

Saturday, January 15.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ROXBURGH & COY. v. BARLAS (YOUNG & ARMSTRONG'S TRUSTEE.)

Process—Appeal—Print.

In an appeal from the Sheriff-court, the titles of the pleadings being found defective in that the name of the respondents was not given, the appellants were ordered to amend the print by adding in manuscript on the margin the titles of the pleadings in the Sheriff-court, and the cause was continued for a week for that purpose.

Proof—Parole—Cheque—Account.

Held, in a claim lodged with a trustee upon a bankrupt estate, that it was incompetent to prove by parole, or otherwise than by the bankrupt's writ—(1) The items below £100 Scots in an account-current between the claimants and the bankrupt; (2) that the bankrupts had received the money in a cheque drawn by the claimants in favour of themselves or bearer, and upon which the name of the bankrupt nowhere appeared.

The firm of Young & Armstrong, wine importers and spirit merchants, Glasgow, and Robert Young and William Armstrong, its sole partners, were sequestrated on 3d December 1874, and David Barlas, accountant, Glasgow, was appointed trustee upon the estate. An affidavit and claim was in due time lodged with the trustee by Roxburgh & Coy., in which it was alleged that the bankrupts were indebted to them in the sum of £1056, 17s. 9½d., conform to an account-current produced. The trustee having rejected the claim *in hoc statu* on the ground of its not being properly vouched, and of the fact that the books of the bankrupts showed that in an account between the parties the claimants would be debtors to the bankrupts, appealed to the Sheriff.

A large part of the account consisted of cash advances, and Roxburgh & Coy. produced in corroboration of these a variety of bank cheques drawn by them, all of which bore to be payable "to self or bearer," but which, it was averred, were given to the bankrupts and cashed on their behalf. None of them bore the name of the bankrupts or were endorsed by them, and the trustee maintained that they were not proper vouchers, and not such as would be granted or accepted in the usual course of business for advances of money. The rest of the account was composed (1) of £60, 15s. 3d. and £50, the amounts of two bills which Roxburgh & Coy. averred had been granted by the bankrupts in their favour in consideration of advances; (2) of a bill for £200, accepted by the bankrupts and retired by the appellants at maturity after the sequestration of the acceptors; (3) of an account for sugar, amounting to £62, 0s. 11½d., the last item in which (an entry of "December 18, 1871, to cash 7s. 6d.," alone excepted) was dated August 22, 1871. In the account-current there were items charged of a lower amount than £100 Scots.

The trustee on the bankrupts' estate produced an account against Roxburgh & Coy., which after deduction of the amount claimed by them still left a balance due. Of this account they refused payment.

The Sheriff-Substitute (GUTHRIE) issued the following interlocutor:—

"Glasgow, 23d November 1875.—Having heard parties, allows the appellants a proof by the bankrupts' writ—*First*, Of the alleged loans of money set forth in the account lodged with their affidavit and claim; *second*, of their averments in regard to the bills for £60, 15s. 3d. sterling, and £50 sterling, being the items dated in said account, February 21, 1871, and August 14, 1872; and *third*, of 'the account per statement' for sugar and cash, amounting to £62, 0s. 11½d. sterling, which forms the last item on the debit side of said account, and to the respondents a conjunct probation; and allows the respondents a proof by the writ or oath of the appellants of their averments relative to the bill for £200 sterling, which is the item dated February 5, 1874, in the said account, and to the appellants a conjunct probation: Grants diligence against witnesses and havers, and appoints the cause to be enrolled on the diet roll to fix a diet of proof.

"*Note*.—Although some of the sums alleged to have been advanced by the appellants to the bankrupts are less than £8, 6s. 8d., the alleged loans were contracted, so far as it appears, in such circumstances and between such parties, that writing was to be expected in evidence of them. It seems therefore to be consistent with the principles of the law of Scotland to confine the proof to writ or oath (*Anand v. Anand's Trustees*, February 6, 1869, 7 Macph. 526). Here, however, there can be no reference to the oath of the bankrupt, and the proof allowed is by writ only.

"The bills for £60, 15s. 3d. and £50 bear to be granted by one partner of the bankrupts' firm only, and not by the firm, and one of them is in favour, not of the appellants, but of Mr Gemmill. It is thought that the appellants' allegations must be proved also by writ.

"The account for sugar appears to be prescribed, and the last item in it, 7s. 6d., of lent cash, appears to be a mere device for eliding prescription, which ought to be disregarded (*Dickson on Evidence*, § 490). Besides, the account on the face of it is incurred not by the bankrupt firm, but by one of its partners before he joined the firm."

Roxburgh & Company appealed to the Court of Session.

When the case came on for hearing on 8th January 1876 the print of the appeal was found to be defective, especially in the titles of the pleadings in the Sheriff-court, in that it nowhere appeared who was the respondent. The Court refused to receive the appeal, and pronounced the following interlocutor:—"The Lords having heard counsel on the note of appeal, appoint the appellants to amend the print by adding in manuscript on the margin the titles of the pleadings in the Sheriff-court, and for that purpose continue the cause till this day week: Find the appellants liable in the expenses of this day, which modify to £2, 2s. sterling, and for which

sum decern against the appellants for payment to the respondent."

When the case was again called, the appellants argued—(1) The question of loan was not the only one in the case; there was the question of payment. On the face of the cheque there was nothing to show that the money was received by the endorser, and to the effect of establishing who was the receiver proof *prout de jure* was competent. (2) Proof *prout de jure* was also competent with regard to the sums under £8, 6s. 8d. *Annard's* case (7 Macph. 526) was a special one, and at any rate there was here sufficient writing to satisfy the requirement of the law as laid down by Lord Deas in that case.

At advising—

LORD PRESIDENT—There are two points raised by the appellants in this case by way of objection to the interlocutor of the Sheriff-Substitute.

The first is, that they should be allowed to prove that the cash, stated in the account before us to have been advanced by them, actually reached the hands of the bankrupts, and that we should thereby be induced to hold that the sums charged had reference to cheques which correspond in amount to the advances made. The cheques are drawn by the appellants, and bear that payment is to be made to self or bearer, and upon the backs occur the names of the persons who endorsed them wherever that was done. On none of these cheques does the name of the bankrupt firm appear either on the front or back, and therefore they do not establish satisfactorily that the money passed from the appellants to the bankrupt. If the cheques had been drawn in favour of the firm of Young & Armstrong, and had been endorsed by them, that might have been evidence that the money had passed to them, and what the appellants now desire is that they be allowed to prove that the parties who endorsed the cheques were representatives of Young & Armstrong, and drew the money for their behoof. To grant this would be to allow the commencement of a proof *prout de jure*. There is no warrant for our following such a course either in law or in expediency, and no reason for our interference as regards the first point in this case. It has been a rule long established that advances in cash do not assume any other form when stated in an account than they would if separately sued for.

The second question which is here raised is whether the smaller items of the account, viz., those under the amount of £100 Scots, may be proved by parole evidence, although the larger may not. It is important to observe what the effect of allowing this would be. It would be that the smaller items in this account might be proved by parole while the larger cannot be similarly treated, and as the payments of cash on the other side are payments in excess of those made by the appellants, the effect would be to allow a part of one side of the account to be proved by parole and the whole of the other only by writ or oath. But the strongest objection is that as it was alleged by the appellants that the payments were all made under the same circumstances, it was to be expected that these payments would be all vouched. And I confess I do not know how that objection is to be disposed of; these payments were all made from year to year, and nothing has been heard of them till the estate is bankrupt.

That is hardly a case in which we can admit parole evidence.

On the whole matter I am of opinion that the interlocutor of the Sheriff should be affirmed.

LORD DEAS—The first point which we are asked to decide in this case is as to the admissibility of parole testimony to explain the cheques granted by the appellants. It is necessary to observe precisely what these cheques are. One of these which I take as an example is drawn by Roxburgh & Co. upon the Commercial Bank at Glasgow, and bears to be payable to self or bearer. So far as that may be said to raise a presumption on the face of it, the presumption would be that Roxburgh & Co. went themselves to the bank and drew the money. But on the back there appears an endorsement by "John M'Kechine," indicating that Roxburgh & Co. did not themselves draw the money over the counter. The presumption then is that M'Kechine drew for Roxburgh & Co., although it does not appear from the cheque that he had any connection with Roxburgh & Co. or with others. It is now said that the man whose name appears upon the back of the cheque was in the employment of the bankrupt firm, and we are asked to allow proof to show this. But that does not make a difference substantial enough to justify us in allowing parole proof, although I do not mean to say that a cheque may not be so drawn as that parole testimony may not for some purposes be competent. Yet this is not a case where explanations can be admitted in such a way.

On the second point, as to the accounts current between the two parties, which extended to some length, it is not proposed that each of the items shall be proved by parole testimony on both sides. What is proposed by the appellants is that in respect some of the items are under £8, 6s. 8d. parole testimony should be allowed so as to set them up against the opposite party. This would be a curious result if at the same time the other party are not to be allowed to prove larger items by parole testimony, and further while there are sums under £8, 6s. 8d. on the one side, there are similar sums on the other, and the whole result depends on the balance at the end. In the account-current on both sides we should naturally expect vouchers, and I cannot admit the contention of the appellants.

I have only to add that I do not think the case of *Annard*, to which the Sheriff-Substitute has referred, has any bearing on the present matter.

LORD ARDMILLAN—I have sometimes found difficulty in regard to the question whether proof *prout de jure* can be admitted to instruct the nature of a payment made by cheque. I was in the minority in the case of *Haldane v. Speirs*, March 7, 1872, 10 Macph. 537, in which we were found wrong, and we are now bound to conform to that decision, which seems to me to dispose of the first branch of the case.

In the second place, it is proposed to pick out and prove the smaller items alone of the account, viz., those below the amount of £100 Scots. It is certainly a peculiar case, and has strong circumstances favourable to the appellants, but I think it would be extremely unfair to one party to take all the items in the account against them and allow these to be proved by parole, to the ex-

clusion of similar items in the counter account. It will not do to examine into an account between two parties and separate the sums below £8, 6s. 8d. from other items with which they are naturally and legitimately connected.

LORD DEAS — I should perhaps explain that I hold this case to be quite well decided without reference to the case of *Haldane v. Spiers*, to which Lord Ardmillan has alluded.

LORD MURE concurred.

The appeal was dismissed.

Counsel for Roxburgh & Co. (Appellants) — Scott—Maclaren. Agents — Morison & Keith, S.S.C.

Counsel for Barlas (Young & Armstrong's Trustee)—Balfour. Agents—Frasers, Stodart, & Mackenzie, W.S.

TEIND COURT.

Monday, January 17.

WADDELL v. HERITORS OF BORTHWICK.

Teinds—Augmentation—Sisting of Process.

Where the minister satisfies the Court that there is free teind, they will grant an augmentation, although the sufficiency of the free teind to meet it depends upon the result of a question of *decimæ inclusæ* right.

Mr Waddell, minister of Borthwick, raised a process of augmentation against the heritors, in the course of which he was appointed to condescend upon the free teinds which he alleged to exist in the parish of Borthwick. He accordingly lodged a condescendence, in which he set forth certain lands lying within the parish, the free teinds of which he averred amounted to £107, 17s. 8½d. To this condescendence answers were lodged for Mr Dundas of Arniston, who objected, *inter alia*, to an article of the condescendence, in which the minister set forth that the teinds of the lands of Shank, belonging to Mr Dundas, were unvalued. The teinds of these lands, according to the minister, amounted to £40. The answers for Mr Dundas stated that the lands of Shank formed part of the mains of Arniston, and were held under a title *cum decimis inclusis et nunquam antea separatis*, that they had been so dealt with by the sub-commissioners in their valuation in 1629, and that in the last process of locality decree had been pronounced on the footing that these lands were teind free. It appeared, however, that setting aside these lands, there was a certain amount of undoubted free teind in the parish.

When the augmentation was called for debate, it was argued for Mr Dundas that, following the rule laid down in the case of *Frood v. The Earl of Stair*, the process should be sisted in order that the minister might bring a declarator to try the validity of this *decimæ inclusæ* right now claimed.

Authority—*Frood, Minister of Glenluce v. Earl of Stair*, Nov. 9, 1874, 2 Rettie 76.

At advising—

LORD PRESIDENT—My Lords, I think this is a Special Case, and not governed by the rule which we laid down in the case of the minister of Glenluce. There the only hope of the minister of obtaining an augmentation lay in establishing that the heritors had no *decimæ inclusæ* right to their lands, and as that was a doubtful point, he was put to the necessity of bringing a declarator to have it established.

But we cannot adopt that course here, because the minister has satisfied us that there is free teind to a considerable extent in this parish, and there is therefore material for an augmentation to some extent at least.

No doubt the minister, if it is proved that Mr Dundas of Arniston has no *decimæ inclusæ* right, will obtain a further amount of free teind. But are we to stop the augmentation until this has been settled?

If Mr Dundas' right is as clear as his counsel say it is, one of the first steps in the locality to follow will be to have it established. I am of opinion that we ought now to give an augmentation to the full amount asked by the minister, on the ground that there is free teind, although it may afterwards turn out upon inquiry that he cannot obtain that amount.

The other Judges concurred.

The Court granted an augmentation of six chalders.

Counsel for the Minister—Asher. Agents—Adamson & Gulland, W.S.

Counsel for the Heritor—Lee—Dundas. Agents—J. & F. Anderson, W.S.

COURT OF SESSION.

Tuesday, January 18.

SECOND DIVISION.

SPECIAL CASE—BLAIR'S EXECUTORS AND OTHERS.

Succession—Implied Bequest—Conditio si sine liberis.

A testator gave and bequeathed all the estate and effects which should belong to him at the time of his death to his father, whom failing by death to his brothers and sisters *nominatim*, share and share alike. The testator's father and two of his brothers predeceased him, one of the brothers leaving issue.—*Held (diss. Lord Gifford)*, in a Special Case submitted by the issue of the predeceasing brother and the surviving brothers and sisters of the testator, that the former were not entitled to any share of the estate, as the *conditio si sine liberis* did not, apart from special circumstances, extend to the case of collaterals.

The late Charles Cunningham, sometime merchant in Smyrna, afterwards H. M. Consul at Galatz, and who died at Galatz on or about 26th November 1860, left a will dated 17th January 1825, in the following terms:—“I, Charles Cunningham, son of James Cunningham,