On 27th June 1877 the Lord Ordinary pronounced an interlocutor repelling the defenders' first plea-in-law, which was as follows—"(1) The defenders are not liable in reparation to the pursuer, in respect that at the time of the occurrence in question there was no contract of carriage between them and him, or anyone on his behalf"—and appointed the pursuer to lodge issues. He added this note:—

"*Note.*—. . . The Lord Ordinary does not think the plea sound, because he thinks that there are many cases in which a person may be travelling on a railway in such circumstances that, if injured by the fault of the Company, he will be entitled to damages, although the Company may have entered into no contract of carriage with him.

"The pursuer is a child of eight years of age. On 4th August 1876 his aunt, in whose company he was travelling, took a ticket for herself, but none for him, from Balloch Pier to Glasgow, stations on the defenders' railway. In the course of the journey, the door of the carriage in which he was, flew open, he fell out, had his skull fractured, and suffered other severe injuries. The fault alleged against the defenders is that of failing to secure the door.

"A child of these tender years cannot be considered capable of intending to defraud the railway company by travelling without a ticket. It may be that his aunt, under whose charge and control he was, intended to defraud the railway company; but it is averred, and must be for the present assumed, that she was under the belief that the Company did not charge for children of so young an age as he was, and had no intention of defrauding the Company. It is further averred that the defenders' servants saw the child and allowed him to enter and remain in the carriage, and that they thus received him as a passenger; but it is not averred that they did so in the knowledge that he had no ticket.

"The child therefore, it must be assumed, was in the carriage neither clandestinely nor fraudulently, and with the knowledge and consent of the servants of the defenders. The question is, Whether in such circumstances there was a duty incumbent on the railway company to use all reasonable precautions for the safe carriage of the child, for breach of which they are liable in damages?

"The Lord Ordinary finds it difficult to distinguish this case from that of *Austin* v. *The Great Western Railway Company*, April 18, 1867, 2 Law Rep. (Q.B.) 442, in which a child three years and two months old, under charge of his mother, who had taken a ticket for herself but not for him, was found entitled to damages for injuries received while travelling upon the defendants' railway. The Lord Ordinary is disposed to concur in the views expressed by Blackburn, J., in deciding that case, viz., that if the child, without any fraud on his part, was received as a passenger by the servants of the company having authority, the duty of safely carrying him attaches to the company. The Lord Ordinary thinks the pursuer has sufficiently averred such a case, and is entitled to have the facts investigated."

The defenders reclaimed.

The Court considered that the question of law raised by the defenders' first plea should be reserved, and appointed the pursuer to frame his issue for the trial of the cause. The following was proposed—"Whether on or about 4th August 1876 the pursuer, while travelling in a train on the defenders' railway between Balloch and Alexandria, was injured in his person, to his loss, injury, and damage?"

Damages laid at £1000.

Argued for pursuer—That though no specia contract was entered into, the pursuer was allowed, by the Company's servants having authority, to remain in the train, and that this was equivalent to a contract. That it was not necessary that there should be a special contract to make the Company liable for injuries done on their line. That a person might be a "passenger" in the sense of the statute (8 and 9 Vict. cap. 83, sec. 101) without having a ticket, and that in any case it was not necessary to insert the word "lawful" passenger in the issue.

Authorities—*Austin* v. *Great Western Railway Company*, April 18, 1867, 2 L.R., Q.B., 442; *Hamilton* v. *Caledonian Railway Company*, June 10, 1856, 18 D. 999, and February 18, 1857, 19 D. 457.

Argued for defenders—That the issue proposed would raise no case of licence or authority, and that the question was whether the Company received the boy as a passenger, or whether he was travelling with the licence of the Company? That therefore there should be some specification of the capacity in which the boy was travelling in the train at the time of the accident.

Authorities—*Scoullar* v. *Crawford*, July 18, 1868, 6 Macph. 1628; *Wilson* v. *North British Railway Company*, November 8, 1873, 1 Rettie 172.

The following issue was then adjusted for the trial of the cause—"Whether on or about the 4th day of August 1876 the pursuer was a passenger travelling in a train on the defenders' line of railway from Balloch to Alexandria, and was injured in his person, through the fault of the defenders, to his loss, injury, and damage?"

Counsel for Pursuer—Campbell Smith—Lang. Agent—Thomas Lawson, S.S.C.

Counsel for Defender—Lord Advocate (Watson)—Balfour—Darling. Agent—Adam Johnston, S.S.C.

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*Friday, October 26.**

OUTER HOUSE.

[Bill Chamber, Lord Adam.

ROYAL BANK *v.* PURDOM.

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict., cap.* 79), *sec.* 65—*Ranking of Creditor who had a security over subjects said to belong, but not* ex facie, *to Bankrupt.*

A bank granted a cash-credit to a firm, for which it held, *inter alia*, in security, a disposition of certain subjects belonging *ex facie* of the titles and of the bond to A, one of the partners. When the firm was subsequently sequestrated, the trustee deducted the value of the subjects

* Decided June 16.

from the bank's claim, on the ground that A truly held them in trust for the firm to whom they belonged. *Held* (by Lord Adam, Ordinary on the Bills)—(1) that the rights of parties fell to be determined by the terms of the cash-credit bond, which specified the particular security which the bank agree dto take, and received; and (2) that it was therefore immaterial whether the bank knew or not of the existence of the trust.

This was an appeal by the Royal Bank of Scotland against a deliverance of Robert Purdom, the trustee on the sequestrated estates of A. J. & H. Donaldson, oil extractors in Hawick, and Archibald Johnston Donaldson and Henry Donaldson, the individual partners of the company.

The Royal Bank claimed to be ranked in order to draw a dividend on the company estate of Messrs A. J. & H. Donaldson for £16,795, 14s. 9d. The trustee, by his deliverance, dated 6th December 1875, admitted the claim, but only to the extent of £7650, 19s. 8d., the amount of the sum claimed after deducting (1) £9000, the value of certain heritable subjects in Hawick which were disponed to the appellants by A. J. Donaldson in a bond and assignation and disposition in security, dated 25th December 1874; and (2) certain other sums which it is needless to particularise. The ground upon which the trustee proceeded was that the subjects which were held in security by the Bank were the property of the company, and not of the individual partner A. J. Donaldson.

Ex facie of the titles, A. J. Donaldson was proprietor of the subjects, which consisted of two lots of buildings in Hawick, both of which were occupied by the company for the purpose of their works. He held the first under a disposition by the trustees of the Hawick Gas Light Company in his favour dated the 6th and recorded the 10th October 1871. He held the second under a disposition by the trustees of the late William Lindsay Watson, with consent therein mentioned in his favour, dated the 14th, 21st, and 26th February and recorded 4th March 1872. There was nothing in the dispositions to show that A. J. Donaldson held the subjects in trust for the company. In 1874 the Royal Bank agreed to grant a cash-credit to the company for advances to the extent of £13,000. By the cash-credit bond, which was dated 5th December 1874, A. J. Donaldson and Henry Donaldson, the individual partners of the company, obliged themselves, both as partners of the company and as individuals, to pay to the appellants the sum which might be due to them under the cash-credit, and in security thereof they severally conveyed to the appellants certain policies of insurance effected by them on their respective lives; and in further security, A. J. Donaldson, with consent and concurrence of the copartnery and partners for all or any right or interest they might have in the heritable subjects, disponed to the appellants heritably but redeemably, but irredeemably in the event of a sale, the said subjects above mentioned.

A record was made up in the Bill Chamber and in the condescendence for the appellants it was, *inter alia*, stated that "The said Archibald Johnston Donaldson was, at the date when the security to the bank was granted, proprietor of the said heritable subjects whose value is estimated at £9000, and they were by the said bond and assignation and disposition in security conveyed to the bank as belonging to his individual estate and not to the estate of the company of A. J. & H. Donaldson. The respondent has erroneously rejected the claim of the appellants on the estate of the said company, in so far as they have not deducted the value of the said heritable subjects in making their claim of ranking for a dividend."

The respondent averred that it was only for convenience that the title to the property in question was taken in name of the senior partner A. J. Donaldson, and that it truly belonged to the firm, and had been paid for from the funds of the firm, or raised by its acceptances. The firm had further spent upwards of £10,000 upon it in new plant and buildings, no part of which was paid from the separate estate of the partners. The property was invariably treated as the firm's property in their books, balance-sheets, &c. The interest on the heritable debt was paid by the firm, and the rents received from tenants of the property were credited to the firm. In the proposal and acceptance for the cash-credit the said works were stated to be the property of the said firm, and were known to be and dealt with by the bank as such.

It was pleaded, *inter alia*, for the appellants—"(2) The respondent's statements are not relevant or sufficient to be admitted to probation. (3) The respondent's allegation that the said heritable subjects were held by the said Archibald Johnston Donaldson as trustee for the company of A. J. & H. Donaldson, can only be proved by the writ of the alleged trustee. (4) In any view, the respondent is not entitled to a proof at large, but only to a proof by writ or oath."

The Lord Ordinary on the Bills (Rutherfurd Clark), by interlocutor dated 26th February 1876, allowed the respondent a proof of his averment that when the bond and disposition in security was granted the subjects in question belonged to the company, but limited such proof to the writ of A. J. Donaldson, and *quoad ultra* allowed both parties a proof of their averments.

The purport of the proof appears from the note of the Lord Ordinary (Adam), appended to an interlocutor by which his Lordship sustained the appeal, recalled the deliverance appealed from, and found the appellants entitled to be ranked and draw a dividend without deducting the value of the subjects named above, "but reserving all questions which may be raised as to the claims of Messrs A. J. & H. Donaldson for meliorations, as well as to any right they may have to remove the plant erected by them in connection with the said heritable property."

The following was the Lord Ordinary's note:—

"*Note.*—. . . The question in this case is whether, in terms of the 65th section of the Bankruptcy Act, the appellants are bound to deduct the value of their security over these subjects from the amount of their claim as being a security held over a part of the estate of the bankrupts.

"Two questions of fact were argued to the Lord Ordinary. First, whether it was proved by competent evidence that the subjects of the security were at the date of the cash-credit bond not the property of A. J. Donaldson, but were held in trust by him for the company: and second,

whether the Bank knew that they were the property of the company. . . .

"The Lord Ordinary thinks that the only documents which have been produced which can be competently founded on as the writ of A. J. Donaldson are the books of the company and the letter of 16th October 1874, addressed by him to Messrs Robertson.

"The Lord Ordinary does not think that under the allowance of proof in this case, bills and other documents which no doubt are the writ of A. J. Donaldson, but which bear nothing on their face to show that they have any connection with the subjects in question, or with the terms on which they are held, can be competently proved by parole to have been in point of fact granted in payment of the subjects or of work and material supplied to the works carried on therein, and so made available for the purpose of proving the alleged trust. *Bryson* v. *Crawford*, November 14, 1833, 12 S. 39; *Johnston* v. *Scott*, January 18, 1860, 22 D. 393; *Evans* v. *Craig*, June 6, 1871, 9 Macph. 801; *Thomson* v. *Lindsay*, October 28, 1873, 1 Rettie 65.

"The books, however, of the company show that the subjects were treated therein as being the property of the company, and in particular the plant account in the ledger commences with the following entry, of date "1873, June 30, To value of plant at Damside and Teviotside, including all buildings, stills, presses, engines, boilers, refrigerators, tanks, and everything not included in stock of grease and oil as per valuation of this date, £16,025," thereby clearly showing that the buildings as well as the machinery, &c., were treated as the property of the company.

"The letter of 16th October 1874, addressed to Messrs Robertson, of Glasgow, which is signed by A. J. Donaldson, is written to them for the purpose of showing the solvency of the company, and with that view bears to set forth the amount of the company's assets. The first asset specified is the "value of our two works at Hawick, including plant at lowest working estimate, £16,000," and the letter throughout clearly represents these works as being the property of the company. It is true that the letter falsely understates to a large amount the debt for which the works were liable, but the Lord Ordinary thinks that the letter may be taken as evidence against the writer that the works were the property of the company, and not his own. It is true that the effect of the evidence thus afforded by the statements and entries in the letter and books might have been removed by contrary evidence, but there is no such evidence, and the Lord Ordinary therefore thinks that it is sufficiently proved that at the date of the cash-credit bond the subjects in question were the property of the company, and were held by A. J. Donaldson in trust for them.

"As regards the question whether the appellants knew at the date of granting the cash-credit bond that the subjects were not the property of A. J. Donaldson, but were held in trust for the firm, the evidence shows, as regards the directors of the Bank, that they did not concern themselves at all as to who were the proprietors of the subjects, all that they looked to was that they should obtain a valid security over the subjects. As regards their agents, Messrs Dundas & Wilson, it appears that they had no knowledge except what they derived from the titles, and that they prepared the cash-credit bond on the footing that A. J. Donaldson was, as he appeared therefrom to be, the owner of the property.

"As regards their local agent, Mr Hadden, it appears that while he frequently spoke and wrote of the subjects as belonging to the company, he had no actual knowledge as to the proprietorship of the subjects, and that from and after the time when the titles were sent to him to prepare the cash-credit bond, and he saw that A. J. Donaldson was feudal proprietor of the subjects, he believed him to be the real owner. The Lord Ordinary is therefore of opinion that the respondents have failed to prove that the appellants knew that the subjects were held in trust for the company.

"The Lord Ordinary, however, is disposed to think that it is not material for the decision of this case whether the appellants knew or did not know the fact, because he thinks that the rights of parties must be determined by the terms of the cash-credit bond, which specifies the particular security which the appellants agreed to take, and received.

"By that bond A. J. Donaldson dispones the subjects in security as absolute proprietor of them, his right and title being unqualified by any trust. Assuming that, nevertheless, the subjects were truly held by him in trust, but that the appellants did not know it, then the Lord Ordinary is of opinion that their rights as creditors can not be controlled by any latent trust existing in favour of the company. *Redfearn* v. *Sommervail*, 5 Paton's App. Cases, p. 707.

"But if the subjects were the property of the company to the knowledge of the appellants, still A. J. Donaldson, as *ex facie* absolute proprietor of them, was in the position of being able to grant a valid security over them for his own individual debts, and as the company consented to the subjects being so disponed in security, they, or the respondent as representing their sequestrated estate, cannot now object to its receiving effect. A security given over the estate of the individual partner is of different value from that given over the estate of the company, because in the event of the sequestration of the company the creditor is not bound to value and deduct the security in ranking on the estate of the company. But what the respondent now proposes to do is to alter the right of the security holders competently granted to them by A. J. Donaldson as an individual, to one granted by the company. That it now appears that the security to which the company consented is prejudicial to the interests of the creditors of the company seems to be no sufficient ground for doing this. The subjects in question were not at the date of the sequestration, in the sense of the 65th section of the Bankruptcy Act, any part of the estate of the bankrupts. They were then vested in A. J. Donaldson, and the right of the respondent was to demand from him a conveyance of the subjects vested in him, but subject only to all rights and burdens validly constituted upon them, of which the security in question is one. *M'Lelland* v. *The Bank of Scotland*, February 27, 1857, 19 D. 574.

"The recent case of the *British Linen Company* v. *Gourlay*, March 13, 1877, 14 Scot. Law Rep. 416, is an authority to the effect that the security having been obtained from A. J Donaldson, who

had a title to grant such a security, and to whom in the event of a sale under the bond the appellants would have been bound to account, any deduction from their claim in respect of such security must be made in ranking on his estate as the appellants have done in this case, and not on the estate of the company, although the company might have a radical right to the subjects."

This interlocutor was acquiesced in.

Counsel for Royal Bank (Appellants)—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Trustee (Respondent)—Maclean—A. J. Young. Agents — Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Friday, October 26.*

OUTER HOUSE.

[Lord Young.

BOYD *v.* DENNY'S TRUSTEES AND OTHERS.

Succession—Vesting—Destination of a Contingent Fee to "Heirs whomsoever."

By a *mortis causa* trust-deed a testator, after providing a liferent of his moveable estate to A and B, his nephew and niece, and a fee to their issue, directed his trustees, in the event of the death of A and B without issue, to pay and divide the estate to and among "his own lawful heirs whomsoever." A and B both survived the testator, and were his next-of-kin at his death. A predeceased B, but both died without issue. B's residuary legatee then claimed the estate against the testator's next-of-kin as at the date of B's death. *Held* (by Lord Young, Ordinary, (1) that there was no intestacy; (2) that the gift of the fee being contingent, no right to it vested while the contingency remained in suspense, viz., till B's death; and (3) that the estate therefore fell to those who at the date of B's death answered the description of the testator's lawful heirs.

Observations upon the cases of *Lord* v. *Colvin*, December 7, 1860, 23 D. 111, and July 15, 1865, 3 Macph. 1083; *Balderston* v. *Fulton*, January 23, 1857, 19 D. 293; *Blackwood* v. *Dykes*, February 26, 1833, 11 S. 445, and June 11, 1833, 11 S. 699.

By trust-disposition and settlement, dated 26th December 1851, Peter Denny, merchant, Dumbarton, disponed his whole estate, heritable and moveable, to trustees for certain purposes. The purposes of the trust were, *inter alia*, as follows—"Second, I direct my said trustees to hold the free residue of my said means and estate in trust for and on behalf of the said Elizabeth Denny and James Denny, both lawful children of my brother David Denny, now deceased, in equal proportions, in liferent for their liferent alimentary use allenarly, and for their respective lawful issue, equally among them, share and share alike, in fee . . . declaring that in the event of either of the said Elizabeth Denny or James Denny deceasing without leaving lawful issue, the survivor of them shall be entitled to his or her liferent alimentary use for liferent allenarly of the whole of said residue: Third, At the first of said terms that shall occur after the death of the said Elizabeth Denny and James Denny respectively, said trustees or trustee shall pay and divide the fee of the portion of the residue that may have been so liferented, to and among the lawful issue, if any, of the deceaser, equally among them, share and share alike; whom failing, the same shall be paid (but subject always to the liferent foresaid) to the lawful children, equally among them, of the survivor; whom failing, to and among my own lawful heirs whomsoever."

Peter Denny, the truster, died on 19th February 1856, leaving both heritable and moveable property of considerable value, and was survived by James Denny and Elizabeth Denny, the two liferenters under the settlement. After the truster's death the free income of the whole estate was paid to the two liferenters during their joint lives, and after James Denny's death, in 1858, to Elizabeth Denny, till her death on 4th January 1872.

In October 1872 Peter Denny's trustees raised a process of multiplepoinding and exoneration for the distribution of his estate, and called as defenders his heir-at-law and next-of-kin and their whole representatives, who were the truster's lawful heirs *in mobilibus*. By an interlocutor, dated 18th July 1874, the Lord Ordinary (Young) found the parties therein named entitled to participate in it in the proportions therein mentioned. One finding was—"Finds that, according to said destination, the truster's moveable estate pertains to the representatives of Elizabeth Denny and James Denny, his niece and nephew, the liferenters under said settlement, the said Elizabeth Denny and James Denny having been the truster's next-of-kin, and the lawful heirs *in mobilibus* at the date of his death." A reclaiming note, which was presented by one of the parties, was of consent refused by the Second Division of the Court, and the Lord Ordinary thereafter approved of a scheme of division of the moveable estate among the parties preferred by his first interlocutor, and granted warrant for payment in their favour.

This was an action of reduction of these interlocutors, at the instance of Mrs Isabella Boyd, the cousin and sole residuary legatee of Elizabeth Denny under her trust-disposition and settlement, dated 16th June 1864, against Peter Denny's trustees and the parties found entitled to participate in his estate as above narrated. Neither she nor the trustee and executor of Elizabeth Denny had been called as defenders in the multiplepoinding, and no intimation was made to her. She stated that she did not know of the existence of the action until some time after the decrees were pronounced, and that she believed the Court was not made aware that Elizabeth Denny had left a settlement.

She further averred—"The said estate of the said deceased Peter Denny vested, under the said settlement of the said Peter Denny, in the lawful heirs of the testator *ab intestato* as at the date of his death. At that date the said James Denny was his heir in heritage, and the said Miss Elizabeth Denny his heir in moveables. The said James Denny died unmarried and intestate,

* Decided January 19, 1877