tion should be sustained as a conveyance which denuded the truster, and vested the estate in the trustee for behoof of the creditors, leaving it to any creditor who was dissatisfied with the powers or conditions of the trust to extinguish the trust by resorting to sequestration. It is true that there is a note to the case by which it is indicated that the arresting creditor acceded to the trust. But the decision did not proceed on this ground, and the facts set out in the note would not amount to accession.

I cannot find any later case which is contrary to that which I have cited, and though it may go further than the opinion of Lord Deas in sustaining as effectual to exclude arrestment a trust-deed with extraordinary powers, I am disposed to adopt that opinion. It sustains the trust-conveyance to the effect of securing a fair division of the estate to the exclusion of preferences, and a sequestration affords an easy remedy for avoiding any conditions with which non-acceding creditors are dissatisfied.

Lord Craighill, who was absent at the argument, delivered no opinion.

The Court refused the appeal.

Counsel for Appellant—J. Burnet—Wallace. Agent—Knight Watson, Solicitor.
Counsel for Respondent—Trayner—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Wednesday, November 22.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

HENDERSON *v.* M'LINTOCK.

Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap* 79), *sec.* 86—*Bankruptcy— Trustee in Bankruptcy — Management of Sequestrated Estate.*

Statements in a petition *held not relevant* to entitle the Court to interfere with the management of a trustee on a sequestrated estate under section 86 of the Bankruptcy (Scotland) Act 1856.

Miss Jane Henderson, the appellant in the case reported above, also presented a petition in the Sheriff Court of Dumfries and Galloway, in which she sought to have M'Lintock, as trustee in the sequestration of her father J. M. Henderson, ordained to produce an account of his intromissions with the funds and estate of the bankrupt up to 2d March 1882, and to have him found bound so to account and rank her claim without deducting or taking credit for two sums of £622, 13s. 3d. and £536, 19s. 5d., as if these sums had been recovered by him as part of the funds of the sequestrated estate. The ground on which the petition was brought was that the respondent had illegally and erroneously allowed the trustees under J. M. Henderson's voluntary trust-deed to deduct these sums in accounting with him. The petitioner averred that the trustees under the voluntary trust-deed had realised the greater part of her father's estate, and that the respondent had illegally allowed them to deduct the sums in question, which they were not entitled to credit for in accounting with the arresting creditors, in whose right (as explained in the preceding report) she now was. The sum of £622, 13s. 3d., first above mentioned, consisted for the most part of the expenses of both parties to the litigation, in which the right of Mrs Henderson to be ranked as a creditor of her husband was established. The other sum of £536, 19s. 5d. consisted of dividends paid to certain creditors by the trustees under the voluntary trust-deed. She alleged that these creditors held securities which they were bound to value and deduct, and that they had not done so, and that therefore the payments to them had been illegally and improperly made.

The petitioner pleaded, *inter alia*—"(1) The defender was bound to recover the whole funds belonging to J. M. Henderson at the date of the arrestments, and to administer the same in terms of the Bankruptcy Statute. (2) Mrs Henderson, the pursuer's author, not having acceded to the trust-deed, no part of the expense connected therewith is chargeable against her. (3) The trustees were not entitled to charge Mrs Henderson with the expenses incurred in opposing the action raised by her against her husband. (4) Those creditors who held securities should only have been ranked after deduction of the value of such securities. (5) [This plea was stated in a revised paper lodged by her] By section 86 of the Bankruptcy Act of 1856 the defender is amenable to the Lord Ordinary and to the Sheriff, at the instance of any party interested, to account for his intromissions and management."

The respondent averred that he had, in compliance with the Bankruptcy Act, prepared a report setting forth the state of the bankrupt's affairs, and an estimate of what the estate might produce. In that report he stated that he had taken possession of the books and documents belonging to the estate in the hands of the trustees who had been acting under the private trust-deed, and applied to them for an account of their intromissions. He further stated that the accounts rendered by them had been carefully audited by him, and that the balance had been paid to him by them, a discharge having further been executed in their favour. He also averred that the petitioner had had ample opportunity of objecting to his settlement with the private trustees, and had not availed herself of it.

He pleaded, *inter alia*—"(1) The petition being incompetent at common law, and not founded on the Bankruptcy Act, should be dismissed. (2) Section 86 of the Bankruptcy Act 1856, which alone authorises an application of the nature here made by the pursuer, not being founded on in the petition, it should be dismissed as incompetent, and the pursuer found liable in expenses."

The 86th section of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), enacts as follows:—"The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the Sheriff, although resident beyond the territory of the Sheriff, at the instance of any party interested, to account for their intromissions and management, by petition served on them; and in case it shall appear that such application ought not to have been made, the party complained of shall be entitled to his full expenses, to be either retained out of the funds or recovered from the party complaining, as the Lord Ordinary or the Sheriff shall direct."

The Sheriff-Substitute (BOYLE HOPE) found that the petition was incompetent in respect that it did not bear to be founded on any provision of the Bankruptcy Act; therefore sustained the first plea-in-law for the defender, and dismissed the petition.

"*Note.* — The Sheriff-Substitute feels the same reluctance that he always feels to sustain a purely technical plea, especially when in all probability the result will be merely to cause unnecessary expense; for he assumes, from previous experience in connection with this bankrupt estate, that the points in dispute will be raised again. But he does not see how he can decide otherwise than he has done, looking to the decisions of the Court of Session which the respondent has quoted. The respondent holds a statutory position, and his duties are all defined by the Bankruptcy Act, and procedure of various kinds is provided for the purpose of reviewing or controlling his actings. The respondent seems to the Sheriff-Substitute right in his contention that at common law there is no power to call him to account for his intromissions. If there is not, then the petition does not state that it has been brought in virtue of any statutory provision. If the petition is a common law one, it is appealable to the Sheriff. If it is not, it can only be appealed to the Court of Session. It is therefore of importance that the position of the action should be clearly defined. In the case of *Megget* v. *Fairley*, 1st March 1823, 2 Shaw, p. 233, the Court having dismissed a petition against a trustee on a certain ground, refused, when a reclaiming petition was brought, to entertain it, on the ground that the sections of the Act then founded on had not been founded on in the original petition. The fact of a new Bankruptcy Act having been passed since then does not seem to affect the force of this decision. In *Parlane* v. *Templeton*, 28th June 1825, 4 Shaw, p. 123, the Court dismissed a complaint as incompetent because the section of the Act founded on was not libelled.

"The case of *Carruthers* v. *The Caledonian Railway Company*, 25th March 1853, 15 D. 591, is somewhat analogous, and it is of importance as bearing upon the petitioner's contention that his action is rendered competent because when the plea was stated against the competency of the action he inserted a plea founding on the Act in his revised condescendence. In the case last mentioned it was held that statements made in the condescendence could not cure the defect in a summons not relevantly laid on a statute. It is not necessary to consider the remaining points in the case, but the Sheriff-Substitute will only indicate his opinion, fortified by the case of *Burt* v. *Bell*, 3d Feb. 1863, 1 Macph. p. 382, that a petition founded on the 86th section of the statute would be competent."

The petitioner appealed, and argued that the petition was the only competent course which she could have taken to make the trustee in the sequestration account for his intromissions.

Authorities—*A and B* v. *Tunnock's Trustees*, Nov. 25, 1865, 4 Macph. 83; *Adam and Kirk* v. *Tunnock's Trustees*, Nov. 17, 1866, 5 Macph. 41; *M'Dermott* v. *Ramsay*, Dec. 9, 1876, 4 R. 217.

The respondent replied—At common law there was no power to call him to account for his intromissions. That being so, the present petition was incompetent, inasmuch as it did not state that it had been brought in virtue of any statutory provision. Besides, assuming its competency, it was not relevantly laid.

Authority—*Burt* v. *Bell*, Feb. 3, 1863, 1 Macph. 382.

At advising—

The LORD JUSTICE-CLERK delivered the opinion of the Court as follows—In regard to the question as to how far the 86th section of the statute applies here, I am of opinion that it does not apply, or rather I should say that in my opinion there is no relevant statement here on record to bring it under that statute.

The clause is a useful one in enabling persons having an interest to come before the Court and call on the trustee to account for any proceedings which may have taken place in the course of the sequestration though no creditor appears to challenge under the direct provisions of the statute. Now, there are many supposable cases where the rule is good and salutary, but I am of opinion that the clause was never intended to effect a review of the whole proceedings of the trustee without stating some specific ground of action, such as a specific act of omission or malversation, all of which things come under the eighty-sixth section. Here, however, the clause is used as if it was proposed to raise the whole question without making any specific allegation of a particular fault.

Now, when we come to specification, I think there has been in point of fact no specific fault averred. The irregularity alleged is that the trustee in the sequestration having taken up the estate, did not call on the trustees under the private trust to account for their intromissions. It is shown, however, in the statement that the commissioners did call on them to account, and they did in point of fact account. The account is in process and has been audited, and further the balance has been paid to the respondent. It is said he ought to have challenged the proceedings of the voluntary trustees, but it is not said how the proceedings were improper, and further it is not clear that under the 86th section, the trustee having the funds of the bankrupt, was bound to enter into a litigation with the private trustees. On the whole matter I am satisfied that while the 86th section is a salutary one for the cases to which it applies, there is here no relevant ground stated for this application. Therefore while I cannot concur with the Sheriff in finding that the petition is incompetent, I am of opinion that no relevant case has been stated.

LORD CRAIGHILL, who was absent at the argument, delivered no opinion.

The Court dismissed the appeal.

Counsel for Appellant—J. Burnet—Wallace. Agent—Knight Watson, Solicitor.

Counsel for Respondent—Trayner—W. Campbell. Agents—J. & J. Galletly, S.S.C.