SUMMER SESSION, 1916.

COURT OF SESSION.

Saturday, May 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

SALAMAN (LENNOX' TRUSTEE) *v.* MUNRO (LENNOX SINCLAIR'S TRUSTEE).

Bankruptcy—Sequestration—Succession—Competing Sequestrations — Ancestor's Estate Sequestrated in Scotland—Trustee Appointed on Executor's Bankrupt Estate in England—Right to Funds Earmarked as Executry.

A appointed B her sole executor and universal legatee. After confirmation he lodged in bank two sums on deposit-receipt in favour of the executor. According to the inventory the estate was insolvent, and about a year after death it was sequestrated in Scotland and a trustee appointed thereon. B had two months earlier been declared a bankrupt in England, and a trustee had been appointed there on his estate. Both trustees claimed the deposit-receipts, B on the ground, *inter alia*, that as B was a creditor of his ancestress to a greater amount he was entitled by Scots law to satisfy his debt in preference to all other creditors not having done diligence.

Held that A's trustee was entitled to the deposit-receipts, leaving to B's trustee to claim in that sequestration.

On 25th March 1914 Bonar, Hunter, & Johnstone, W.S., Edinburgh, *pursuers*, brought an action of multiplepoinding and exoneration against, *inter alios*, Frederick S. Salaman, C.A., London, trustee on the bankrupt estate of Claud H. M. Lennox of East Pallant House, Chichester, and Claud H. M. Lennox for his interest, if any, *reclaimers*, and Charles J. Munro, trustee on the sequestrated estates of Lady Lennox Sinclair of Stevenson, in the county of Haddington, *respondent*. The fund *in medio* consisted of two sums contained in two deposit-receipts, the one for £245 in the pursuers' name for behoof of Claud H. M. Lennox, executor of the late Lady Lennox Sinclair, and the other for £350 in the pursuers' name for behoof of the executor of Lady Lennox Sinclair.

The *facts* of the case appear from the opinion of the Lord Ordinary (ORMIDALE), who on 19th December 1914 dismissed the claim of reclaimers, and ranked and preferred the respondent to the whole of the fund *in medio* under deduction of a claim already admitted.

Opinion. — "Parties have agreed to the claim for Messrs Bonar, Hunter, & Johnstone, W.S., being sustained.

"With regard to the balance of the fund *in medio* I have come to the conclusion that the trustee on the sequestrated estates of Dame Lennox Sinclair falls to be preferred, under reservation of the rights and pleas of the claimants the trustee on the bankrupt estate of Mr Claud H. M. Lennox and Mr Lennox.

"The deposit-receipts which constitute the fund *in medio* are dated subsequent to the lapse of six months from the death of Dame Lennox Sinclair, which shows that whatever rights Mr Lennox may have had as at once a creditor and executor confirmed, he did not affect to operate payment of his debt out of the executry estate. At the date of the sequestration therefore the fund *in medio* was clearly earmarked as part of the executry estate.

"Now I take it to be a rule of Scots law that property evidently held by a bankrupt in a representative capacity does not pass to the trustee on his sequestrated estate. It is not said by the trustee on Mr Lennox's bankrupt estate that the law of England is different. In my opinion therefore Mr Salaman has no title to the fund *in medio*.

"The claim for Mr Lennox is not stated as a separate substantive claim, and this creates a difficulty. He claims along with his trustee for any interest he may have in the premises. I am not at all satisfied that if the trustee's title is bad, as I think it is, the defect can be cured by the concurrence of Mr Lennox.

"Apart from that, and assuming that a separate claim is tabled by Mr Lennox, he

justifies that claim on the ground that he is entitled to the fund in preference to the other creditors of the defunct in virtue of his confirmation as executor-nominate. Mr Lennox has not either in effect or form retained at any time either before or after the lapse of the six months the executry estate in question in liquidation of his claim upon it. The result, in my judgment, sequestration having supervened, is that the executry estate still existing as such has vested in the trustee on the sequestrated estate, and while Mr Lennox as executor may have a preferable right to it he must in the circumstances vindicate his claim in the sequestration.

"It has to be noted further that there are averments made by Mr Munro which cannot, in my judgment, be disposed of without inquiry. I mean averments with reference to the lodging with and the admitting by the executor of the claims of certain creditors within the six months. Indeed the statement is made that he paid one of these claims within that period. It is also averred that in the knowledge of the executor the estate of the deceased was from the first insolvent. I am not prepared to say that these statements, if proved, may not affect the right of the executor now to claim a preference.

"I do not proceed at all on the ground urged by Mr Mackay that the law as laid down in the institutional writers and the decisions draws any distinction between the case where confirmation is taken out within six months and the case where it is taken out after the lapse of six months from the defunct's death. As at present advised, I accept as well founded the proposition that an executor-nominate duly confirmed who is also a creditor, when no other creditor has in terms of the Act of Sederunt of 1662 used the diligence therein prescribed within six months from the death of the debtor, has in the ordinary case secured a preference, and at the end of the six months may pay his own debt out of the executry estate by way of retention. I am not, however, prepared to say that extinction of the executor's debt is operated automatically *confusione*.

"In holding that the claim of the executor to a preference must be worked out in the sequestration I proceed on the ground that the estates of the deceased have been sequestrated before the executor here has in fact paid his own debt, and that the averments to which I have referred are relevant to infer a right in the other creditors to dispute his claim to a preference."

Frederick S. Salaman and Claud H. M. Lennox reclaimed, and argued—An executor was not a trustee for the deceased's creditors, but the executry estate vested in him subject to a duty to account to the deceased's creditors — *Globe Insurance Company* v. *Mackenzie*, 1850, 7 Bell's Appeals 296; *Stewart's Trustee* v. *Stewart's Executrix*, 1896, 23 R. 739, *per* Lord M'Laren at p. 744, 33 S.L.R. 570; *Mitchell* v. *Mackersy*, 1905, 8 F. 198, 43 S.L.R. 107; *Taylor & Ferguson* v. *Glass's Trustees*, 1912 S.C. 165, 49 S.L.R. 78; *dist. Gray's Trustees* v. *The Royal Bank*, 1895, 23 R. 199, 33 S.L.R. 140. An administrator was entitled in any administration action to retain estate to meet his own debt in preference to other creditors of equal degree — *In re Belham*, [1901] 2 Ch. 52. Consequently Lady Sinclair's sequestration was incompetent, because there was nothing in her to attach, and the deposit-receipts fell into the English bankruptcy, where they must be dealt with—*Menzies* v. *Poutz*, 1916 S.C. 143, 53 S.L.R. 111; *Goetze* v. *Aders*, 1874, 2 R. 150, 12 S.L.R. 121; *Obers* v. *Paton's Trustees*, 1897, 24 R. 719, 34 S.L.R. 538. The executor's confirmation operated as a diligence in his favour *quoad* the debt due to him by the deceased, and placed him in the same position as one confirming *qua* executor creditor, except that the latter confirmed only to what was necessary to pay his debt. This position was not affected by the mere intimation by other creditors of claims exceeding the value of the executry estate unless they did diligence within six months from the date of death or took out sequestration within seven months, which would bring them in *pari passu* with the executor — A.S. 28th February 1662; Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 110. In default, however, of diligence by other creditors or sequestration, on the expiry of these periods the executor became debtor and creditor in himself, which extinguished the debt *confusione*, or at least entitled the executor to retain the executry estate in satisfaction of his claim—Stair's Inst. iii, 8, 73 and 76; More's Notes, p. ccclv; Ersk. Inst. iii, 9, 44 and 46, and on *confusio*, iii, 4, 23; Ersk. Princ. iii, 9, 23; Bell's Comm. ii, 80, 84, 118; Bell's Princ. sec. 1900; *Creditors of M'Dowal* v. *M'Dowal*, 1744, M. 10,007; Graham Stewart on Diligence, pp. 444 and 449; *Elder* v. *Watson*, 1859, 21 D. 1122, *per* Lord Wood at p. 1127. Lady Sinclair's trustee could only claim in the English bankruptcy where the rights of the creditors he represented would be adjudicated upon—*Tait* v. *Kay*, 1779, M. 3142; Goudy on Bankruptcy, p. 594—and he could not claim the *corpus* of the executry. Further, he could not plead personal bar; that must be pled separately by Lady Sinclair's creditors, each in respect of his own interest.

Argued for the respondent — Lady Sinclair's sequestration was now final and could not be recalled, and it carried her whole estate and property to the respondent —Bankruptcy (Scotland) Act 1856 (*cit.*), secs. 4 and 102—which necessarily included the deposit-receipts, for they *ex facie* existed as executry funds at the date of this sequestration, and whatever rights Claud Lennox may have had over them they had not been exercised at that date. Further, they did not pass to the English trustee, for in England estate held by the bankrupt as executor did not pass to his trustee—Baldwin on Bankruptcy, 11th ed., p. 303; Williams on Executors, 10th ed., vol. i, pp. 474 and 475; the Bankruptcy Act 1883 (46 and 47 Vict. cap. 52), sec. 44. In Scotland the executor not being a trustee, the executry estate might pass to the trustee in his sequestration, who had to administer both for the

creditors of the deceased and of the heir. In England the trustee could not touch executry estate and could not administer except for the bankrupt's own creditors, and consequently there was material reason for the Scots sequestration. The cases of *Menzies*, *Goetz*, and *Obers* (*cit. supra*) did not apply. Confirmation did not *ipso facto* transfer the deceased's estate in full property to the executor, because, if so, sequestration of the deceased's estate would be impossible without sequestrations of the executor, yet separate sequestration of both were contemplated by the Bankruptcy Acts —Bankruptcy (Scotland) Act 1856, secs. 13 and 15. Further, the liability of the executor was limited to the amount of the estate he received, and he was bound to prefer the ancestor's creditors to his own *quoad* executry estate. In fact he neither had the full property in the ancestor's estate nor did he hold it in the same capacity as his own. The contention that confirmation had operated a complete transference of the deceased's estate to the executor was only sound where the plea of exhaustion of the estate was available, *i.e.*, where the whole executry estate had been paid away and lost its identity as such. Here there were still funds earmarked as executry. Further, the debt was not extinguished *confusione*, for the passages quoted from the institutional writers spoke only of a right in the executor to retain and pay himself, which in this case admittedly he had not exercised. But in any event this right to pay himself was on the same footing as the right of any other creditor to get payment. He could only get payment as *primus veniens* if others had not done diligence or intimated claims or the estate was solvent —*Addie* v. *Gray*, 1628, M. 9977; *Creditors of M'Dowal* v. *M'Dowal* (*cit. sup.*); *M'Leod* v. *Wilson*, 1837, 15 S. 1043; *Rough's Trustees* v. *Miller*, 1857, 19 D. 305, *per* Lord Curriehill at p. 316; Bell's Comm. ii, pp. 84 and 86; *Russel* v. *Simes*, 1790, Bell's Dec. (8vo.) 217; M'Laren on Wills, vol. ii, p. 1163; *Globe Insurance Company* v. *Mackenzie*, 1849, 11 D. 618, *per* Lord Fullerton at p. 640; *Elder* v. *Watson* (*cit. sup.*), *per* Lord Wood at p. 1128. In fact the executor's confirmation merely relieved him of the necessity to constitute his claim, but as executor he must deal fairly with other creditors, and as a creditor he was only entitled to a dividend — *Taylor & Ferguson* v. *Glass's Trustees* (*cit. sup.*), *per* Lord Dunedin, and the cases reported in M. 3863 *et seq.*, *e.g.*, *Jaffrey* v. *Gray*, 1626, M. 3866; *M'Gann* v. *M'Gann's Trustees*, 1883, 11 R. 249, 21 S.L.R. 179.

At advising—

LORD PRESIDENT—I agree with the view taken and the course followed by the Lord Ordinary. But inasmuch as the case as presented to him was on somewhat different lines apparently from those on which the argument before us proceeded, I shall state in a few sentences the reasons for my judgment.

Lady Lennox Sinclair died on 6th April 1912, leaving a will by which she appointed her son Claud Lennox to be her executor and universal legateee. He was duly confirmed on 24th July 1912 and apparently proceeded to ingather and distribute the estate. Now the estate, according to the inventory, amounted to £3196 odds; but the debts, conform to schedule relative to the inventory given up by the executor, amounted to £3343. There was an apparent deficiency of £147. The estate was insolvent. The executor knew it. He in point of fact took no beneficial interest as universal legatee under his mother's will. In reality the whole estate belonged to the creditors of Lady Lennox Sinclair, of whom he, it is alleged, was one to the extent of £581.

On the 1st May 1913 the estates of Lady Lennox Sinclair were sequestrated under the Scottish Bankruptcy Acts, and the claimant Mr Munro was appointed trustee. He was therefore from that date vested in the whole executry estate, and was bound, in conformity with his duty as trustee, to distribute it among the creditors of Lady Lennox Sinclair.

Now, part of the estate ingathered by the executor consisted of two sums of £245 and £350 contained in two deposit-receipts taken in the name of the solicitors for the executry "for behoof of Claud Lennox, Esq., as executor of the late Lady Lennox Sinclair." These two sums constitute the fund *in medio*. They are claimed by Mr Munro as trustee on the sequestrated estate of Lady Lennox Sinclair, inasmuch as the property in the sums contained in these deposit-receipts was transferred to and vested in him as at 1st May 1913, subject to such preferences and securities, if any, as existed at that date and are not null and reducible.

That claim, in my opinion, is well founded and ought to be given effect to. There is, however, a rival claimant in the field in the person of a Mr Salaman, the trustee on the bankrupt estate of Claud Lennox. It appears that on 12th March 1913 Claud Lennox, as an individual, was adjudicated bankrupt under the English Bankruptcy Acts, and Mr Salaman was appointed trustee. It is not said that by virtue of the bankruptcy the estate of Lady Lennox Sinclair passed to Mr Salaman as trustee. On the contrary, it is distinctly averred on record that by the law of England "the title of Mr Salaman as trustee aforesaid does not extend to executry or trust estate whereof the bankrupt was executor or trustee," and that was not disputed in the argument before us. It is neither averred nor pleaded that the effect of the English bankruptcy was to transfer to Mr Salaman the executry estate of Lady Lennox Sinclair, which at that date was, and which is now, vested in Mr Munro for behoof of her creditors.

The claim advanced on behalf of the trustee in bankruptcy rests on a totally different footing. It is said that, inasmuch as Claud Lennox was at once executor on his mother's estate and a creditor on his mother's estate, that he is by the law of Scotland held to have done diligence against the estate, and is entitled to a preference over all creditors who have not done dili-

gence. At the expiry of six months from the date of the death of Lady Lennox Sinclair, so it is contended, the executor was entitled to help himself to as much of the estate as was necessary to enable him to pay his claim in full, leaving the other creditors, however numerous and however clearly their claims had been intimated to the executor, out in the cold.

I have a very decided impression that the bankrupt Claud Lennox has no such right according to the law of Scotland. But it is in my view unnecessary to express a final opinion upon that question, for whatever his rights may be as a creditor on his mother's estate, these rights must be made good in his mother's sequestration, and it is the duty of Mr Munro as trustee on the sequestrated estates of Lady Lennox Sinclair to adjudicate upon the claims so made, and to rank or refuse to rank as he thinks proper in the first instance, subject, of course, to the usual statutory appeals prescribed by the Bankruptcy Act.

That is the view taken by the Lord Ordinary. I think it is right, and I am for affirming his judgment.

LORD SKERRINGTON—It is apparent from the pleadings that this action of multiplepoinding was brought for the purpose of obtaining a decision upon a somewhat technical question of Scots law, namely, whether in the actual circumstances the executor of the late Lady Susan Lennox is entitled to apply the fund *in medio*, which forms a substantial part of the executry estate, in paying a debt which he alleges to have been due to him by his deceased mother to whom he was appointed executor. No voucher or other evidence was lodged by Mr Lennox to show that he was a creditor of his mother, and accordingly no progress could have been made towards a decision upon the merits of that question unless the validity of the alleged debt had been first established. Assuming, however, that difficulty to have been got over, no authority was quoted which justifies the proposition that where an executry estate is apparently insolvent, and where the executor gives up an inventory showing that there are not enough assets to pay in full the claims of the persons alleging themselves to be creditors, then on the termination of six months from the date of death the executor is entitled to pay his own debt to himself in preference to the other creditors. I agree, however, with your Lordships that this question does not properly arise for decision here, because the estates of the deceased lady have been sequestrated. If there is any substance in the claim for the executor, that claim can be given effect to in the sequestration. On the other hand, I am of opinion that we ought not to give effect to a contention which was put forward by Mr Lennox and his trustee in bankruptcy in the course of the debate before us—a contention of which no trace is to be found in the pleadings. It was argued that the whole executry estate belonged beneficially to the executor and had passed to the trustee in his English bankruptcy, and that accordingly, in virtue of his universal title as trustee, Mr Salaman is entitled to be ranked and preferred to the fund *in medio*, leaving the question on the merits—the question of Scots law which I have already explained—to be adjudicated on, first of all, by himself as trustee, and then by the Court of Bankruptcy in England. I express no opinion on the question whether this contention ought to have received effect if it had been timeously and properly stated, because I think that it was waived by Mr Lennox and by his trustee in bankruptcy, and properly waived, because nothing could have been more inconvenient and indeed absurd than that a Scottish Court should relegate a technical question of Scots law for decision by an English trustee in bankruptcy and the English Court of Bankruptcy, with the necessary result that the Court of Bankruptcy would have to send the question back to Scotland for adjudication. That consideration explains to me the attitude—and I think the proper attitude—taken up by Mr Salaman, the English trustee. He did not oppose the sequestration of the estates of Lady Susan Lennox, as he ought to have done in the view now presented to us, nor did he object to the competency of the present action of multiplepoinding on the ground that there was not and could not be any double distress. Further, if Mr Salaman was to claim the whole fund *in medio* merely in virtue of his title as trustee in bankruptcy he ought to have made his position clear on the face of his claim; but if he had taken this course he would have been met with a plea of personal bar. Accordingly, I agree that the real question between the parties ought to be decided by the trustee in the Scottish bankruptcy.

LORD HUNTER—I concur with your Lordships.

The first point maintained by the reclaimer in argument was that the sums contained in the deposit-receipts passed to him as trustee upon Mr Claud H. M. Lennox's bankrupt estate. For this contention he relied mainly upon the recent case of *Menzies* v. *Poutz*, 1916 S.C. 143, 53 S.L.R. 111. In that case the estate of a widow who had succeeded to the whole estate of her husband was sequestrated. Thereafter the estate of the husband was also sequestrated by one of his creditors. The Court recalled the second sequestration on the ground that there was no estate of the husband in existence which could fall under his sequestration. Both sequestrations had been granted in Scotland, where it is well settled that the creditors of a deceased person may claim in the sequestration of his executor. Their rights are defined by statute, which gives them a preference in the sequestration over the executor's creditors in that part of the estate which was taken by representation. This involves separation of the estate, and under the modern Bankruptcy Statutes the estates of the ancestor may be sequestrated without the executor as an individual being rendered bankrupt. In the present case the executor was sequestrated in England, and it is not clear that the ancestor's credi-

tors have in that country any rights in the bankruptcy of an executor.

The respondent avers that the reclaimer never called upon the pursuers and real raisers to make payment of the amounts contained in the deposit-receipts as falling to him in virtue of his title as trustee, and that he could not do so, as by English law the executry estate did not pass to the reclaimer as trustee on Mr Lennox's estate. The reclaimer does not make any averment on record as to English law, and does not, as I read his pleadings, properly raise the point that the deposit-receipts passed to him as the estate of the bankrupt. He did not oppose the granting, and has not applied for the recal of the sequestration of the estates of the late Lady Sinclair. In my opinion the case of *Menzies* does not apply to the present situation. We are bound to assume that the respondent's appointment was competently made. He is therefore entitled to succeed in the present competition unless the reclaimer can show that the fund *in medio* became beneficially the estate of Mr Lennox upon some specific ground other than the doctrine that the executor is *eadem persona cum defuncto*. This is the hypothesis on which he has framed his claim in the competition, for he founds upon the allegation that Mr Lennox was the creditor of Lady Sinclair in a sum exceeding the amount of the deposit-receipts, and maintains in his plea-in-law that he is entitled to apply or retain the fund to account of that indebtedness.

The respondent does not admit the alleged indebtedness of Lady Sinclair to Mr Lennox, and therefore the plea of the reclaimer could not in any event be sustained without inquiry. I agree, however, with your Lordships that the circumstances disclosed in the present case preclude the necessity of such inquiry and enable us to affirm the Lord Ordinary's interlocutor.

The authorities to which we were referred appear to me to support the view that the right of an executor who is a creditor of the deceased, acquired by confirmation, is to pay himself, without the necessity of raising an action to constitute his debt, out of the funds to which he has confirmed, but that he cannot exercise this right to the prejudice of the other creditors where he knows that the estate is insolvent. Although the executor is not trustee for the creditors it does not follow that he has no duty towards them. In the case of *Taylor & Ferguson* v. *Glass's Trustees*, 1912 S.C. 165, 49 S.L.R. 78, Lord Dunedin explains that although the executor may after the lapse of six months pay *primo venienti*, yet if the creditors come forward in such numbers that he sees that the estate is insolvent it would be his duty to give notice to them to that effect and not pay more to one than to another.

In the present case it is clear from the inventory and schedule of debts that the executor had notice of claims in excess of the estate, and I think that he was only discharging his duty when he took the deposit-receipts, both dated more than six months after Lady Sinclair's death, in name of himself as executor and not as an individual.

LORDS JOHNSTON and MACKENZIE, who had not heard the case, delivered no opinions.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Appellants—Chree, K.C.—M'Robert. Agents — Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondent—Blackburn, K.C. — A. M. Mackay. Agents — Alex. Morison & Company, W.S.

Tuesday, May 30.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

LYONS *v.* WOODILEE COAL AND COKE COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* (1) 1 — *Accident "Arising out of the Employment" — Workman Catching a Chill by Waiting in a Current of Cold Air at Bottom of Pit Shaft while Inspection of Shaft was Taking Place.*

A workman having finished his work about the hour when the inspection of the pit shaft was beginning proceeded to the bottom of the shaft to be raised to the surface on the upward journey of the cage. The inspection, the duration of which varied according to the repairs required, was prolonged by the breakdown of the bell wire, and the workman was kept standing in a current of cold air and contracted a chill from which he died. *Held* that he was not injured by accident arising out of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Mrs Catherine Docherty or Lyons, widow of the deceased Denis Lyons, *appellant*, and the Woodilee Coal and Coke Company, Limited, *respondents*, the Sheriff-Substitute (MACDIARMID), at Dumbarton, decided against the appellant, and stated a Case for appeal at her request.

The Case stated—"I found the following *facts* were either admitted or proved—(1) That the said deceased Denis Lyons was employed as a brusher by the respondents in their Woodilee Pit; (2) That his average weekly earnings exceeded £2; (3) That he was a healthy man, and on the evening of Thursday 11th November 1915 in his usual good health; (4) That on said night and the early morning of 12th November he was on the night-shift in said pit; (5) That about 4·30 a.m. he finished his work, and proceeded to the bottom of the said shaft to be taken to the surface; (6) That there was no stated time for brushers on the night-shift to leave off work, and that, except during the inspection after mentioned, the practice