were identifiable, the heir acted as a trustee for the ancestor's creditors, and such estate was not carried into the heir's sequestration by his trustee's act and warrant—Bell's Principles, section 1934. The trustee in a sequestration merely received the reversion or radical right. Here all the heir's trustee received was a quantum, which did not include the security in the National Guardian bond. The said bond was void under the Act 1661, cap. 24, in a question with the ancestor's creditors. The estate which would vest in his trustee was therefore a quantum including the security in the said bond—Bell's Comm., i, 764 *et seq.* The question was not one of preference, but of the assets carried to the one trustee as against the other. The heir's trustee could not therefore vindicate the estate free of the National Guardian bond. Even if he could reduce the said bond, he could only do so to the prejudice of the heir's creditors and to the advantage of the ancestor's. His duty, however, was to act for the whole body of creditors whom he represented — Bankruptcy Act 1913, sections 8 and 9. Further, the trustee's paramount duty was to realise the assets for the creditors. Only the ancestor's trustee could give a clear title to the bonded estate, because he could bring a declarator and sell without the consent of the bondholder; the price obtained for the estate might be seriously affected; the ancestor's trustee could sell by private bargain; the heir's trustee was always subject to the bondholder's veto—Bankruptcy Act 1913, sections 108, 109, 110. Apart from agreement with the heir's trustee, the National Guardian Investment Company could poind the ground, and the poinded goods would be outwith the sequestration—*Campbell* v. *Edinburgh Parish Council* (*cit.*). As against the ancestor's trustee there was no such preference possible, and no necessity for such an agreement.

At advising--

LORD PRESIDENT—In this case we have not the advantage of knowing what the opinion of the Lord Ordinary on the Bills was on the legal question raised. His Lordship seems to have thought that he was precluded from forming and expressing an opinion upon the question in respect that if he did so he would be reviewing a decision of a brother Judge exercising co-ordinate jurisdiction with himself, and accordingly, whilst not throwing any doubt upon the

competency of considering the question, he came to the conclusion that it would not be proper or seemly that he should do so, and apparently without applying his mind to the topics raised he refused the petition. In this I am of opinion that the Lord Ordinary erred, because it was clearly not only competent but right, and his duty to apply his mind to the consideration of the questions raised before him. Otherwise I do not see how it would be possible for him to exercise the jurisdiction conferred upon the Lord Ordinary on the Bills by section 30 of the Statute (3 and 4 Geo. V, cap. 20), which enjoins him to order answers to be given in to a petition for recal of sequestration and thereafter to proceed to pronounce judgment.

We therefore approach consideration of the question raised for the first time. It is this—Ought the sequestration of the estates of the late Sir Neil Menzies now to be recalled? I am of opinion that the sequestration awarded by the Lord Ordinary on the Bills on the 9th April 1915 must be recalled in respect that at that date there was not, and by legal possibility there could not be, estate of Sir Neil Menzies in existence, because by the sequestration of Lady Menzies the whole estate, heritable and moveable, which once belonged to Sir Neil Menzies had passed to her trustee in bankruptcy. The soundness of that opinion obviously depends upon the legal scope and effect of the sequestration of Lady Menzies. There is no proposal to recal that sequestration. The assumption of the argument on both sides of the Bar was that it should stand.

Now Sir Neil Menzies died on 21st December 1910 leaving heritable and moveable property, and by his will he appointed Lady Menzies to be his universal disponee and legatee and executrix. She completed her title to the heritable property on 20th March 1911 and confirmed to the moveable property on 24th April 1911, and thus at the date of the sequestration of her estates on 26th November 1914 she had the sole right and title to the whole property, heritable and moveable, which had belonged to her deceased husband. In short, his estate had become her estate, and his creditors had become her creditors. They were all, whether his creditors or her creditors, creditors on the sequestrated estate of Lady Menzies only, to use the words of Lord Fullerton in the case of *Hoskins* v. *Christie*, 1845, 8 D. 167, at p. 183—"creditors in debts differently circumstanced." Accordingly her trustee in bankruptcy is now vested, heritably and irredeemably, in the whole estate which once belonged to Sir Neil Menzies, to the effect set out in section 97 of the Bankruptcy Statute of 1913.

Of course the rights of Sir Neil Menzies' creditors in the estate are preserved intact. They are in no way affected by the sequestration of Lady Menzies' estate, and, indeed, at the date of her sequestration they had by force of statute done complete diligence against the estate. For I see no reason whatever to doubt the soundness of Professor Bell's Observations when commenting on the Statute of 1839, p. 168, obs. 3, that "the act and warrant in favour of the trustee operates by this section as complete diligence in favour of the creditors of the ancestor who wish to claim in the sequestration in any question with the creditors of the heir relative to the land. The reason and principle of that rule would seem to extend it to the case of moveables also." Certainly, for there can be no partial sequestration of the estate.

The same view was expressed by Lord Cunningham, a very eminent authority in bankruptcy law, in the case of *Hoskins* v. *Christie*. There a father died insolvent possessed of heritable property to which his son succeeded and made up a title and thereafter was sequestrated. Questions arose with regard to the rights of the father's creditors on the sequestrated estate of the son, and Lord Cunningham observed in the course of his opinion that "the sequestration, under the rule established in the well-known case of *Bennet* v. *M'Lachlan*, 1826, 4 S. 712 [N.E. 717], 3 W. & S. 449, became a diligence for behoof of the creditors of the ancestor as well as for those of the heir, and the trustee is to prefer each, on the respective estates of the ancestor and the heir, according to their legal order of preference. As to that proposition in the abstract," he said, "there is no question."

Indeed the whole law on this subject was fully explored and expounded in the opinion of Lord Fullerton in the case to which I have just referred, and in the paragraph at p. 184 of the report which was read to us more than once in the course of the discussion, and which is summed up, I think, effectively so far as the question now before us is concerned in these words—"In that case"—the case of *Bennet* v. *M'Lachlan*—"it was held, as it must be in the present, that although the preferences are to be determined by the Act of 1661, the debts must be claimed and the estate administered under the sequestration of the bankrupt heir."

Indeed, I think Lord Ormidale in his opinion when granting sequestration expressed with perfect accuracy the result of the opinions of the Judges in the case of *Hoskins* v. *Christie* when he said—"The assumption of these opinions is that the trustee represents creditors of the ancestor as well as creditors of the heir, and that the heir's estate included not only estate acquired by himself but also the estate which he had taken by representation from his ancestor."

Accordingly at the date of Lady Menzies' sequestration the estate which had once belonged to her husband had ceased to exist as a separate entity. It had become her estate, and all the creditors were creditors on her sequestrated estate whether their debts had been incurred by her or by her late husband. We must therefore recal the sequestration of the estates of the late Sir Neil Menzies.

The question of expediency was argued to us with great earnestness and at considerable length, but if my view on the question of competency is sound, then all considerations of expediency vanish, for if the whole

estate that once belonged to Sir Neil Menzies has passed under the sequestration of Lady Menzies, then, however expedient it may be, the sequestration of Sir Neil Menzies cannot stand; and if, on the other hand, the whole estate that once belonged to Sir Neil Menzies has not passed to the trustee in bankruptcy of Lady Menzies, then, however inexpedient, the sequestration of Sir Neil Menzies must stand.

Accordingly I am for recalling the interlocutor of the Lord Ordinary and granting the prayer of this petition.

LORD JOHNSTON—[*After narrating the facts*]—Against this judgment (of Lord Anderson on 30th June 1915) the present reclaiming note has been taken on the ground both of inconveniency and incompetency. I am far from saying that the inconveniency is not manifest, but I think that the true ground for recal is incompetency, and that on that ground an order of recal should be pronounced.

The fundamental question for consideration is the position of the deceased Sir Neil's estate when it was sequestrated on 9th April 1915. Whose was the estate, and whose were the debts which he left behind him? This is no case of an heir lying out, or of an executor failing to confirm. The estate, both heritable and moveable, had been lawfully and effectually taken out of the *hæreditas jacens* of Sir Neil and vested in Lady Menzies as far back as March-April 1911. With it she had become debtor in his debts as representing him. At common law Lady Menzies would have been liable not merely to the value of the estate taken, but in full. This alone is enough to establish that the debts had become her debts.

(1) It required the intervention of statute to limit the liability of the heir-at-law, though not of the heir of provision or executor, to the value of the estate. With this branch of the subject we are not concerned here.

(2) It required the intervention of statute to give the creditors of the defunct a preference on his estate over those of his heir, and that preference was of limited application.

The Statute 1661, chap. 24, did two things. It declared first that the creditors of the defunct should be preferred to the creditors of the heir on the defunct's estate, provided they did diligence against the heir and the real estate of the defunct within three years after the defunct's death. This, in passing, I may note that Mrs Poutz has done. And it declared second that no disposition granted by the heir in prejudice of his predecessor's creditors should be valid unless made and granted a full year after the defunct's death. Again in passing I may note that accordingly Lady Menzies' bond to the Guardian Investment Company was ineffectual in a question with Mrs Poutz and any other creditors of Sir Neil by reason that it was granted within a year of his death.

And (3) it required a further intervention of statute (Bankruptcy Act 1913, secs. 11 and 101) to enable the creditors of Sir Neil conveniently to recover his estate in *forma specifica*, so as to effectuate their preference under the Act of 1661. But it does not follow that they could take the benefit of these provisions after the heir had been sequestrated, and his estate, including that derived from the deceased debtor, had been taken out of the heir's person and vested in the trustee in his sequestration.

The sequestration of the estate of a deceased debtor was introduced by the Bankruptcy Act of 1839 and continued by that of 1856, and the provisions thereanent have been somewhat extended by the recent codifying Act of 1913. By the latter Act (sec. 11) the estate of a deceased debtor may be sequestrated, but though sequestration may be applied for it cannot (sec. 13) be awarded until six months after his death. Where sequestration is dated within seven months of his death provision is made (sec. 106) for cutting down diligence done and preference obtained after the sixtieth day before his death, and any confirmation as executor-creditor. Anything covered by such diligences or preferences, or of which confirmation shall have been expede, is declared to belong to the trustee. And not only so, but (sec. 101) where the heir has made up title to the heritable estate the Lord Ordinary or the Sheriff shall on petition to that effect, if no cause to the contrary is shown, declare such estate to be transferred to and vested in the trustee as at the date of the sequestration, to the same extent and effect as already provided in regard to the act and warrant of confirmation of the trustee.

So far statute has intervened and modified the common law. But it does not meet the case where the heir who has been himself sequestrated and his estates, which *ex hypothesi* include those derived from the ancestor and deceased debtor, have been vested, with all statutory consequences, in a trustee. Where there are unsatisfied claims against a deceased, and difficulties in bringing the heir to book, a realisation of the estate derived from the deceased and a ranking of his creditors are no doubt called for, and that is conveniently provided to be done by sequestration, and a subsequent judicial retransfer of the deceased's estate from the heir to the trustee in the sequestration. That does not, however, in the least affect the fact that in law the debts are the debts of the heir and the estate the estate of the heir. If there is any residue it goes back to the heir. But where the heir is himself sequestrated the situation, though equally requiring handling, is already provided for. The estate, as part of the heir's estate, has already been taken out of the person of the heir and vested in a trustee for realisation and distribution according to law.

It is, I think, the necessary result of the leading cases of *Bennet* v. *M'Lachlan*, 1826, 4 S. 712 (N.E. 717) and 3 W. & S. 449, and *Hoskins* v. *Christie*, 1845, 8 D. 167, that after the sequestration of the heir who has taken the estate the sequestration of the ancestor is neither required nor competent. In the latter case Lord Fullerton said (p. 184)—"After the heir has served and taken possession there is

no room for such a separation" (*i.e.*, of the estate and debts of the ancestor from the estate and debts of the heir). "The debts of the ancestor are the heir's debts, and the ancestor's estate is the heir's estate. The true description of the operation of the statute" (viz., that of 1661) "is that it introduces a separation of that part of the heir's debts which are of his own contracting from that part which, though also his own debts, are contracted by representation; and of that part of his own estate differently acquired from that other part of his own estate which he has taken by representation of his ancestors. That was the very principle on which the case of *Bennet* v. *M'Lachlan* was decided. . . . In that case it was held, as it must be in the present, that though the preferences are to be determined by the Act of 1661, the debts must be claimed and the estate administered under the sequestration of the bankrupt heir." It is quite true that at the date (1826) when the case of *Bennet* v. *M'Lachlan* was under consideration provision had not been made by statute for the sequestration of a deceased debtor. But the subsequent enactment of 1856 in no way affects the fundamental law of the situation, as is clearly shown by Lord Fullerton in the passage which I have quoted, or renders either necessary or possible the sequestration of the estates of a deceased debtor, where these have been taken out of his *hæreditas jacens* by the heir, and where the heir has already been himself sequestrated.

It is certainly not necessary and it would be most inconvenient. There is already a trustee in the saddle whose duty it is to ingather the estate of the heir, which includes that derived from the deceased, and distribute it among the creditors of the heir, who now include by the representation the creditors of the deceased. Their preferences are determined by the Act 1661, cap. 24, supplemented by provisions in the Act of 1913. To adjudicate on their respective and relative claims may be a more difficult undertaking than to adjudicate upon those of the claimants on an ordinary estate. But it is not beyond the powers of a trustee experienced in bankruptcy proceedings and under the control of the Court. To set up a rival trustee, instead of facilitating matters, would only lead to double expense and tend to friction and litigation. While, therefore, the incompetency is, I think, clear, even if it were competent I should hold it inconvenient.

The learned Dean of Faculty appeared in the end mainly, if not entirely, to found his case upon expediency or necessary convenience, based upon an alleged difficulty which he contemplated the trustee on Lady Menzies' estate will encounter in effecting a sale of the heritable estate, in respect that he cannot expect the consent of the Guardian Investment Company, heritable creditors of Lady Menzies alone. I do not think that that anticipation is justified.

In the first place, *ex hypothesi*, at present the whole massed estate derived from Sir Neil and Lady Menzies' own is effectually vested in the person of the latter's trustee. Lady Menzies' trustee has a duty to realise the massed estate and rank the creditors claiming according to their respective rights of preference as ancestor's and heir's creditors, and also *inter se* within these categories. Under the Act of 1913 I think that the trustee would have no difficulty in effecting a sale with the concurrence of one or more of Sir Neil's heritable creditors, who must, in the nature of things, be prior to the Guardian Investment Company, and that that company would have no title to interfere with that sale, but only a right to rank on the surplus, if any.

In the second place, seeing what Mr Hamilton Buchanan's duty is, I think that the Act must be read and applied by the Court in such manner as to effectuate its intention, in a case where the intention is clear, though the precise circumstances are not provided for. Accordingly I am prepared to hold that the realisation of the heritage must proceed upon the footing that Sir Neil's heritable creditors and the heritage derived from Sir Neil are primarily and exclusively to be considered, and therefore that sections 108 to 111 of the Act of 1913 must be read in such manner as to give due effect to the Act of 1661. Otherwise the trustee's duty under section 112 to prepare a scheme of division of the proceeds of the heritage could not be performed.

I quite accept that the fact that this possible attitude has been attributed to the Guardian Investment Company—and this contention has been based upon it—indicates that doubts may be spread in the writing chamber and in the auction room. But I do not think that it would be impossible by proper proceedings, to which the Guardian Investment Company would *inter alios* be contradictors, to clear the atmosphere of both and allow the sale to proceed with public knowledge that the trustee was acting within his powers and could make absolutely good and valid title to a purchaser.

A further argument was based upon some assumed difficulty arising out of the respective rights of both sets of heritable creditors to proceed to poind the ground for their heritable debts. This argument was, I think, based on an unintelligible misconstruction of the expression "current half-yearly term" occurring in section 114 of the Act of 1913, and oblivious of the fact that that section contains a new provision, viz., "and that whether the debts or securities in respect of which such poindings of the ground shall be brought shall have been constituted or granted by the bankrupt or by any ancestor or predecessor of the bankrupt." This provision was doubtless inserted in the codifying Act to obviate the effect of the judgment in the case of *Millar*.

Accordingly I agree that the Lord Ordinary's interlocutor cannot stand, and that the sequestration of Sir Neil Menzies' estates should be now recalled, and the way cleared for Mr Hamilton Buchanan performing his statutory duty as trustee in Lady Menzies' sequestration.

LORD MACKENZIE — In my opinion the petition for recal of the sequestration of the

estates of the deceased Sir Neil Menzies should be granted.

Lady Menzies was the universal legatory of Sir Neil. She made up a title to the heritable estates, and was confirmed executrix to the moveables. Upon her sequestration the whole property was vested in Mr Hamilton Buchanan as trustee in the sequestration to the effect provided by the Bankruptcy Act of 1913, section 97, subsection (2) of which deals specially with heritage. Standing this sequestration—and there is no proposal to recal it—there is and can be no possible estate which can be carried under a sequestration of the estates of Sir Neil. All that could vest in the trustee under such a sequestration would be the estate of Sir Neil as at the date of the sequestration. But the whole of Sir Neil's estate has already vested in Mr Buchanan for onerous causes, and irredeemably. There being no possibility of estate the petition to sequestrate Sir Neil is, in my opinion, incompetent. It will be Mr Buchanan's duty to distribute the estate in his hands among the creditors of the ancestor and heir, in accordance with the rules of preference. The debts of the ancestor are the heir's debts, and the ancestor's estate is the heir's estate.

The argument of the Dean of Faculty proceeded entirely upon the special feature that Lady Menzies granted a bond within a year of Sir Neil's death, which is a valid charge on the heritable estate as in a question with her own creditors, but ineffectual as in a question with the creditors of Sir Neil. It was contended that the rights of the latter may be prejudiced. This, however, cannot be so, for their rights are defined by the Act 1661, cap. 24. The vesting of the estate in Mr Buchanan will accordingly have no effect upon the rights of the creditors of the ancestor, as provided by section 97 (2).

What I have said appears to be in accordance with the authorities, especially the cases of *M'Lachlan* v. *Bennet*, 1826, 3 W. & S. 449, *aff.* 4 S. 712 (N.E. 717), and *Hoskins* v. *Christie*, 1845, 8 D. 167.

LORD SKERRINGTON—I am of opinion that the sequestration of the estates of the late Sir Neil Menzies was ineffectual for accomplishing the avowed object of its promoters, which was to take out of the sequestration of Lady Menzies' estates the property to which she had succeeded as legatee of her husband's whole heritable and moveable estates under his last will and testament.

By section 97 of the Bankruptcy (Scotland) Act 1913 the property which it is desired to attach by the sequestration of the late Sir Neil Menzies' estates was already vested heritably and irredeemably in Mr Buchanan in virtue of the act and warrant in his favour as trustee on the sequestrated estates of Lady Menzies. In order to divest Mr Buchanan of that property it would have been necessary either to have the sequestration of Lady Menzies' estates recalled, or, alternatively, to establish in a petition, under section 99 of the statute, that the property in question ought to be taken out of the sequestration of Lady Menzies' estates. It is, however, too late to resort to the former remedy, and as regards the latter a petition under section 99 must inevitably have failed, because the property to which Lady Menzies succeeded from her husband having become her property by his *mortis causa* disposition was rightly and properly included in the sequestration of her estates. One arrives at the same result if one transfers one's attention from the position of Sir Neil's estates to that of his creditors. By the operation of section 103 of the statute these creditors were placed in the position of persons who had adjudged the heritable estates of Lady Menzies, including the estates to which she had succeeded from her husband. It was therefore incompetent for them to attach these latter estates a second time either by individual adjudication or collectively by sequestration, as the necessary effect of any such attachment (if valid) would be to disturb and alter the rights conferred upon the whole creditors of Lady Menzies by section 103. Counsel for the respondents founded upon the proviso in section 97 (2) of the Act as having the effect of entitling a creditor of the ancestor to ignore the sequestration of the heir's estates and to resort to all manner of diligence against the ancestor's estates, including sequestration, in exactly the same way as if the heir's estates had not been sequestrated and a trustee appointed thereon. This construction seems to me to be inadmissible, and there is no difficulty in finding a reasonable meaning and effect for the enactment that the transfer and vesting in favour of the trustee on the heir's sequestration shall have no effect upon the rights of the creditors of the ancestor. Indeed the words which immediately follow and which make the act and warrant operate in favour of the ancestor's creditors as complete diligence make it plain that the ancestor's creditors are assumed to be in the position of adjudgers in the sequestration of the heir's estates as subsequently enacted by section 103. In these circumstances I do not profess to understand the view which found favour both with the Lord Ordinary who awarded the sequestration of Sir Neil Menzies' estates and also with the senior counsel for the respondents, to the effect that the ancestor's creditors have an option either to make a claim in the sequestration of the heir for a preference over the estates which formerly belonged to the ancestor, or alternatively to ignore that sequestration and to attach the ancestor's estates by adjudication, sequestration, or other diligence.

While I have come to the foregoing conclusion on principle and on a construction of the language of the Bankruptcy Act, it appears to me that the question is really concluded by the authorities cited by the petitioners' counsel.

If I am right in thinking that it is impossible by sequestrating Sir Neil Menzies' estates to divest Mr Buchanan of any part of the estates which belonged to Lady Menzies at the date of her sequestration, it follows, in my opinion, that the first-men-

tioned sequestration is incompetent upon the simple ground that there is no estate which it can possibly attach, and that the sequestration cannot therefore serve any useful purpose. There is authority for the proposition that the absence of any visible or apparent estate may not be a good ground for refusing to award sequestration, but the case is entirely different where it is demonstrated that no estate falling under the sequestration can possibly exist. Entirely different considerations might have applied if Sir Neil had left only a part of his estate to his widow, or if his will had been challenged as not validly executed. In neither of these cases could it have been predicated with certainty that the sequestration of Sir Neil's estates could not effect any useful purpose. In the present case it seems to me that any preferable right or any preference by exclusion which the law confers upon the creditors of Sir Neil Menzies as regards the estates which belonged to him at the date of his death may be perfectly well made good in the sequestration of Lady Menzies' estates. The respondents' senior counsel in his argument practically perilled his case upon the theory that the right conferred upon the ancestor's creditors by the Act 1661, cap. 24, entitling them to challenge voluntary alienations executed by the heir within one year of the ancestor's death could not be effectually, or at least satisfactorily, enforced if Sir Neil's estates were administered as part of Lady Menzies' sequestrated estates. Challenges founded on the Act 1661, cap. 24, are comparatively rare, but challenges on the ground of inhibition are common, and give rise to no practical difficulty in the working out of a sequestration, though they may give rise to complicated questions of ranking, as in the case of *Baird & Brown* v. *Stirrat's Trustee*, (1872) 10 Macph. 414. 9 S.L.R. 250. As Mr Bell points out (i, 771), the effect of the statutory prohibition "is similar to that of the diligence of inhibition."

For these reasons I agree with your Lordships that the Lord Ordinary ought not to have refused, but on the contrary ought to have granted, the prayer of the petition.

The Court pronounced this interlocutor—

"Recal said interlocutor and remit to the Lord Ordinary to recal the sequestration of the estates of the late Sir Neil Menzies; declaring always that Mr J. Hamilton Buchanan as trustee on Lady Menzies' estate shall make payment of the necessary expenses incurred by Mr John S. Gowans as trustee on the estate of Sir Neil Menzies, and also of a reasonable remuneration as such trustee out of the dividend, if any, falling to Mrs Poutz, the sole petitioner for the sequestration of the estates of Sir Neil Menzies: Find the respondents liable to the petitioners in the expenses caused by their opposition to the petition for recal: Find the respondents liable to the minuter, the said John S. Gowans, in a watching fee: Find the petitioners entitled to their expenses so far as not hereinbefore disposed of out of the sequestrated estates of Lady Menzies; and remit the accounts of said expenses to the Auditor to tax and to report to the Lord Ordinary, to whom grant authority to deal with the same and to proceed in the petition as accords."

Counsel for Reclaimers—Hon. W. Watson, K.C.—A. M. Mackay. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents—The Dean of Faculty (Clyde, K.C.)—Anderson, K.C.—D. M. Wilson. Agents—Burns & Waugh, W.S.

Counsel for the Minuter, John Stuart Gowans—Wilson, K.C.—D. M. Wilson. Agents—Burns & Waugh, W.S.

Tuesday, November 23.

OUTER HOUSE.

[Lord Dewar, Ordinary.

MUIR'S TRUSTEES *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED.

Process — Expenses — Fee Fund Dues — Multiplepoinding—Condescendence and Claim by Several Claimants Claiming Separate Legacies.

Where in an action of multiplepoinding and exoneration a single condescendence and claim is tendered for several claimants who claim separate legacies but have combined, the fee fund dues are 2s. 6d.

C.A.S. (1913) K. ii, dealing with fee fund dues, gives the table of fees. Part ii of the table (Outer House), head 17, is—"Condescendence and claims or interests, and revised condescendences and claims or interests in multiplepoindings, rankings, &c., for each separate claim where the sum claimed is upwards of £10. . . . 2s. 6d."

In an action of multiplepoinding and exoneration raised by the testamentary trustees of Mr and Mrs Muir of Abbeybank, Arbroath, acting under their mutual will, a single condescendence and claim was tendered by the National Provincial Bank of England, Limited, and twenty other claimants. Each of these claimants claimed a separate specific legacy or a separate pecuniary legacy. Seventeen of the pecuniary legacies exceeded £10 each, and one was of that amount; the specific legacies were three in number. A question was raised as to the fee fund dues payable on such a claim, whether the amount should only be one 2s. 6d., or should be obtained by taking 2s. 6d. for each claimant whose separate legacy exceeded £10 in value.

On 23rd November the Lord Ordinary (DEWAR) pronounced this interlocutor:—"The Lord Ordinary having considered the condescendence and claim lodged by the National Provincial Bank of England and twenty other claimants (the several claimants joining in said condescendence and claim being separate claimants for separate