

Saturday, November 26.

FIRST DIVISION.

[Sheriff of Renfrewshire.

CLAVERING v. M'CUNN.

(Before the Lord President, Lord Mure, and Lord Adam.)

Proof—Parole—Writ—Receipt—Bankruptcy—Voucher.

In the sequestration of a firm and its partners a creditor lodged as a voucher in support of his claim two receipts for the amount of his claim granted to him in name of the firm. He also, as required by the Bankruptcy Act (19 and 20 Vict. cap. 79, sec. 22), lodged a heritable security granted in his favour by an individual partner over subjects belonging to that partner. The security was for the same amount as the claim, but it was a second security, and was practically worthless except as giving a personal obligation against the individual partner. The trustee having ranked the creditor to the full amount of his claim, another creditor objected, on the ground that the receipts, though in name of the firm, did not truly represent a loan to the firm, but to the individual partner, and that the vouchers being *ex facie* for a larger sum than the claim, parole evidence was competent to instruct the whole circumstances of the case. *Held* that parole was incompetent; but that the claimant having founded on part of a correspondence to show that the receipts were truly for firm debts, the objecting creditor was entitled to recover the remainder of the correspondence.

The firm of J. Clark & Company, thread manufacturers, Paisley, consisted of John Clark, John Morgan, John Morgan junior, and E. A. Morgan. John Morgan was also the sole partner of John Morgan & Company, shawl manufacturers, Paisley. The estates of these two firms and the individual partners thereof were sequestered, and D. G. Hoey, C.A., Glasgow, was appointed trustee. The present dispute related to the following deliverance by the trustee:—

“2. *Thos. Clavering, St Vincent Place, Glasgow.*

“Cash advanced, per receipts produced	£10,000 0 0
“Interest thereon, as per statement	873 0 0
	—————£10,873 0 0

“The claimant has now produced in addition to the vouchers formerly lodged, a bond and disposition in security for £1800 sterling over property in Gordon's Loan, Paisley, belonging to the bankrupts J. Clark & Co., and having valued the same at £1800, the trustee admits the claim on the company's estate, under deduction of the above £1800, and of interest, as follows:—

“Sum claimed	£10,000 0 0
“Less valuation of security	1,800 0 0
	—————£8,200 0 0

“In respect the interest has been paid or accounted for to the claimant up to the date of sequestration, the trustee rejects the claim of £873 for interest.

“The claimant has also lodged a bond and disposition in security in his favour by the bankrupt John Morgan, for the sum of over the lands of Easter and Wester Greenlaw, but said bond being a second bond, and the property having been sold for a sum less than sufficient to pay the amount of the first bond, this security is worthless, except as giving the personal obligation of the bankrupt John Morgan for the principal sum and interest due thereon. The trustee accordingly admits this claim to rank on John Morgan's estate for the said principal sum of £10,000.

“But in respect that interest has been paid and accounted for to the claimant up to the date of sequestration, the trustee rejects the claim of £873 for interest, and in ranking the claimant on the estates of J. Clark, John Morgan junior, and Edward Aikman Morgan the trustee values the claim against the company at 8s. per £, and admits claimant to a ranking on each of the three estates above mentioned for £4920.

“Claimant's affidavit on John Morgan's estate was lodged too late for adjudication at this period.”

The receipts produced were for £8000 and £2000, and were dated respectively 10th May 1878 and 10th July 1878. They were in the following terms:—

“Received from Thomas Clavering, Esq., the sum of Eight [*or* Two] thousand pounds stg. Paisley, 10th May 1878.

“£8000 stg. J. CLARK & Co.”

M'Cunn, another creditor, objected to the foregoing deliverance, and appealed to the Sheriff on the following grounds:—“First, The two receipts produced, the one dated 10th May 1878 for £8000, and the other dated 10th July 1878 for £2000, are not legal evidence of loans to or debts due by the company. It is not alleged in the claim itself, or state of debt annexed thereto, that these sums were advanced in loan to the company, and no further evidence in support of the claim as against the company estate was called for by the trustee. Second, If any cash passed upon the delivery of these receipts, or either of them, which is not admitted, it is believed and averred that it was advanced in loan to the bankrupt John Morgan as an individual, and formed the sum contained in and acknowledged by him to be due under bond and disposition in security for £10,000 over his lands of Wester and Easter Greenlaw, Paisley, in favour of the said Thomas Clavering, dated 8th, and recorded in the Division of the General Register of Sasines applicable to the county of Renfrew on 11th May 1878, which bond and disposition in security was delivered, and the transaction fixed for settlement at Glasgow on or about 10th May 1878. . . . Third, The said receipts were *per incuriam* granted by the bankrupt John Morgan junior in name of the said firm of J. Clark & Company, or were obtained from him by the said Thomas Clavering for what was not a company debt. Fourth, In any case, the said sums of £8000 and £2000 were not advanced in loan by the said Thomas Clavering to the said company, and the said John Morgan junior was not authorised or entitled to grant or

deliver said receipts as evidence of loans to or debts due by the company."

The appellant further explained that "he has ascertained, and avers, that the said two bonds and dispositions in security for £10,000 and £1800 respectively were delivered to the said Thomas Clavering at Glasgow on the 10th May 1878, by or on behalf of Messrs Hodge, Young, & Martin, writers, Paisley, law-agents of the said John Morgan as an individual, and Messrs Campbell & Russell, writers there, law-agents for the company; that the receipt of that date was granted at one and the same time with the delivery of these deeds by the said John Morgan junior in the absence and as the representative or agent of his father, the said John Morgan, who was upwards of seventy years of age, as for £8000 of the money secured by and mentioned in the said bond and disposition in security for £10,000 over the latter's lands of Wester and Easter Greenlaw, Paisley; that no other or further sum was given or paid by the said Thomas Clavering in exchange for, or upon the delivery of, said last-mentioned two bonds and dispositions in security; and that in the bankrupts' books the said sum of £8000, and also the sum of £2000 alleged to have been lent to the company upon 10th July 1878, are dealt with by the company as having been advanced to the said John Morgan as an individual, and are placed to his credit as input capital with the company."

Clavering in reply narrated the circumstances in which the alleged loans had been made, and produced and founded on a correspondence between Clark & Company and himself as showing that the advances had truly been made to the firm of Clark & Company, and not to Morgan as an individual.

M'Cunn pleaded, *inter alia*—" (9) In the circumstances condescended on, parole proof is competent to instruct the circumstances under which, and the purpose for which, the receipts for £8000 and £2000 were granted."

Clavering pleaded, *inter alia*—" (2) Respondent's acknowledgment of debts for the loans claimed, and correspondence betwixt him and bankrupts establishing by written evidence that the sums claimed were paid over on the footing of repayment, and neither of them in any way in liquidation of a prior obligation, it is incompetent to redargue such documents of debt and evidence by parole proof—hence the appeal ought to be dismissed with expenses."

The Sheriff-Substitute (COWAN) pronounced this interlocutor:—"Before answer, allows the parties a proof of their respective averments, the appellant to lead in the proof, and allows the appellant a conjunct probation."

Clavering appealed, and argued—The receipts were evidence of loan—*Haldane v. Speirs*—and they were the only vouchers. The creditor was required by the Act to produce all the securities of the debtor which he might have, but the £10,000 bond by Morgan was not a voucher, and was in fact valueless. The vouchers and the claim therefore corresponded exactly, and parole proof consequently was incompetent.

Replied for M'Cunn—The objection was that it was sought to control writ by parole. But was the claim here vouched by writ—that is, by

unambiguous writ? It was not. The receipts and the bond were for more than the amount of the claim, and therefore the writ required explanation. At all events, the creditor having himself founded on the correspondence, could not object to other extrinsic evidence being admitted. In fact, the correspondence as he had produced it was incomplete in material respects, and ought to be completed.

Authorities—*Haldane v. Speirs*, March 7, 1872, 10 Macph. 537; *Fraser v. Bruce*, November 25, 1837, 20 D. 115; *Thomson v. Geikie*, March 6, 1861, 23 D. 693; *Grant's Trustees v. Morison*, January 26, 1875, 2 R. 377.

At advising—

LORD PRESIDENT—I do not think the respondent is entitled to any further inquiry. At the same time, I am disposed, in consequence of this correspondence having been produced and founded on by the appellant, to give the respondent an opportunity of recovering any further documents passing between him and the company or its partners relating to this advance of £10,000.

LORD MURE—I am of the same opinion. The circumstance that these letters have been produced and founded on by the appellant makes it but fair to allow the respondent to recover any other documents bearing on the particular point in question.

LORD ADAM—I concur.

LORD DEAS and LORD SHAND were absent.

The SOLICITOR-GENERAL asked whether the company's books would be included in the diligence?

LORD PRESIDENT—No. The respondent has nothing to do with them.

The Court granted diligence to both parties for recovery of all letters passing between the appellant and Clavering, and the firm of J. Clark & Company or any of its partners, regarding the debt of £10,000 forming the first branch of the appellant's claim.

Counsel for Appellant—Lord Advocate (Bal-four, Q.C.)—Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Respondent—Solicitor-General (Asher)—Pearson. Agents—Mill & Bonar, W.S.

Tuesday, November 29.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

YULE v. YULE.

Process—Curator Bonis—Cognition—Proof before Lord Ordinary of Necessity for Appointment of Curator Bonis where Insanity denied.

In a wife's petition for the appointment of a curator bonis to her husband, who was alleged to be insane and was in a lunatic asylum, and the husband lodged answers denying that he