LORD COTTENHAM and LORD BROUGHAM, and they both, I think, always laid it down as the rule, that the victor should have his costs, unless there was something peculiar in the case. Merely saying that a will is ill constructed is not a reason for departing from the general rule.

Interlocutor affirmed, and appeal dismissed with costs.

For Appellant, Grahame, Weems, and Grahame, Solicitors, London; J. & A. Peddie, W.S., Edinburgh.—*For Respondents*, Melville and Lindsay, W.S. Edinburgh; Loch and Maclaurin, Solicitors, London.

FEBRUARY 20, 1860.

WILLIAM C. WRYGHTE, Official Manager of the Royal Bank of Australia, *Appellant*, *v.* DONALD LINDSAY, Judicial Factor on the Estate of the late Sir Francis Walker Drummond, Bart. of Hawthornden, and Others, *Respondents*.

Bankruptcy—Sequestration, Competency of—Acts 2 and 3 Vict. c. 41; 16 and 17 Vict. c. 53—Winding up Acts, 11 and 12 Vict. c. 45, and 12 and 13 Vict. c. 108—Call on Contributories—Debt—*A party in Scotland having died, holding shares in an English joint stock company, his representatives confirmed to his estate, including these shares. After his death, the Joint Stock Companies' Winding up Acts* (1848 *and* 1849), 11 *and* 12 *Vict. c.* 45, *and* 12 *and* 13 *Vict. c.* 108, *came into operation. The official manager made a demand against the executor of the deceased shareholder, for payment of a large sum in name of a call, in terms of the acts, and particularly under the* 83*d section of the act of* 1848; *but the executor did not pay the call. The official manager then applied, by direction of the Court of Chancery in England, in terms of the acts* 2 *and* 3 *Vict. c.* 41, *and* 16 *and* 17 *Vict. c.* 53, *for sequestration of the estate of the deceased shareholder in respect of the call.*

HELD (affirming judgment), *That the claim made under the call was not a "debt" in the sense of the act* 2 *and* 3 *Vict. c.* 41, *and sequestration refused as incompetent.*[1]

This case, which was reported by the Lord Ordinary to the First Division, was virtually disposed of by the Court on 18th July 1856; but doubts having occurred whether the Court could, in the first instance, pronounce an interlocutor, they remitted to the Lord Ordinary to do so, and his Lordship thereafter pronounced an interlocutor refusing the application for sequestration. On a reclaiming note by the petitioner, the Court adhered on the grounds previously expressed by their Lordships.

The petitioner appealed to the House of Lords on the following grounds:—1. The proceedings for winding up the affairs of the bank in the Court of Chancery conclusively established that the estate of Sir Francis Walker Drummond was liable to the appellant, as official manager, for the sum of £14,000, the amount of the call, and that this sum formed a debt against his estate. 2. Even if the proceedings in Chancery under the winding up were not conclusive, and could be examined by the Court of Session, the respondent, as representing the estate of Sir Francis Walker Drummond, was rightly inserted in the list of contributories, and the estate of Sir Francis was liable for the sum of £14,000, the amount of the call in question. 3. The liability for a call constituted a debt against the estate of Sir Francis Walker Drummond, in respect of which it was liable to be sequestrated under 2 and 3 Vict. cap. 31. 4. The proceedings of the appellant in the Court of Session, as well as in the Court of Chancery, were in all respects regular and proper; and the Court of Session ought to have directed the Lord Ordinary on the Bills to grant sequestration of the estates of Sir Francis Walker Drummond.

The respondents supported the judgment of the Court of Session on the following grounds:—1. The appellant, as official manager, had no right or title to apply for sequestration of the estates of the deceased Sir Francis Walker Drummond. As official manager, he could adopt no steps excepting those authorized or warranted by the Statutes, and these did not warrant an application for sequestration in Scotland. 2. The call, in respect of which the appellant sought sequestration to be awarded, was not such a debt as under the Scotch Bankrupt Statutes warranted sequestration. It was in its nature contingent, and did not necessarily imply that any debt whatever would ultimately be found due by the party upon whom the call was made. 3. Even supposing the appellant's title and the debt claimed to be unexceptionable, the debt was

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[1] See previous reports 19 D. 55: 28 Sc. Jur. 660. S. C. 3 Macq. Ap. 772: 32 Sc. Jur. 360.

not due by the deceased Sir Francis Walker Drummond, and, therefore, was not a debt in respect of which sequestration of his estates could be awarded. (1) At the death of Sir Francis, there was no debt due by him either to the bank or to its creditors, and all the losses sustained by the bank had occurred long subsequent to Sir Francis' death. (2) The shares were taken up by Sir James Walker Drummond, who was registered as a partner, and he alone was liable. (3) Sir James Walker Drummond alone was entered as contributory in the list settled by the master, and it was incompetent, while that list stood unaltered, to claim the call from any one not entered in the list. (4) By the Scotch Bankruptcy Statute, the estates of a deceased debtor cannot be sequestrated at the instance of any one who cannot instruct that he was a creditor of the deceased at the time of his death. 4. The affidavit upon which the appellant's petition for sequestration was founded was disconform to the Statute, and insufficient to support the prayer of the petition. 5. In the whole circumstances, it was inexpedient that sequestration of the estates of the late Sir Francis Walker Drummond should be awarded. It was not incumbent on the Court to award sequestration; and no good reason had been shewn why, by such an award, the administration of the respondents should be interrupted and superseded.

Daniell Q.C., *Anderson* Q.C., and *Roxburgh*, for the appellant.—The Winding up Act 1848, and the order of the Court of Chancery, enabled the appellant to apply for sequestration of the estate of the deceased Sir Francis Drummond. The order of the Court of Chancery constituted the estate of Sir Francis a contributory and the appellant a creditor; and, accordingly, he was entitled to the ordinary remedies of creditors—*North of England Banking Co.* 1 De G. & Sm. 545; *Thomas' Case*, 1 De G. & Sm. 579; *Hamer's Case*, 2 De G. M. & G. 366; *Robertson's Case*, 6 De G. M. & G. 586; *Crossfield's Case*, 2 De G. M. & G. 288; *Connell's Case*, 25 L. J. 649, Ch.; *Macdonald* v. *Auld*, 2 D. 1104; *Newall's Trustees*, 2 D. 1108.

Rolt Q.C., and *Sir H. Cairns* Q.C., for the respondents.—The appellant had no title to apply for sequestration of the estate of any party in Scotland. There was no debt, but merely a claim, and a claim upon Sir James', and not Sir Francis', estate. The application did not comply with the requirements of the Statute 2 and 3 Vict. c. 41, § 9, inasmuch as it did not set forth the securities in respect of which the alleged debt arose.

LORD CHANCELLOR CAMPBELL.—One question in this case is, whether the act of parliament under which this proceeding is instituted has been repealed or not. I do not feel it my duty to give any opinion upon that question, because I think that, even if the act of parliament was in force at the time, still the interlocutor appealed against was properly pronounced, and that therefore this appeal ought to be dismissed. I should have been very loath to reverse this interlocutor, which turns very much upon Scotch procedure, unless I had clearly seen that the Court below was wrong; but, after hearing the arguments on both sides, it seems to me clear that the Court below was right. I abstain from giving any opinion upon the validity of the order of the 9th of August 1854. There are very serious difficulties upon that question, but I give no opinion upon it. *Esto* that that was a valid order, I am of opinion that the Court did well in refusing the sequestration.

This is a most peculiar remedy that is given by the 4th section of the 2 and 3 Vict. c. 41; and the question is, whether this is a case coming within that enactment. It enacts, that sequestration may be applied for the estates of any deceased debtor, who, at the time of his death, resided, or had a dwelling house, or carried on business, in Scotland, and was at that time owner of heritable or moveable estate in Scotland, provided that such sequestration shall be applied for by one or more creditors qualified as hereinafter mentioned. This, then, is a most peculiar proceeding, whereby the whole of the real or personal property of the deceased is to be sequestrated for the benefit of all his creditors. The question is, whether this enactment has been framed so as to meet the case of an application by this official manager upon the property of a deceased shareholder, the proceedings having been taken against the representative of that shareholder. Now, in order to bring this case within the act of parliament, it seems to me quite clear, that there must be the relation of debtor and creditor subsisting between the petitioner and the person against whose estate the sequestration is sought. It must be shewn that Sir Francis Walker Drummond was the debtor of Wryghte, the petitioner. The properly qualified persons to apply for the sequestration are described in the 8th section of this act of parliament. Does that description in the slightest degree accord with the situation of Wryghte, the official manager acting under the order of the Court of Chancery? I am clearly of opinion that it does not. It is for the petitioner to shew, that this debt does arise necessarily from the engagement into which Sir Francis entered, binding his estate; but it is unnecessary now to decide that question. The reason is enough to authorize the refusal of the sequestration, that the relation of debtor and creditor never subsisted between Mr. Wryghte and Sir Francis Walker Drummond. It is quite certain that that relation never subsisted. And it seems to me equally certain, that, according to this act of parliament, the relation of debtor and creditor must subsist between the petitioner and the party against whose property the sequestration is sought. On that ground I am of opinion, that the sequestration was properly refused by the Court below, and that this appeal ought to be dismissed.

LORD BROUGHAM.—In the course of this argument, from which we have derived all the aid to be hoped for, I have had very considerable doubts upon more points than one; but I agree with my noble and learned friend, that, upon all the points upon which I entertained doubts, it is unnecessary that we should now decide. In the first place, the question arises, whether or not the act of parliament, 2 and 3 Vict. c. 41, has been repealed. It is unnecessary to dispose of that question. And, in the next place, as to the validity of the Master's order of the 9th August 1854, I say nothing whatever upon these points. There are other points, particularly in various parts of the very able and elaborate judgment of the Lord President in the Court below, upon which considerable doubts occurred to my mind, in examining that judgment from time to time, but into these matters I do not at all enter. The question, and the only question for us in this stage of the cause, is, whether the relation of debtor and creditor existed between Wryghte, the petitioner for the sequestration, and Sir Francis Walker Drummond, the deceased, whose representative was Sir James Walker Drummond, the party before us. I entertain no doubt whatever upon the grounds stated by my noble and learned friend, that that relation did not subsist between them; and it is enough for us to be assured of that, in order to support the judgment of the Court below in refusing the sequestration.

LORD CRANWORTH.—If this case had to be disposed of upon what I may call the preliminary point, namely, whether the Statute originally giving sequestration, the 2 and 3 Vict. c. 41, was repealed, and a new Statute substituted for it, I give no intimation as to what opinion I might have been called upon to express; but this I do not hesitate to say, that, in determining that question, I would have endeavoured to stretch language to the very utmost limits in order to shew, that the effect of that second Statute was not what is supposed, viz., to put an end to proceedings that were actually pending at the time that it passed. I concur, however, with my noble and learned friend on the woolsack, and with my noble and learned friend who has preceded me, that, on this appeal, we need not consider how that question ought to be decided, because, whether the act was in force, or whether it was not in force, at the time these proceedings were pending, I think the interlocutor of the Court below was perfectly right.

The doubt which occurred to my mind for some time during the argument was this—Whether or not, throwing overboard altogether the order of the 9th August 1854, and all which followed upon it in Scotland in the way of registration, the proceedings might have been sustained simply by the order of the Master of the 8th of March 1856, directing this application for sequestration grounded upon the previous order to pay the call. That was a view that for some time I thought possibly might have been sustained; but, upon further consideration, I think that also fails upon the same grounds upon which my noble and learned friend thinks it fails.

With reference to the order that was registered, the Master, of course, could not validly direct the sequestration unless the Statute authorized it. The Statute authorizes the application for the sequestration of the estate of a deceased person at the instance of a creditor of that person. Now Wryghte certainly was not a creditor; and although, by means of the English act of parliament, he is put *in loco creditoris*, so that it cannot be gainsaid as against him, that he is not a creditor in whose place he is substituted, that is purely English machinery, which is not introduced into Scotland at all. And if the judgment of the Master, establishing the fact that Sir Francis Walker Drummond was a debtor, may be taken as a judgment not conclusive—at least, a foreign judgment valid *primâ facie* in Scotland—you cannot import into Scotland, with that *primâ facie* judgment against the estate of Sir Francis, the machinery of English law, whereby that is to be enforced. Upon that short ground, (I do not mean to say that there may not be other grounds,) it appears to me, that no sequestration could be granted under the Statute of 2 and 3 Vict. cap. 41, and consequently that the interlocutor was right.

LORD WENSLEYDALE.—I am entirely of the same opinion as my noble and learned friend on the woolsack, and the other noble and learned Lords who have preceded me. I found my opinion entirely upon the 4th clause of the 2 and 3 Vict. cap. 41. I had very grave doubts upon the other parts of the case, but it is unnecessary to give any opinion upon them. I confine myself to that clause; it is necessary under that clause that the deceased should be a debtor, in some sense, at the time of his death; and that Wryghte should be a creditor—not Wryghte personally, but Wryghte as representing creditors at the time when the order for the payment of the call was made. I think, that neither of these points is clearly established, and I think, that the judgment of the Lord President in the Court of Session, though it may be open to some of the objections which have been stated in the course of the argument, was perfectly correct in that respect. Those two facts are not made out; and therefore I concur with my noble and learned friend in the opinion that the judgment should be affirmed.

Mr. Daniell.—Would your Lordships think it right to make an addition to the order with regard to costs, that the costs of all parties should be paid out of the estate?

Sir Hugh Cairns.—There is an absolute order of the House for the payment of costs.

Mr. Daniell.—What I suggest does not interfere with the order of the House.

LORD CHANCELLOR.—Out of what estate do you mean?

Mr. Daniell.—Out of the estate of the Royal Bank of Australia.

LORD CRANWORTH.—The order will be without prejudice to any application you may make for the payment of your costs.

Mr. Daniell.—It will be a personal order upon the official manager, without prejudice to any application he may make under the Winding up Acts.

Interlocutors affirmed, and appeal dismissed with costs, without prejudice to any application which the appellant may make under the Joint Stock Companies' Winding up Acts, in respect of the payment of costs out of the assets of the said Bank and the calls under the said Acts.

For Appellant, H. Harris, Solicitor, London.—*For Respondents*, Robertson and Simson, Solicitors, London.

FEBRUARY 23, 1860.

PATRICK DAVIDSON and Others, Trustees and Executors of the late Duncan Davidson, *Appellants*, *v.* The Reverend GEORGE TULLOCH and Others, Executors of the deceased Dr. John Tulloch, *Respondents*.

Reparation—Damages—Fraud—Sale of Shares—Joint Stock Company—Fraudulent Reports of Directors—Liability of Executors of Director—Relevancy—Title to Sue—*The representatives of a deceased shareholder A in a joint stock bank brought an action after his death, (which took place in* 1851,) *against the executors of B, a director, (who had died in* 1849,) *concluding for repayment of the price paid by A for shares of the stock of the bank purchased by him in the market in* 1834, *on the ground that A had been induced to purchase by false and fraudulent representations made, and reports issued, by B and his co-directors, and alternatively for reparation for the loss and damage sustained by A through the wrongous actings of the directors during the period A held stock of the bank.*

HELD (affirming judgment), (1) *That the averments on the record were relevant and sufficient to support the action;* (2) *That the action, being grounded on fraud and misrepresentation, was competently directed against the executors and representatives of B, the deceased director;* (3) *That a single shareholder was entitled to pursue for reparation of the wrong alleged, without the concurrence of the company or the other shareholders;* (4) *That the damages were measured by the difference between the price paid and what would have been the fair price of the shares at the time of purchase; and* (5) *Form of issues approved of to try the case.*[1]

A company, called the "Banking Company in Aberdeen," had carried on business there prior to 1828. In the end of 1827, a new contract of copartnery was entered into for twenty-one years, from 1st January 1828. It provided that the business of the company should be confined to banking; that regular and distinct books should be kept and balanced on the 1st of March yearly; and that the majority of the partners present at the subsequent general meeting of the company, to be held on the first Tuesday of April yearly, should have it in their power to declare such a dividend from the free nett profits as they should think proper, and order payment thereof according to the respective shares of the partners in the capital. Two annual general meetings were to be held; a governor and twelve directors to be annually chosen, four of them to be a quorum; and the business of the governor and the directors was to be to superintend and direct the cashier, accountant, and others employed in the office of the company.

The 18th article of the contract provided, that if it should appear, upon bringing the affairs of the company to the yearly balance, that one twelfth part of the capital stock of the company had been lost in the prosecution of the business, in that case it should be in the power of a majority of the partners at the next general meeting of the company, or at any other subsequent general meeting called in terms of the contract, to insist that the partnership should be forthwith dissolved, and that the said meeting should be obliged thereupon to declare accordingly, by a minute to be entered and engrossed in the sederunt book.

In October 1834, the late Professor Tulloch, whose executors the pursuers are, purchased ten shares of the stock of this bank, which was discovered to be insolvent in 1849.

The present action was raised by Professor Tulloch's executors, against the representatives of the deceased Duncan Davidson, advocate in Aberdeen, who had been one of the directors of

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[1] See previous reports 20 D. 1045, 1319: 30 Sc. Jur. 635, 747. S. C. 3 Macq. Ap. 783: 32 Sc. Jur. 363.