Counsel for Commissioners of Inland Revenue —Lord Advocate (M'Laren, Q.C.)—Rutherfurd. Agent—D. Crole, Solicitor of Inland Revenue.

Saturday, November 20.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

IRELAND *v.* NORTH OF SCOTLAND BANKING COMPANY.

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 35, 38, *and* 101—*Unvouched Claims—Deed of Arrangement—What Creditors are Entitled to Vote and to Sign Deed of Arrangement.*

A majority in number and four-fifths in value of the creditors of a deceased bankrupt agreed at the first statutory meeting to wind-up the estate by deed of arrangement. Certain non-concurring creditors objected to the claims of three subscribers to the proposed deed, which were founded on alleged loans to the bankrupt many years before, on which no interest had been paid, and in support of which no writing was produced. The Sheriff disallowed these claims, and the subscribing creditors whose debts were over £20 in value being then less than the four-fifths in number and value required by sec. 38 of the Act, he refused to approve of the proposed deed, and appointed the sequestration to proceed. One of the creditors whose claim had been disallowed appealed. Appeal *refused.*

On 22d April 1880 the estates of the deceased John Ireland, hardware merchant, Dundee, were sequestrated by the Sheriff-Substitute of Forfarshire, and the statutory meeting for election of a trustee, in terms of the Bankruptcy (Scotland) Act 1856, appointed to be held on 8th May following. At that meeting it was resolved, by a majority in number and four-fifths in value of the creditors present or represented, that the estate should be wound-up by a deed of arrangement; and a petition was accordingly presented to the Sheriff-Substitute to sist proceedings for a period not exceeding two months, in terms of sec. 36 of the Act. This petition was granted without opposition. On 10th July the Sheriff-Substitute ordered intimation of the production of the deed of arrangement to be made to the non-concurring creditors. Objections to the deed were lodged for the North of Scotland Banking Company and others, in which it was argued that the deed was not "reasonable" in the meaning of sec. 38 of the Act, upon the grounds, *inter alia*, that the claims of various alleged creditors who had voted at the first meeting were unfounded, and their grounds of debt invalid. Objection was made amongst others to the claims of—(1) William Thoms, mason, who made affidavit and claim for £43, 7s. 6d., grounded on an alleged loan of £30 to the bankrupt in 1871, on which interest had never been paid and now amounted to £13, 7s. 6d.; (2) John Ireland, porter, who claimed £53, 10s. 3d., on an alleged loan to the bankrupt in 1871 of £37, with interest since that time; and (3) John Duff, teacher, who claimed £53, 0s. 1d., on an alleged loan of £40 made in 1873 and interest. In none of these cases had any interest been paid, and no writing was produced in support of the claims. It was answered that the objection to the validity of these claims as not being properly vouched was not a competent one, in respect that having lodged affidavits these claimants were entitled to vote at the first statutory meeting and to sign the deed of arrangement. It was also answered, that in counting the number of creditors for the purpose of voting every creditor must be computed whether his debt amounted to £20 or not.

On 15th October the Sheriff - Substitute (CHEYNE) refused to approve of the proposed deed of arrangement, and with a view to the sequestration proceeding appointed a meeting of creditors for the election of a trustee. He added this note:—

"*Note.*—I am satisfied, after a careful consideration of it [the deed] with the account given in by the executrix, and I think it by no means improbable, that when the expenses of the sequestration have been provided for, the creditors will find themselves worse off than they would be were the proposed arrangement to receive effect. It is therefore with much reluctance that I have come to the conclusion embodied in my interlocutor; but at the same time I am bound to see that all the requirements of the statute have been complied with, and I have been unable to satisfy myself that this has been done. . . . . The objection which I have found it impossible to get over relates to the claims of John Duff, John Ireland, and William Thoms. These claims were all for loans of money alleged to have been made to the bankrupt years before his death, but it was conceded that in none of the cases was there any writing, either of the bankrupt or of the executrix, tending to instruct the loan, and also that in none of them has any interest ever been paid. It may be that on fuller investigation the trustee may see the way to admit them as good claims against his estate, but in the circumstances above stated I am not satisfied as to their validity, and I must therefore strike them out of the computation; but the result of doing so is to bring the majority, so far as the creditors entitled to be reckoned in number are concerned, below the statutory four-fifths, for the remanent subscribers of such creditors (*i.e.*, creditors having debts above £20) are only ten out of fourteen; and this being so, it follows—assuming that I am right in throwing the claims in question out of view—that I must decline to approve the deed of arrangement, and allow the sequestration to take its natural course." . . . .

John Ireland, one of the creditors whose claim was thus disallowed, appealed to the Court of Session.

At advising—

LORD PRESIDENT—Two points are raised in this appeal. In the first place, in computing the number of creditors who have signed a deed of arrangement, the claims of the three persons mentioned by the Sheriff-Substitute have been disallowed, and so the number of signing creditors is under the majority in number and four-fifths in value required by the statute. As I understand the appellant's contention, it amounts to this, that anyone who lodges an affidavit is entitled to vote at the meeting under sec. 35 of the Act, and to sign a deed of arrangement, or at any-

rate to do the latter. That seems a most extraordinary contention. The meeting is that for the election of a trustee, and the creditors then assembled for that purpose, may, if they see fit, resolve instead to wind-up the estate by means of a deed of arrangement. They are the same body of creditors whether they do the one thing or the other, and the procedure must surely be the same in either case. Those who are entitled to vote at the election of a trustee are certainly not creditors who merely lodge their affidavits, but those who accompany these affidavits with the grounds of their respective claims. Now, the claims in this case are as thoroughly unvouched as possible; they are claims for borrowed money, borrowed at a period long before the sequestration, on which no interest has ever been paid, and for which no vouchers are produced. Now, it is settled law that a loan is not to be proved without writing, and if there had been any writing here it surely would have been produced. It is clear that these gentlemen cannot vote and cannot rank unless written evidence of the loan be hereafter produced. I think the Sheriff-Substitute's view is perfectly right, and that to allow such creditors to take part in the proceedings as belonging to the general body of creditors would just be to give the bankrupt the power of regulating his own sequestration.

The other point is equally clear. The 101st section enacts that no creditor shall be entitled to vote except those whose claims are for over £20 in value when the creditors are required to be counted in number for the purpose of voting. No doubt by the interpretation clause of the Act "vote" means not merely voting at a meeting, but includes also consenting to any offer of composition. And this is just an offer on the one part, and an acceptance on the other, of a composition in the form of a deed of arrangement. That is voting in the meaning of the Act.

I think this appeal should be dismissed.

LORD DEAS and LORD MURE concurred.

LORD SHAND—It appears to me that the procedure here applicable is to be gathered without difficulty from sections 35 and 38 of the statute. Section 35 provides—"At the meeting for the election of the trustee, or at any subsequent meeting to be called for the purpose, a majority in number and four-fifths in value of the creditors present or represented at such meeting may resolve that the estate ought to be wound-up under a deed of arrangement, and that an application should be presented to the Lord Ordinary or the Sheriff to sist procedure in the sequestration for a period not exceeding two months, and on such resolution being carried it shall not be necessary to elect a trustee." By that section the creditors present or represented at the meeting who are entitled to vote, with the result of sisting proceedings in view of the preparation of a deed of arrangement, must be duly qualified to vote by having claims on the estate supported by affidavit and by the necessary vouchers. The right to vote at this meeting depends on the same considerations as the right to vote in the election of a trustee.

But assuming that creditors to the requisite extent in number and value have procured a sist, the next matter is the deed of arrangement. There is no meeting of creditors necessary for the purpose of sanctioning or adopting such a deed. The creditors sign the deed severally, and then it is produced to the Sheriff. When that takes places the Sheriff has very wide powers as to what may be done. Section 38 provides—"If the sequestration shall be sisted, the creditors may, at any time within the period of such sist, produce to the Lord Ordinary or Sheriff a deed of arrangement subscribed by, or by authority of, four-fifths in number and value of the creditors of the bankrupt; and the Lord Ordinary or Sheriff may consider the same and make such intimation thereof as he may think proper, and hear parties having interest, and make any inquiry he may think necessary; and if he shall be satisfied that such deed of arrangement has been duly entered into and executed, and is reasonable, he shall approve thereof and declare the sequestration at an end." Now, I do not say or think that in the ordinary case it is necessary to produce with the deed of arrangement affidavits and claims by the persons signing it. When the Sheriff, on the evidence before him, including the bankrupt's state of affairs, showing who are according to his statement the creditors, is satisfied, and there is no opposition, I think there would be no need of affidavits and claims. But it was obviously intended by the Legislature, and it is, I believe, the present practice, that the Sheriff shall order intimation to non-concurring creditors, and if they enter appearance, and opposition is made, inquiry is necessary, and the production of the affidavits and claims and vouchers, so far as necessary, may be required.

Assuming that to be the course of procedure, what is the case here? The creditors whose concurrence in the deed of arrangement is objected to, after having had an opportunity, cannot show that they have the necessary vouchers or other evidence requisite to support their alleged claims, and accordingly their votes have been disallowed. If they were in a position to produce satisfactory evidence in support of their claims, they would still be in time to maintain the validity of their concurrence in the deed of arrangement; but it is admitted that they are not in a position to instruct their claims by the evidence which is necessary to give them a voice in this matter, or indeed in any matter to be determined by the votes of the creditors in the sequestration.

Then the appellant contends that creditors under £20 in value are to be counted in the number of the votes. That is an extraordinary view with reference to the acceptance of a composition, which this arrangement really is. The spirit and the letter of the statute are, that in order to a person having his vote counted, his debt must be greater than £20.

I think the Sheriff-Substitute's judgment was quite right.

The Court refused the appeal.

Counsel for Appellant — Rhind — Strachan. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Kinnear—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.