

we should be obliged to come to a consideration of the subject after the case had been submitted to him and he had consented to the recommendation embodied in the Sheriff's deliverance. There would at this stage be a review, accordingly, not merely of the deliverance of the Sheriff but of the consent which had followed upon it. This was not a thing in contemplation, and, to say the least, would be inconsistent and anomalous, but it may, and I think it ought, to be avoided. Any deliverance of the Sheriff not excluded from review may, as we have seen, be appealed against, and the sooner an appeal against such a deliverance as that which on this occasion was pronounced is submitted to review the better for all concerned. These things being so, the question is whether the deliverance should be affirmed or recalled. The trustee and the Sheriff appear to think that a sum out of any pension, large or small, may be applied in payment of the debts of the pensioner. But this appears to me to be an erroneous view of the statutory provision. Cause must be shown, and here no cause has been shown by the trustee. No proof has been offered that £46 is more than is required for the support of the appellant and his family, and without something to support that conclusion the deliverance appealed against cannot be sustained. How it should be assumed that £46 is more than is required for the appellant's maintenance I cannot understand. The contrary appears to be the reasonable conclusion. And therefore it is my opinion that the deliverance should be recalled, there being no ground in the circumstances of the case for the application which the trustee has presented and the deliverance appealed against which the Sheriff-Substitute has pronounced.

LORD RUTHERFURD CLARK—I am of the same opinion, and have no doubt about the competency or about the merits. The appeal falls to be determined under the 170th section of the Bankruptcy Act, and, on the other point, I see no propriety in ordering the bankrupt to pay his pension into a sequestration of which it would be the sole asset.

LORD YOUNG—I entirely concur. I have no doubt as to the competency of this appeal, and I agree with Lord Craighill it is altogether expedient that the appeal should be taken at this stage.

On the merits I confess I have very little sympathy with a sequestration taken out as this is, not for the purpose of distributing and ingathering the assets of the bankrupt, but for an indirect and sinister purpose. The trustee stated that the funds of the estate, with the exception of a small quantity of household furniture hypothecated to his landlord for rent, and the said pension, consist of a number of claims of damages which, in so far as the actions had been raised, had been decided against him. The trustee was satisfied that these claims were utterly groundless and worthless, and there were no available funds out of which the expenses of the sequestration could be met.

This is not, then, a process to distribute an estate. It is of the nature of a scandal, and it is unfortunate the law permits it. We have a report by the liquidator of the Money Order Bank with regard to the sequestration, in which he says—"To provide against any further delay in the final decree of

cessio being obtained against Mr Scott, the liquidator and agents thought it right in the meantime to proceed against him under a decree for £310, being the taxed amount of expenses in an action for £5500 against the bank, so as to have his estates sequestrated and prevent his carrying an appeal to the House of Lords without having first obtained his trustee's concurrence, or his instituting any further actions without finding caution for expenses." I hope the law will provide some means of overcoming these somewhat scandalous proceedings. But we are not further concerned with that here than as to the account which the record gives of both sides of a sequestration which is the foundation of the present application, in which it is proposed to take £10 of the bankrupt's little pension of £46 as the asset to be distributed by the trustee.

I entirely agree that the Sheriff's judgment ought to be altered, and this petition dismissed with expenses, and I have to propose that, as the poor man has appeared himself without agent or counsel, the Court should modify the expenses to be paid to him for his attendance in the Sheriff Court and here, and for preparing the proceedings, to £7, and for that grant decree against the respondent.

The LORD JUSTICE-CLERK was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and dismissed the application.

Counsel for Trustee—Nevay. Agents—Richardson & Johnston, W.S.

Saturday, January 17.

OUTER HOUSE.

[Lord M'Laren.]

DON'S TRUSTEES *v.* CAMERON (MACKINTOSH'S TRUSTEE).

Bankruptcy—Right in Security—Heritable Bond—Trustee—Tantum et tale.

A lender agreed with a borrower to lend him a sum on bond over heritable property for five years at 4 per cent., the interest to be 5 per cent. if regular payment should not be made. The borrower granted a bond payable at the next term, with interest at 5 per cent., and the loan was made. The borrower having shortly thereafter been sequestrated, his trustee consigned the amount of loan with 4 per cent. interest, and sold the estate as unencumbered. The lender sued him for damages for the loss of the investment and for 5 per cent. interest. The Lord Ordinary *assolized* the trustee (*reserving* a claim in the sequestration for loss of interest), *holding* that the obligation not to disturb the investment was a personal obligation of the bankrupt resolving into a claim in the sequestration for a dividend for loss of interest.

In July 1883 an agreement was entered into between the marriage-contract trustees of Robert Bogle Don, merchant, Dundee, and his wife, and Mr Francis Henry Pottinger Mackintosh of Farr,

Inverness-shire, whereby the trustees agreed to lend Mr Mackintosh a sum of £5000 on the security of the then entailed estate of Farr, which was about to be disentailed. The loan was to be for five years at 4 per cent. per annum, the interest to be 5 per cent. if regular payment should not be made. Mr Mackintosh thereafter granted a bond and disposition in security over the disentailed estate of Farr for £5000, dated 27th August 1883. The bond contained an obligation by the granter to pay the principal sum at the term of Martinmas 1883, and interest at the rate of 5 per cent. per annum. On 9th October thereafter the said sum was advanced, and the bond and disposition delivered in exchange.

On 21st January 1884 the estates of Mr Mackintosh were sequestrated on his own application, and the principal asset in the sequestration was the estate of Farr. Robert Falconer Cameron, chartered accountant, Inverness, was appointed trustee on the sequestrated estate. He entered upon the possession and management of the said estate, and uplifted the rents. In March he advertised the estate of Farr for sale by public roup, and called upon the agents for Don's trustees for the title-deeds in their possession. They replied that in the articles of roup arrangements must be made for continuing the loan of £5000 at 4 per cent. This, however, the trustee and the commissioners refused to do, and the estate was sold by public roup to William Dalziel Mackenzie as an unencumbered estate. Intimation was, by letter of 9th May from Mr Cameron's agent, made to Don's trustees that the loan was to be repaid at the term of Martinmas 1884, "under reservation of all questions," but they declined to accept the said intimation, insisting on the agreement of loan being carried out. The sum of £5000, with 4 per cent. interest to Martinmas 1884, was consigned with the Caledonian Banking Company (Limited) in Inverness, Don's trustees refusing to accept these sums as a fulfilment of the trustee's obligations. They also lodged a claim for damages for breach of agreement in the sequestration.

Don's trustees raised this action against Cameron, as Mackintosh's trustee, and also as an individual, to have it found that the defender was bound to perform the agreement for the loan, and had failed to do so, and in respect of his failure should be ordained to pay £200 as damages, and to pay the principal sum, and £273, 5s. 9d. as the interest on £5000 at 5 per cent. from 9th October 1883, when the bond was delivered, till 11th November 1884, under deduction of £18, 1s. 8d. paid to account on 11th November 1883.

The pursuers pleaded—" (1) The loan agreement before mentioned concluded between the pursuers and the said Francis Henry Pottinger Mackintosh continued binding and effectual in every respect, notwithstanding of the sequestration of the estates of the said Francis Henry Pottinger Mackintosh. (2) The defender, by his actings and intromissions with the estate, and the rents and price thereof, has incurred personal liability in the premises. (4) The loan agreement having been broken as aforesaid by the defender, the pursuers are entitled to decree against him for damages thereby occasioned to them, as concluded for. (6) The lands contained in the pursuers' bond cannot be disencumbered of it without legal premonition or the pursuers' consent."

The defender pleaded—" (3) The defender never having disputed his liability to repay the loan, with interest, and having consigned the amount of the same, the action is unnecessary, and should be dismissed. (7) The sale having been conducted with the authority of the commissioners and in conformity with the provisions of the Bankruptcy Statute, the defender has incurred no personal responsibility in connection therewith."

The Lord Ordinary (M'LAREN) pronounced this interlocutor:—" Finds that the defender, as trustee on the sequestrated estate of Mr Francis Mackintosh, was not bound to give specific implement of the obligation of the insolvent to allow the loan of £5000 to remain invested for five years on the security of the estate of Farr, and that the defender is not personally liable in damages in respect of the measures which he has taken for the repayment of said loan, reserving to the pursuer his claim to be ranked in the sequestration for loss of interest if so advised: Therefore assoilzies the defender, &c.

" *Note.*—The pursuers are creditors in an heritable bond for £5000 over the estate of Mr Mackintosh of Farr, and the defender is trustee on Mr Mackintosh's sequestrated estate. In August 1883 the pursuers lent the £5000, and received the relative bond and disposition in security, which, as is customary in such cases, contained an obligation for repayment of the principal sum at the ensuing term of Martinmas, and an agreement to pay interest at 5 per cent. per annum until the principal should be paid. But in the proposals for the loan it was agreed that the loan should be for five years, and should bear interest only at 4 per cent.

" Mr Mackintosh having become insolvent in the month of January following (1884), the trustee for his creditors immediately exposed the estate to sale, giving notice to the pursuers at the time of the sale of his intention to pay off the bond. The estate was sold as an unencumbered estate, and the amount of the loan (£5000), with interest to Martinmas 1884, was consigned in bank in consequence of the pursuers declining to accept payment or to grant a discharge. The pursuers now claim damages, being the loss of interest consequent on the premature termination of the contract for the investment of their money for the period of five years.

" If the bond had contained an undertaking to the effect that provided the interest should be punctually paid the investment was not to be disturbed during a period of five years reckoned from the date of the loan, then without question the creditors of Mr Mackintosh would have been bound by the agreement, and the loan could not have been paid up in the autumn of 1884, or could only have been paid on condition of making compensation for the loss of interest to be incurred during the four years which the bond had to run.

" But as the agreement that the loan should be for five years is only contained in the preliminary contract, and as it does not enter the public records in any way, the trustee on Mr Mackintosh's estate claims to be entitled to sell without being bound by the agreement.

" It is then for consideration what is the nature of the obligation undertaken by the preliminary contract, and whether it is obligatory on the creditors of either of the contracting parties ?

"I do not think that it can be held that the obligation to leave the money invested for five years was extinguished by the granting of the bond, any more than that the agreement to restrict the interest to 4 per cent. was so extinguished. The reason is, that these conditions in their inception were not intended to be introduced into the heritable bond, but were to remain personal. The granting of the bond accordingly neither vacated nor confirmed these conditions, but left them standing on the basis of the written offer and acceptance.

"That being so, the agreement as to the five years is apparently an unsecured personal obligation qualifying the effect of a recorded heritable bond.

"If in a case like the present the heritable creditor should become bankrupt, his creditors apparently would not have the power of calling up the bond before the expiration of the prescribed period. The reason is, that creditors take the bankrupt's estate by the title of gratuitous alienees, and in the case supposed their title—*videlicet*, the heritable bond—would be affected by the personal condition that its powers of sale and realisation should not be enforced within the prescribed period.

"But here it is the debtor in the bond who has become bankrupt, and the position of the trustee on his estate is altogether different. His title is Mr Mackintosh's sasine in the estate of Farr. The heritable bond is no part of his title; it is an encumbrance upon his title. It would be a strange and alarming extension of the doctrine of *tantum et tale* if creditors were to be bound not only by latent qualifications of the bankrupt's title, but by obligations affecting every person deriving right through the bankrupt. So far as the defender (the trustee) is concerned, the obligation not to disturb the loan appears to me to be nothing more than a personal contract, resolving into a claim for a dividend in consequence of its non-fulfilment. I do not understand that the pursuers' claim to a dividend is contested, but it must be worked out through the sequestration.

"These questions of the real or personal quality of obligations are a little perplexing, and I was somewhat impressed with the argument founded on the authorities as to the limited nature of a trustee's title. But on consideration I think it will be found that wherever the doctrine of taking *tantum et tale* truly applies, the qualification of the bankrupt's title always and necessarily is a right in some other person coming into existence at a time either antecedent to the bankrupt's acquisition of the estate or simultaneously with that acquisition. As regards rights subsequently acquired by the bankrupt, and which have not been made real, these are held unfulfilled obligations entitling the creditor to a ranking. An obligation by a landlord to give security over his estate is, for example, of no value in bankruptcy except as supporting a claim to a ranking, because although it has relation to the estate it is in no sense a qualification of the debtor's title. The claim now preferred appears to me to be of a cognate description.

"It was argued for the pursuer that the notice of payment given by the trustees was open to challenge on various grounds. It appears to me that a different form of action would be necessary to raise such questions. It is also objected that

the sum consigned is insufficient, because the trustee ought to have allowed interest, not at 4 per cent., but 5 per cent. in terms of the bond. Probably the trustee is officially liable in interest at the rate of five per cent. until payment, because he cannot ignore the personal contract as to the loan being for five years, and at the same time found upon it in order to restrict the rate of interest to 4 per cent. But this point also would only arise upon a challenge of the consignment. If consignment has not been made in terms of the statute, I presume the debt is not paid off, and in that case the bond gives the pursuers the means of recovery of any balance of termly payments which may be due to them. In this action I must assolvize the defender with expenses."

Counsel for Pursuers—Guthrie Smith—Jameson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Defender—J. P. B. Robertson—W. C. Smith. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Tuesday, January 20.

FIRST DIVISION.

[Sheriff of Forfarshire.

CORRIE, MACKIE, & COMPANY v. STEWART.

Lease—Landlord and Tenant—Rent—Undue Use of Premises Let.

The floor of premises let to a jute merchant gave way under the load placed on it, and he abandoned the premises and refused to pay rent for them. *Held*, on a proof, that the floor gave way because he had loaded it unreasonably, and that he was liable for the rent.

This was an action for rent, raised in the Debts Recovery Court at Dundee, by David Stewart, solicitor, Dundee, proprietor of a warehouse at Arcade Buildings there, against Corrie, Mackie, & Company, jute and flax merchants. The warehouse was let to the defenders by the pursuer for nine months from 28th February to Martinmas 1884, at a rent of £60, payable half at Whitsunday and half at Martinmas 1884. The rent claimed in this action was £30, being that alleged to be due at Martinmas. The defenders refused to pay, and maintained that the rent was not due in respect that the subjects were let as a flax and jute warehouse, that the flooring gave way when only loaded to the extent of half its cubical capacity, and was even to a greater extent structurally defective and unfit for the purpose for which the warehouse was let.

It appeared that about the beginning of April some of the beams and joists of the floor of the upper flat of the warehouse gave way, and this part of the store became useless for the purpose of storing jute. The defenders shortly after removed the whole of their jute from the warehouse and abandoned their lease.

After a proof the Sheriff-Substitute, on 27th November 1884, found, *inter alia*—“(4) That at the time when the floor gave way . . . the defenders had in the upper flat of the warehouse about 1797 bales of jute, representing a