

Saturday, November 15.

FIRST DIVISION.

[Sheriff of Renfrewshire.

REID v. DRUMMOND.

Bankruptcy—Competition for Trusteeship—Affidavit and Claim—Diligence to Enable Vouching of Claims.

Circumstances where (following *Tennent v. Crawford*, Jan. 12, 1878, 5 R. 433, 16 Scot. Law Rep. 265) a diligence was granted for the recovery of documents in the hands of specified persons in order to the vouching of claims of parties seeking to vote in the election of a trustee in bankruptcy.

James Drummond, C.A., had a majority in number and value of the creditors in competing for the trusteeship on the sequestrated estate of Manson & Auld, wrights, Crossmyloof. He applied to the Sheriff for a "diligence against havers to recover from the bankrupts, their clerk R. . . M. . . or other third parties in possession of the following documents, which will instantly verify the following claims in said competition" (for trusteeship), "and which claims are admitted by the bankrupts in their state of affairs made up in terms of the statute. Said documents are out of the possession of and entirely beyond the respective claimants' control, and delivery thereof cannot be obtained without warrant of Court." A detailed specification followed specifying the names of the claimants and the documents sought to be recovered. The claimants referred to were three in number, tradesmen who had done work for the bankrupts. On 18th October 1879 the Sheriff-Substitute (Cowan) granted the diligence as craved.

Against this interlocutor Robert Reid, a competitor for the trusteeship, appealed. He objected to the validity of the votes tendered in support of Drummond, on the ground that the accounts on which the various claims rested were totally unvouched, in respect that there were not produced the contracts, estimates, measurements, and details of the work charged for. The affidavit in each case declared that the bankrupts were "and still are justly indebted and resting-owing to the deponent the sum of £ sterling, conform to account or state of debt annexed and subscribed by the deponent as relative hereto."

The appellant argued—The affidavits were bad, because the work charged for was insufficiently vouched in the annexed state of debt. This case did not fall within *Tennent v. Crawford*, for there the document (apart from the matter of stamping) showed no *ex facie* objection; but here the affidavits were *ex facie* defective. The estimates and offers, &c., should have been produced; they must either be in the possession or control of the claimants, or if not, they should under sec. 50 of Bankruptcy Act have shown cause why not. [LORD SHAND—That section refers to payment of dividend—not to competing for trusteeship.] If this diligence was granted, the claimants might simply allege debt £ conform to note annexed, and the note might only state, "to work done £", and any after inquiry into the details would be very much against the "least possible delay" prescribed by sec. 71.

Authorities—*Tennent v. Crawford*, Jan. 12, 1878, 5 R. 433; *Woodside v. Esplin*, July 15, 1847, 9 D. 1486; *Aitken v. Stock*, Feb. 14, 1846, 8 D. 509; *Wiseman v. Skene*, Mar. 5, 1870, 8 Macph. 661.

At advising—

LORD PRESIDENT—I am quite clearly of opinion that this case is within the principle of *Tennent v. Crawford*, but it is necessary to be cautious in sanctioning the granting of diligences for such purposes. It would never do to allow any sort of proof to be led in support of affidavits, else those delays would infallibly occur which it is the very object of the statute to prevent; but if a person brings forward a relevant statement of claim, and an account or note of the items, and says the vouchers are in the hands of A, B, and C, and that he wishes to recover them in order to verify an affidavit, I think it is quite competent and only just that he should be entitled at once and without delay to summon such persons as havers for the production of the vouchers. It is indispensable, however, that the statement should be very specific who has the documents, or one or other of which parties, and what are the documents to be recovered. Now, Mr Drummond in his specification has asked a diligence against certain persons distinctly named, and then he says the documents are outwith the possession and beyond the control of the claimants, and the documents are then specified at length. I think this is quite within *Tennent's* case, and in conclusion I have only to add that I am not prepared to go further than we did in that case, but that I do not think we are doing so here.

LORD DEAS—I quite agree with your Lordship that it is necessary to be cautious in granting diligence in these competitions. The processis meant to be a very summary one. But I think this case is clearly within *Tennent's* case, and I therefore assent to the judgment proposed.

LORD SHAND concurred.

LORD MURE was absent.

The Court refused the appeal.

Counsel for Appellant—Dickson. Agent—W. Elliot Armstrong, S.S.C.

Counsel for Respondents—Alison. Agents—Macbrair & Keith, S.S.C.

Saturday, November 15.

FIRST DIVISION.

[Lord Curriehill, Bill Chamber.

WELDON v. FERRIER (WELDON'S TRUSTEE).

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), secs. 139 and 169—Consent of Commissioners to Offer of Composition by Bankrupt.

The consent of the commissioners is, by section 139 of the Bankruptcy Statute 1856, necessary before the trustee can call a meeting of creditors to consider an offer of composition made by a bankrupt subsequent to

the meeting held after his examination; but in the event of the trustee or commissioners abusing their office in refusing such consent, a remedy is open under the 169th section of the statute, either by appeal or by petition and complaint. Circumstances where in such an appeal at the instance of the bankrupt the Court declined to interfere, and refused the appeal, there being no evidence that the commissioners had abused their office.

Charles Weldon became bankrupt, and his estates were sequestrated in March 1879, a trustee (Mr Ferrier) and two commissioners being appointed. At the first general meeting of the creditors on 19th March there was submitted a written offer by the bankrupt of a composition of 2s. 6d. per £1, and suggesting the name of one or other of two gentlemen as security. This offer was subsequently rejected, as the gentlemen named did not consent to give caution. At the second general meeting of creditors on 8th April a state of affairs of the bankrupt shewed assets *nil*, liabilities (preferable) £530 and (ordinary) £1022. On 11th August the bankrupt wrote to the trustee offering a composition of 1s. per £1, to be paid by instalments, and to this letter was appended—"I hereby become security for the composition above offered.—George Weldon, 33 Montague Street, Edinburgh." The trustee and the commissioners subsequently held a meeting on 20th August, the minute of which bore that "George S. Ferrier, the trustee, laid before the meeting an offer of composition of 1s. per £, dated 11th August 1879, from the bankrupt, with an offer by the bankrupt's brother Mr George Weldon of security for the said composition. The meeting after due consideration refused to give their consent to the trustee to call a meeting of the creditors to consider and decide upon that offer, in respect, first, of the inadequacy of the offer, and second, of the insufficiency of the cautioner."

On August 26th the bankrupt's law-agent wrote to the Accountant in Bankruptcy requesting him to "require the trustee to call the necessary meeting of creditors to have the offer and security disposed of in terms of the statute." The Accountant replied (on August 27th) that under section 139 of the Act, the commissioners having refused their consent, "I do not find that I can order the trustee to call such a meeting. It is for the bankrupt's consideration whether he should not, under the provisions of the 169th section of the said Act, appeal against the deliverance of the trustee and commissioners in regard to this matter."

The bankrupt appealed, and on 15th September the Lord Ordinary officiating on the Bills (CURRENT) refused the appeal, adding to his interlocutor the following note:—

"*Note.*—The consent of the commissioners by section 139 of the Bankrupt Statute necessary before the trustee can call a meeting of creditors to consider an offer of composition made by a bankrupt subsequent to the meeting held after his examination. It appears to me that it is absolutely within the discretion of the commissioners to grant or withhold their consent. In this case not only do the commissioners withhold their consent, but it was stated at the hearing, and not denied, that the trustee concurs with the commissioners in thinking that the offer is not

one which should be submitted to the creditors. I can see no grounds for holding that the commissioners are abusing their discretionary powers, and, on the whole, I think the note of appeal must be refused, with expenses."

The bankrupt reclaimed, and argued—The commissioners were not entitled at their own hand to prevent the calling of a meeting of creditors to consider an offer of composition made in proper form and on sufficient caution. As to the offer being too small, the assets were *nil*, and the composition offered would be found money to the creditors. The proceedings had, in fact, been actuated by private and interested motives.

At advising—

LORD PRESIDENT—It is important to observe at what stage of the sequestration this question arises, and at what stage only it can arise under the statute. It is only after several meetings, after the bankrupt has been examined and his affairs investigated by the trustee and commissioners, and after the meeting held subsequently to the bankrupt's examination, at which the creditors are called on to consider his conduct and the state of his affairs—it is only after all that is done that the bankrupt in offering composition requires to do so at a meeting to be called by the trustee with consent of the commissioners. Before this time he can do so without anyone's consent down to and inclusive of the meeting held after his examination. If he loses all these opportunities, then he must have the consent of the commissioners. There may be excellent reasons—more than one—for this; but it is unnecessary to enter into them, as the statute is quite clear in its terms. One distinction is that at any previous meeting the offer of composition requires to be accepted by a majority in number and nine-tenths in value of the creditors; but at such a meeting as is here asked to be called, a majority and four-fifths in value is sufficient. We must obey the precise rule of the statute, and we cannot put ourselves into the position of the commissioners when they refused consent without being in full possession of the facts as they were. The examination of the bankrupt, for example, is very important, and it is not before us. Again, we have a general statement made about vindictive and personal motives, but what does that mean? If it means that the commissioners were disappointed and indignant because of the largeness of the debts and the assets being *nil*, we can hardly wonder at it.

But what we have to consider is that there has been no allegation even at the bar that the commissioners have abused their office for the purpose of oppressing the bankrupt. If they had done so, a remedy might have been had from the Accountant in Bankruptcy, who can come to this Court for aid; and further, section 169 of the statute authorises a petition and complaint against any deliverance of the trustee or commissioners. We cannot therefore entertain this appeal against the commissioners; and as to the trustee, the absence of his consent renders it incompetent for him to call the meeting. I am therefore for refusing the reclaiming note.

LORD DEAS—I agree with the Lord Ordinary

and with your Lordship. The Lord Ordinary in his note says—"The consent of the commissioners is by section 139 of the Bankrupt Statute necessary before the trustee can call a meeting of creditors to consider an offer of composition made by a bankrupt subsequent to the meeting held after his examination." He has no power to call the meeting without it. But the Lord Ordinary does not say that if the trustee and commissioners abuse their office there is no remedy for it; he says he sees no evidence that they have done so; and we have had no intelligible statement from the bar to that effect. It must be remembered that these meetings involve expense—that the other one had failed for want of proper caution, and that this one bade fair to do so also. All that is legal and reasonable; and I am for refusing the appeal.

LORD SHAND—I concur in the result at which your Lordships have arrived. The commissioners here gave what I take to be a deliverance. The bankrupt applied for their consent, and after due consideration they refused it on specified grounds. The Accountant in Bankruptcy then suggested that it was for the consideration of the bankrupt whether he should not appeal under section 169; and I think this was the right course. The deliverance is one which may fairly be brought under the notice and review of this Court by appeal, and if the bankrupt could show that there had been any abuse I think the Court might on an appeal of this kind interfere and order the required meeting to be called. But I do not think this case discloses any such abuse. On the statement we have heard the bankrupt had no estate, but, on the other hand, no sufficient caution was offered; we know nothing of "George Weldon," and the trustees and commissioners probably had information on the subject. I am clearly of opinion that we should refuse the appeal. What might be done in the case of a *bona fide* offer of composition being made with sufficient caution by a person having means, in the event of the trustee and commissioners refusing to entertain such an offer, is a different matter.

The Court refused the appeal.

Counsel for Appellant and Reclaimer—Mair.
Agent—James Barton, S.S.C.

Counsel for Respondents—Rhind. Agents—
J. & W. C. Murray, W.S.

Saturday, November 15.

FIRST DIVISION.

[Exchequer Cause.

THE INLAND REVENUE v. DOUGLAS.

Revenue—Customs and Inland Revenue Act 1878 (41 Vict. c. 15), sec. 13, sub-sec. 2—Inhabited House-duty—Is a Hotel a Dwelling-house?

Held that a hotel is liable to assessment as a "dwelling-house" under the Inhabited House-duty Acts, and that the fact that the landlord does not personally occupy it will not bring it under the exemptions of sub-section 2 of the Act, 41 Vict. cap. 15, sec. 13,

applying to houses "occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit."

Revenue—Inhabited House-duty Act 1808 (48 Geo. III. cap. 55), Schedule B, Rules 2 and 6—Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 13, sub-sec. 1—Stables.

Where a hotel and stables were occupied together, and for one combined purpose, though the rent of the one was separate from that of the other—held that the stables ought to be included in an assessment of the hotel under the Inhabited House-duty Acts, and did not fall under the exemptions of the 1st sub-section of the Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 13.

Observed that the same rule might not apply where the stables were occupied for the purposes of a coaching establishment separate from the hotel.

John Douglas, innkeeper, Campbeltown, appealed to the Commissioners for General Purposes of the Income-tax and Inhabited House-duty Acts for that district of Argyllshire against an assessment of £3 laid upon him by Alexander Young, surveyor of taxes, being inhabited house-duty at 6d. per £1 on the hotel and stables occupied by him, rented at £120 from the Duke of Argyll. The Commissioners having sustained the appeal, the surveyor craved a case for the opinion of the Court of Exchequer.

The case bore that "the appellant claimed total relief from the assessment under sub-section 2 of 41 Vict. cap. 15, section 13, in respect that the premises assessed are occupied solely for the purposes of his trade or business as a hotel-keeper, by which he seeks a livelihood or profit, the appellant having a separate residence for his family about three-quarters of a mile distant, the appellant or his wife and servants remaining on the hotel premises only for the conduct of the business.

"In the event of the premises not being held to come within the exemption granted by the sub-section 2, the appellant alternately claimed relief from the assessment as far as it included the stables, on the ground that the hotel and stables are distinct tenements, and separately let to him at the rents of £80 and £40 respectively, as entered in the Lands Valuation Roll for the burgh of Campbeltown, and therefore fell within the exemption granted by sub-section 1 of section 13 of 41 Vict. cap. 15.

"The stables are separated from the hotel by a court or yard surrounded by houses partly occupied by the appellant and partly by other tenants. The stable-court is behind the hotel, with entrance by a gate from a side street, and the court is in the appellant's occupation.

"In answer to the first ground of appeal, the surveyor contended that the exemption granted by sub-section 2 of 41 Vict. cap. 15, read in the light of previous enactments, applied only to premises used for trade or business purposes during the day, and not used for residence; and that the house occupied by the appellant being a hotel was essentially an inhabited house used for residence, in which parties dwelt or resided during the night as well as by day, and therefore did not come within the exemption claimed.

"In answer to the alternative contention of