

—it being insufficient that we are not satisfied that it was, and even shrewdly doubt it.

Had the two instruments here been in the same terms—the second being an exact copy of the first—though signed and of a later date, it would not, I think, have been doubtful that the latter was intended to supersede the former. I should have thought so whether both were found in the testator's drawers, or the one there and the other with the mother of the boy. The thing in question is not a common legacy, but a provision by a father for his natural son, and that he wrote and signed these same provision twice over, retaining the one and handing the other to the child's mother, would not only not have suggested to my mind the idea that he meant a double provision, but would have satisfied me that he did not. But the second is not an exact copy of the first. It is for a larger sum—£6000, instead of £4000—names two additional trustees, and appoints the last moiety to be paid when the boy reaches twenty-four, whereas the first appointed it to be paid when he reached twenty-five. These changes—and there are no others—rather tend to confirm my judicial conviction that the second instrument was intended to be substitutional. I say judicial conviction, for with the view of the law which I have expressed mere conjecture or impression would be insufficient.

I have the same opinion with respect to the second legacy given to Mr Clunas, and for reasons so plainly arising from the views I have already expressed, that it would be superfluous to state them.

My opinion is strengthened by comparing the provisions of the two instruments in favour of the testator's unmarried female cousins.

The Court answered the question by finding the legacies in the second writing substitutional for those in the first.

Counsel for First and Second Parties—Macintosh—A. G. Murray. Agents—Tods, Murray, & Jamieson, W.S.

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Saturday, November 12.

FIRST DIVISION.

GUNN v. SMITH AND ANOTHER (LIQUIDATORS OF THE BENHAR COAL COMPANY, LIMITED).

Public Company—Secured Creditor—Agreement to Pay certain Creditors before Liquidation commenced.

A debenture-holder in a limited company, when her debenture fell due, instead of withdrawing her money, agreed, at the request of the company, to accept a bond and disposition in security for the amount over certain heritable subjects belonging to the company, which on realisation fell short of the sum secured. The company was at the time in difficulties, and afterwards went into liquidation under the supervision of the Court. Before the liquidation began, the directors, with the view of, if possible, carrying on

the business, intimated that they were "enabled to make a payment of 3s. 4d. per £ on the unsecured debt" out of the proceeds of the sale of certain oil-works. The creditor above mentioned claimed a share of this payment proportionate to her debt, and intimated that she would hold the directors personally responsible if they failed to make due provision for her. Thereupon a sum equal to her claim was consigned in bank, in the joint names of the company and her agents, "to await the determination of her claim to the said dividend, which in the meantime the company dispute." *Held*, in a petition at her instance, that being a secured creditor, she was not entitled to payment of that sum in the liquidation.

The Benhar Coal Company (Limited) was in liquidation, subject to supervision, in terms of an order pronounced by the Court on 18th Jan. 1881. The liquidators were J. T. Smith, C.A., and A. W. Turnbull. The company was embarrassed, and petitions for winding it up were presented in the end of 1878, which after sundry proceedings in Court were withdrawn. An endeavour was then made to resume business. The petitioner was at that date the holder of two debentures for £1000 each, which fell due at Whitsunday 1879, and which she declined to renew; but ultimately she agreed to allow her debentures to be cancelled, and to accept in their place a bond and disposition in security for £2000, dated 23d July and recorded 13th August 1879, over 1st, the dwelling-house 14 Maitland Street, Edinburgh, already burdened with a debt of £2750, and 2d, the lands of Easter Hassockrigg, in the parish of Shotts, already burdened with £1200.

In 1880 the Benhar Company realised various heritable assets appropriated to secured creditors, and also certain oil-works at Benhar and Broxburn, the latter for the sum of £40,000, out of which the directors ordered a payment to be made of 3s. 4d. per £ to all the creditors of the company not secured. In the circular making this intimation, which was dated 18th August 1880, and was addressed to all the creditors of the company, the directors stated that they were anxious "to bring under your notice what has been and is being done towards paying off the company's debts, and to ask your concurrence in the arrangements they propose for the future. Since the present board took office they have disposed of feu-duties to the value of about £30,000, the brick-work at the price of £7500, the oil-works at Benhar and Broxburn for £40,000, and one or two minor portions of heritable property. With the exception of the proceeds of the oil-works, however, these realisations have been applied in reduction of heritable debt, in terms of the agreement at present in force. Out of the proceeds of the oil-works the directors, having regard to the requirements of the collieries, are enabled to make a payment of Three shillings and fourpence per pound on the unsecured debt, which will be remitted to you in the course of a few days; or in the case of debts on debentures or otherwise which are not yet exigible, will be deposited in bank in name of Messrs Dove and Gair, the creditors' advising committee, to be paid when due."

With reference to this dividend, the petitioners' agents on 13th December 1880 wrote as follows to the secretary of the company:—"We hope you are keeping in view to set aside a dividend at the declared rate on this debt; Mrs Gunn is a heritable creditor of the company, but she is, nevertheless, entitled to share with the ordinary creditors in any composition which is payable on the debts of the company. We must beg you to give notice to the directors that our client will hold them personally responsible if they have failed to make due provision for payment to her of the composition in question." Thereafter, on 21st December 1880, there was consigned by the company a sum of £333, 6s. 8d., being equal to 3s. 4d. per £ on £2000, in the National Bank of Scotland, on a consignment-receipt, the terms of which had been previously adjusted by the parties as follows:—"Received for the National Bank of Scotland from the Benhar Coal Coy. Ltd., the sum of three hundred and thirty-three pounds, six shillings, and eightpence stg., being a sum equal to three shillings and fourpence per pound from the price of the oil-works on the amount of loan of two thousand pounds due by the company to Mrs Isabella Gunn, 38 Melville Street, Edinburgh, and which sum is placed to the credit of the said company and Morton, Neilson, & Smart, W.S., on behalf of Mrs Gunn, on deposit-receipt, to await the determination of her claim to the said dividend, which in the meantime the company dispute; declaring that the bank are not cognizant of the statements above narrated."

Previously to this consignment, upon 2d October 1880, the petitioner gave notice to the Benhar Company requiring payment of the loan of £2000, and interest thereon, at the expiry of the period of three months from that date, and subsequently, under the powers of sale contained in the bond and disposition in security in her favour, she sold by public roup, and after due advertisement, upon 13th April 1881, the lands of Easter Hassockrigg at the price of £2000. The sum realised, after deducting the prior debt and the expense of sale, was £750. The other security, namely, the dwelling-house, No. 14 Maitland Street, Edinburgh, was exposed for sale at the same time at the price of £3200, but did not find a purchaser.

The liquidators of the Benhar Company having refused to make payment of the dividend of 3s. 4d. per £ on her debt of £2000, consigned in the National Bank of Scotland as aforesaid, the petitioner presented this petition, in which she prayed the Court "to find that the petitioner, as one of the creditors of the company, was entitled to payment or consignment of said dividend of 3s. 4d. per £ on the amount of her debt, and that the consigned money, with accruing interest, is now payable to her; to grant warrant to and authorise the National Bank of Scotland to make payment thereof to the petitioner," &c.

The liquidators lodged answers, in which they admitted that they had refused to endorse the deposit-receipt and allow the petitioner to uplift the money consigned. The respondents submitted that the said money was part of the general assets of the Company, and fell to be ingathered and distributed by them among the various creditors of the Company according to their respective rights in the liquidation. They therefore humbly submitted that the Court should pronounce an order upon the petitioner ordaining her to direct

her agents to endorse the deposit-receipt in favour of the respondents, that they might uplift the money consigned and distribute it in the liquidation with the other assets of the Company."

The arguments appear from the opinions.

Authorities—*In re Smith, Knight, & Company, ex parte Ashbury*, Feb. 14, 1868, L.R. 5 Eq. 223; *Waterhouse v. Jamieson*, May 20, 1870, L.R. 2 Sc. App. 29.

At advising—

LORD PRESIDENT—The Benhar Coal Company was in a state of embarrassment in the year 1878, and proceedings were then taken for the purpose of having it wound up, but after a time these proceedings were put an end to, and the directors were allowed an opportunity of going on experimentally to see whether they could not extricate the company by making the most of the resources at their command. That state of matters went on till 1880. The petitioner was a debenture creditor of the company prior, apparently, to the embarrassments of 1878, and when her debenture became payable in 1879 she was, as she herself states, desirous of having the money, and was not willing that it should remain any longer on the credit of the company. She changed her mind, however, and took a new security from the company, but of a different kind. The debenture was cancelled, and in its place she accepted a heritable security. That was in July 1879. The embarrassments of the company continued, but in August 1880 the directors paid off a considerable number of heritable creditors by means of the sale of the subjects over which their securities extended, and they also realised a sum of £40,000 by the sale of certain oil-works over which there were apparently no heritable securities. This £40,000 the directors proposed to pay to the creditors who had no security for their debts, and that proposal was embodied in a circular dated 18th August 1880. Now, I do not think that there is any ambiguity about the terms of this circular, whatever may be said of the propriety of the proposals it contains or of the right of creditors to object to them. It is perfectly frank. The directors, after stating what properties belonging to the company they have realised, say—"With the exception of the proceeds of the oil-works, however, these realisations have been applied in reduction of heritable debt, in terms of the agreement at present in force. Out of the proceeds of the oil-works the directors, having regard to the requirements of the collieries, are enabled to make payment of three shillings and fourpence per pound on the unsecured debt, which will be remitted to you in the course of a few days; or in the case of debts on debentures or otherwise which are not yet exigible, will be deposited in bank in name of Messrs Dove and Gair, the creditors' advising committee, to be paid when due." Now, this circular is addressed to all creditors, both secured and unsecured, and it contains, in the first place, an intimation to unsecured creditors whose debts were then exigible that they would receive a dividend of 3s. 4d. in the £ in a few days; and secondly, an intimation to unsecured creditors whose debts were not then exigible, that a dividend of the same amount would be deposited in bank in the names of Messrs Dove and Gair, to be paid as their debts fell due; and

lastly, it is an intimation to the secured creditors that this £40,000 was to be paid away to the unsecured creditors to the entire exclusion of the secured creditors. All this is plain on the face of the circular. Now, what took place? The unsecured creditors whose debts were exigible got their dividend; those whose debts were not yet exigible got a deposit in bank in name of Messrs Dove and Gair; the petitioner got neither the one nor the other, and did not complain, and why? Because she was a secured creditor. She now says that her security was imperfect, but she was none the less a secured creditor, for her document of debt was an ordinary bond and disposition in security. With that can it be said that she falls into the category of unsecured as distinguished from secured creditors? I say nothing as to the legality of the proposal which the circular of the directors contained if anyone had objected; but no one did object, and it was carried out. Then follows the liquidation, and in the liquidation the petitioner comes forward and says—"I am truly an unsecured creditor, because my security was an imperfect one, and therefore I have right to 3s. 4d. in the £ like the other unsecured creditors." Now, is it possible to listen to such a plea in this liquidation? If the proposal of the circular was an illegal proceeding as establishing an undue preference, it is out of the question for any creditor who did not get the benefit of the proposal, to come forward now and ask that his undue preference should be established in the liquidation. That would be too monstrous a proceeding. But if the proposal of the circular was a legal one, it is impossible to say that a creditor who was not only not embraced in the terms of the circular, but was expressly excluded, should be entitled to come forward and say, notwithstanding its terms—"I have a right to be transferred from the class of secured to that of unsecured creditors, and to get the dividend of 3s. 4d. to which the unsecured creditors are entitled." Therefore the one alternative seems to me just as impossible as the other.

But it is said that before the liquidation took place—on the eve of it—the petitioner became entitled to this dividend by a contract with the directors. Now, that matter stands in this way—The agents of the petitioner on 13th December 1880 wrote to the manager asking him to set aside a dividend for Mrs Gunn, adding—"We must beg you to give notice to the directors that our client will hold them personally responsible if they have failed to make due provision for payment to her of the composition in question." Now, in answer to that threat, with a pistol, so to speak, at their heads, the directors say—"If you are going to raise any question of that kind, we will consign the money in the joint names of your agents and the company until the question of indebtedness is settled." Now, observe what that question was. It was not the question of the petitioner's right to £2000, but of her right to participate in the 3s. 4d. dividend which was given exclusively to creditors who held no security, and what she has to make out in order to get the consigned money is, that independently of her agents' letter and the deposit-receipt she has a good claim to the dividend. The only contract which these documents embody is one to abide the decision of the question whether the petitioner is entitled to this dividend or not, and,

for the reasons already stated, I am of opinion that she is not. I think therefore that we should refuse the petition.

LORD DEAS and LORD MURE concurred.

LORD SHAND—This company is in liquidation, and by section 133 of the Joint Stock Companies Act of 1862 it is provided, that being so, that the property of the company shall be applied in satisfaction of its liabilities *pari passu*. That of course leaves creditors who have got security for their debts to vindicate those securities, and get the benefit of them, but unless the petitioner can show that she is a secured creditor in respect of this dividend of 3s. 4d. in the £ now claimed, she must rank with the other creditors *pari passu*. She says that she is a secured creditor, but to prove that two things must be made out—First, that before the liquidation the directors had contracted to pay her this dividend of 3s. 4d; and secondly, that in implement of this contract the money had been specially laid aside and appropriated to her for payment of that debt under the contract, the term of payment only being postponed. Both these elements are necessary. For if there was nothing more than a contract that she and the other creditors should get payment of the dividend, and the others were vigilant and got their money before the liquidation began, she would just be in the position of a creditor claiming a payment for which she had no security. The contract alone will not do. The money must be deposited under the contract, payable to her at a time fixed. I think the petitioner fails on both points. I do not think that there was any contract to give her this dividend. The circular intimates that two separate amounts had been collected—one of these to be paid over to the heritable creditors, and the other to be paid on the unsecured debt. That makes a distinct division of the creditors into two classes—those who held special securities, and those who were general creditors only; and as this lady had a mortgage for her debt, it is impossible to hold that she is in the first class. I think that her case further fails in this, that even if she were, within the meaning of the circular, an unsecured creditor, she has not succeeded in getting the money deposited in such a way as to secure her right to the money when the mortgage fell due. The deposit was intended to await the decision of the question as to her right to the dividend. Assuming her right under the circular to a payment to account of her debt, she was simply in the position of a party who had contracted to get such a payment, but who had not before the liquidation began actually got it, and who could not therefore enforce the contract.

The Lords refused the petition.

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Counsel for Respondents—D.-F. Kinnear, Q.C.—Graham Murray. Agents—J. & F. Anderson, W.S.