

lands are held *cum decimis inclusis et nunquam antea separatis*, and this title must go back to a period anterior to the Act of Annexation. Both branches of the cabalistic words are necessary. The "*cum decimis inclusis*"—that is, the assertion that the lands were teind free in the hands of a privileged churchman and as privileged lands; and there must always be the additional words "*nunquam antea separatis*"—that is, the additional assertion that they never had been in any other position—that they never had been held by a separate tenure, but had always been either *labores* or *novalia*. Further, the privilege will be destroyed if it appear anyhow that there ever was a separate reddendo for lands and teinds. I need not notice other requisites, or go into further detail.

Now, on almost every point the present claim for a valid *decimæ inclusæ* right fails. Mr Dundas has not produced titles instructing the various particulars which are requisite to constitute a valid right of the nature claimed, but not only is a valid *decimæ inclusæ* right not instructed by the titles produced, but when carefully examined these very titles destroy the alleged right. The earliest title produced is the charter of 24th January 1563 by Queen Mary to James Sandilands, Lord St Johns of Torphichen. This charter contains the teinds, that is, it disposes them, but it does not contain a single word of their being "included;" still less is there any assertion that they were *nunquam antea separatis*. This of itself is fatal, for if the original title flowing from the Crown does not contain the "included" right, no subsequent subject proprietor had any power to create it. For Lord Torphichen or any of his successors to insert a *decimæ inclusæ* right in their subinfeudations when they had not such right in their own charter was manifestly incompetent. Indeed, it was a fraud upon the church—an attempt to make lands teind free which were not so. There is no charter either from the Crown or from the Pope conferring or confirming the right of exemption, and this of itself would be fatal.

But the charter of Queen Mary of 1563 absolutely extinguishes Mr Dundas' claim in another way equally conclusive. It contains separate reddendos for the lands and for the teinds. For the lands a money feu-duty is stipulated at two terms in the year. For the teinds, and as a reddendo for the teinds, Lord Sandilands is to support habile and fit ministers, according to the law and usage of the kingdom—that is to say, the teinds are to pay and be allocated upon for minister's stipend. It is hopeless, with such a provision of payment from the teinds, to maintain that the lands are teind free. I do not wonder that Mr Dundas clung with all his energy to the plea of *res judicata*—he really had no other hope—and perhaps the absolute hopelessness of this plea on the merits sheds a reflex light on the plea of *res judicata*, for I could not easily hold that the Court decided *causa cognita* that a *decimæ inclusæ* right was valid, which on the face of the very first and only Crown charter was so hopelessly and utterly untenable.

To go into other objections after this utter failure on the Crown title of 1563 is really needless. The first Lord Torphichen was not a churchman, but a mere titular, and the title has not been traced back to a privileged churchman.

The lands have not been shown to be privileged lands either *labores* or *novalia*. The subaltern titles, which do speak of an *inclusæ* right, were never confirmed either by Crown or Pope, and they were ultimately extinguished by resignation *ad remanentiam*. Even in these subaltern titles the cabalistic words are incomplete—sometimes they want the "*inclusæ*" and sometimes they want the "*nunquam antea*." Indeed, in the infestments for 200 years the second part of the clause—the "*nunquam antea separatis*"—are wanting, as well they might be, seeing the separation is demonstrated by Queen Mary's charter of 1563. It is superfluous to say more. It seems to be true that in all the localities extant so far as we can trace them these 81 acres have been omitted—they have never actually paid teind; but this is not enough to give perpetual exemption. There is no prescription of immunity from teind, or from stipend, and if the minister has now at last discovered lands which will afford him augmentation, Mr Dundas may be well satisfied that he has escaped so long.

LORD ORMDALE—I concur with your Lordship, and in addition I have only to remark that while it is settled law that in support of the exemption contended for by Mr Dundas there should be produced a title bearing date prior to the Act of Annexation, 1587, cap. 29; that it should be granted by a churchman of one of the regular orders of clergy; and that it be confirmed by the Pope before the Reformation, or by the King before the Act of Annexation—those requisites are wanting in the present case.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

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

Counsel for the Objector—Lee—Monereiff.
Agents—J. & F. Anderson, W.S.

Saturday, February 8.*

FIRST DIVISION.

[Lord Adam, Bill Chamber.

SYMONS (M'MILLAN'S TRUSTEE) v. SMYTH
AND M'MILLAN.

Right in Security—Bankrupt—Effect of unrecorded back letter by bankrupt acknowledging whole debt, where two bound ex facie as principals under a bond.

Certain subjects belonged to the extent of three fourths to a party who had become bankrupt, and the remainder to his brother. Both were bound conjunctly and severally in a bond over the whole estate, but there was a back-letter by the former acknowledging that the whole debt was his. This back-letter was not recorded.

Held—reversing the Lord Ordinary (Adam)

* Decided January 29, 1879.

—that as the back-letter did not appear on the record, the creditor was entitled to rely on the brother for payment of half the amount of the debt.

This was a petition presented to the Lord Ordinary on the Bills by the trustee on the sequestrated estate of Samuel James M'Millan, under the 116th section of the Bankruptcy Act 1856, for approval of a scheme of ranking and division of the price of the heritable property of the bankrupt among the heritable creditors. The heritable estate sold consisted of three-fourth parts of the lands of Maidenbower which belonged to the bankrupt. The remaining fourth belonged to his brother Robert M'Millan. These lands were divided by decree of the Court, dated 23d May 1877, and the bankrupt's share was subsequently sold under the 113th section of the same Act.

By the scheme of ranking and division it was proposed in the first place to rank Mr J. A. Smyth on the price of the estate in respect of a bond for £1000, and there was no objection to this.

It was proposed, in the second place, to rank Mr Smyth as in right of a bond and disposition in security for £500, dated 16th and recorded 19th January 1863, granted by the bankrupt and his brother Robert M'Millan in favour of the trustees of Thomas Robinson Smyth. But as the bankrupt and Robert M'Millan were conjunctly and severally liable on the face of the bond, which was granted over the whole lands of Maidenbower, belonging to the two brothers, it was proposed to deduct one-half of the amount, £250, as being Robert M'Millan's share of the debt, and to rank the creditor for the sum of £250 only, leaving him to recover the other half from Robert M'Millan. This was objected to by Robert M'Millan, on the ground that the whole sum in the bond was truly the debt of the bankrupt, and he produced in support of his contention a holograph letter by the bankrupt, dated 25th February 1863, before the sequestration, acknowledging that the whole debt was his. The genuineness of this holograph letter was not disputed, but it had not been recorded. The heritable creditor, Mr Smyth, was also creditor in a subsequent bond for £1000 over Samuel M'Millan's portion of the estate.

Mr Smyth contended, *inter alia*—“(1) The bond for £500 is not due by the bankrupt only, but by him and the objector conjunctly and severally, and the respondent, who is creditor in that bond, cannot be affected by an unrecorded back letter between the debtors. . . . (4) The respondent, as postponed heritable creditor, when he took the postponed security was entitled to look to the Register of Sasines as disclosing the true position of the prior bond for £500, and to rely on the prior creditors proceeding under that bond unfettered by any latent back letter.” The balance of the price of the bankrupt's heritable estate was not nearly sufficient to pay in full Mr Smyth's claims under the third bond for £1000.

The Lord Ordinary (Adam) sustained the objections for Robert M'Millan, and remitted to the trustee to alter and amend the scheme to the effect of ranking the bond for £500 to the full amount thereof on the price realised by the sale of the bankrupt's heritable estate. His Lordship added the following note to his interlocutor:—

“Note.—[After stating the facts]—It appears to

the Lord Ordinary that Robert M'Millan having shown by competent evidence that the debt in the bond for £500 was the proper debt of the bankrupt, would, if he had been called upon to pay it, have been entitled to demand an assignation to it, and so put himself in the place and acquired the rights of the creditors in the bond.

“The Lord Ordinary does not think that the creditor in the subsequent bond, although he might have had an interest, would have had a title to object to such an assignation being granted, and he does not think that Mr Smyth, because he has acquired right to the bond for £500, could found upon his interest as a postponed creditor under the bond for £1000, to refuse to grant an assignation to the bond for £500 upon getting payment of it from Robert M'Millan.

“But Mr Smyth maintains that in lending the sum of £1000 he was entitled to rely upon the facts as appearing on the face of the records, and that the records show that Robert M'Millan and his estates were conjunctly and severally liable for the debt of £500 with the bankrupt and his heritable estate. But the Lord Ordinary thinks that the records show that the bankrupt's estate was at the date of the second bond burdened with the previous debt of £500. Mr Smyth was entitled to rely upon the records as showing that the bankrupt's estates was not burdened to any further extent than with the sum of £500, but he was not entitled to rely upon them as showing that, to a greater or less extent, payment of the £500 might possibly be operated out of the estate of Robert M'Millan.

“But if such would have been the rights of parties if there had been no sequestration, they do not appear to the Lord Ordinary to be affected by the fact of the sequestration. The practical result of the scheme of division is, that Robert M'Millan is to be called upon to pay £250 of the bond for £500. If he had in fact paid this sum, the Lord Ordinary thinks that to that extent he would have been entitled to be put into the place of the original creditors in the bond, who would have had right to demand that their bond should be paid in full out of the price of the bankrupt's heritable estate before any part of it was applied in payment of the subsequent bond for £1000, and the Lord Ordinary thinks that the scheme of division should be framed upon the same footing.”

Mr Smyth reclaimed, and argued—The objector and the bankrupt were bound conjunctly and severally *ex facie* as principals, and therefore each was liable for a half. As the back letter was *res inter alios* it could not affect creditors even if recorded; *a fortiori* if it was unrecorded. The result of the Lord Ordinary's interlocutor was to put the objector into the position of a cautioner.

Authorities—2 Bell Comm. 417, Ersk. 3, 12, 66; *Stewart v. Maxwell*, 11 Jan. 1814, F.C.; *Scotland v. Bairdner*, 3 January 1696, M. 3367; *Preston v. Erskine*, 22d February 1715, M. 3376; *Austin v. Grant*, 24th May 1827, 5 S. 654 (701); *Sligo v. Menzies*, 18th July 1840, 2 D. 1478.

Argued for respondent—He had shown the debt was a debt of the bankrupt only. He was therefore entitled to demand an assignation to it if he paid. Mr Smyth did not acquire any better right by becoming creditor in the subsequent bond. He was entitled to look to the record to

the effect only of seeing that the bankrupt's estates were not burdened to a greater extent than £500, he was not entitled to rely on the amount being less.

At advising—

LORD PRESIDENT—I am sorry that I cannot agree with the Lord Ordinary's interlocutor in this case. His reasoning is in its general principles sound and consistent, but it is liable to objection. I think a fallacy pervades his whole argument. The state of the facts is this—Samuel M'Millan, the bankrupt, and his sister Agnes M'Millan, were originally joint-proprietors of an estate called Maidenbower in Dumfriesshire, and while owners borrowed a sum of £1000, and granted a bond and disposition in security for the £1000 over that estate, dated 18th and 25th and recorded 26th April 1853, in favour of certain persons who are now represented by Mr John Alexander Smyth. After that Agnes died, leaving her half of the estate to her two brothers Samuel and Robert in equal portions. From that date the property was held in the proportion of three-fourths by Samuel M'Millan and one-fourth by Robert. Now while the title stood vested in these proportions the brothers borrow the sum of £500 and grant a bond and disposition in security, dated 16th and recorded 19th January 1863, in favour of the trustees of Thomas Robinson Smyth, in right of whom Mr Smyth now is. That is the second bond on the estate, and it is to be observed that it is a document of the same description as the first as regards extent—it is over the entire estate. But at a subsequent period, on the 8th October 1867, a third bond was granted, by Samuel M'Millan alone, for £1000, and in security he conveyed, not the entire estate, but only that portion which belonged to himself, his brother not being a party, and his share of the estate not being impignorated.

As regards the first of these three bonds, it is needless to say anything further. The case may be regarded as if it were freed from that bond altogether. The real competition has reference to the second and third bonds.

Suppose that there were only two bonds—one for £500 in favour of Thomas Smyth over the entire estate, and the other for £1000 extending only over that portion of it which belonged to Samuel M'Millan. The trustee in bankruptcy of Samuel M'Millan has proceeded to rank the £500 debt this way, one-half upon the bankrupt estate, which has been brought to sale in the usual manner, leaving the other half to come out of the estate of Robert M'Millan, who is perfectly solvent. Now, the answer to this demand is that Robert M'Millan although he is *ex facie* a joint-obligant, and although his estate has been jointly impignorated for repayment of this sum of £500, is in truth not a joint-obligant, but only a cautioner. It is averred that the money was borrowed for the purposes of Samuel only, and in support of that averment a back letter is produced, dated 26th February 1863, which acknowledges that the whole debt is his. But this letter has never entered the record, and has never been published in any way. On the face of the record it appears that the two brothers are jointly bound, and their two estates jointly impignorated. It appears to me that the back letter and the fact that Robert M'Millan was a cautioner only—both of which as facts I fully assume—cannot be allowed any weight in this

question. The creditors dealt with the estate as it appeared on the face of the record, and knew nothing of the back letter. They were therefore entitled to rely on a security not only over the estate of Samuel but of Robert also; and therefore when they came to operate payment they were entitled to draw their payment in equal portions out of the two estates impignorated. This appears to me to be the true view of the case.

The Lord Ordinary proceeds on the assumption that if no bankruptcy had taken place the party paying the £500 would have been entitled to an assignment of the entire security. That is a mistake. He would be entitled to an assignment only to the extent of one-half, on the plain doctrine that he himself is bound to pay one-half and his co-obligant to pay the other. No doubt it is said that Robert M'Millan is only a cautioner, but for the reasons I have stated that cannot be allowed to enter into the case at all. If it were otherwise it would be inconsistent with the rules of ranking of heritable securities. The back letter was never published. I think therefore that the scheme of ranking which the trustee has prepared is perfectly well calculated to carry out this principle, and Robert M'Millan must just submit to have his estate burdened to the extent of one-half. That does not arise here in form, but our judgment will rule Mr M'Millan's case. I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be altered to that effect.

LORD DEAS and LORD SHAND concurred.

LORD MURE was absent.

The Court therefore recalled the Lord Ordinary's interlocutor, repelled the objections for Robert M'Millan, approved of the scheme, and decerned.

Counsel for Petitioner—R. Johnstone. Agents—J. C. & A. Steuart, W.S.

Counsel for Smyth (Respondent and Reclaimer)—Scott—Rankine. Agent—W. S. Stuart, S.S.C.

Counsel for Robert M'Millan (Objector and Respondent)—Trayner—M'Kechnie. Agents—Carment, Wedderburn, & Watson, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

DUKE OF ROXBURGH *v.* GRIFFITH AND OTHERS (WALDIE'S TRUSTEES).

Fishings—Right to Salmon Fishings—Possession—Rod Fishing—Obstruction in River.

R held the Sprouston fishings in the river Tweed *ex adverso* of the lands of Sprouston under a barony title from the Crown *cum piscationibus*. W held the Edenmouth lands and fishings, which were opposite the fishings of Sprouston, also under Crown titles *cum piscationibus*. R had for hundreds of years exercised the full right of salmon-fishing by net and coble on the said fishings both above and below a certain part of the river about a quarter of a mile in extent, where, on account of islands and the shallowness of the stream, net and coble fishing was not