

Counsel for the First Party—Hunter.  
Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Third Party—Campbell,  
K.C.—Cullen. Agents—Wallace & Guthrie,  
W.S.

*Tuesday, June 9.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.]

### MACDOUGALL'S TRUSTEE v. LOCKHART.

*Bankruptcy—Sequestration—Valuation and Deduction of Security—Withdrawal of Claim by Creditor after Assignment of Security Demanded by Trustee—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 65.*

A bankrupt's estate was sequestrated on 23rd June 1900. The creditor in a heritable bond for £1000, granted by the bankrupt, lodged a claim under section 65 of the Bankruptcy (Scotland) Act 1856, valuing the security at £850, and claiming to be ranked for the balance of £150. On 31st December 1901 that claim was admitted to a ranking. On 22nd January 1902 the trustee on the sequestrated estate intimated to the creditor that he desired an assignation of the security in terms of section 65. On 25th January, before any dividend had been paid, the creditor withdrew his claim. The trustee maintained that it was too late for the claim to be withdrawn, and raised an action for declarator that he was entitled to an assignation. *Held* that the creditor, by valuing the security for the purpose of ranking, virtually offered the security to the sequestrated estate at the value put upon it; that the trustee's intimation that he desired to take over the security at that value was an acceptance of the offer; and that the creditor could not after such acceptance withdraw his claim for a ranking to the effect of disentitling the trustee to an assignation.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) enacts, section 65:—"To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall, on oath, put a specified value on such security and deduct such value from his debt and specify the balance; and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security, at the expense of the estate, on payment of the value so specified out of the first of the common fund, or to reserve to such creditor the full benefit of such security; and in either case the creditor shall be ranked for and receive a dividend on the said balance and no more, without prejudice to the amount of his debt in other respects."

James Landells Selkirk, C.A., Glasgow, trustee on the sequestrated estate of Robert Macdougall, Sghor Bheann, Dunoon, raised

an action against Mrs Agnes Gardner Dalziel or Lockhart, 26 Dryburgh Avenue, Rutherglen, concluding, *inter alia*, for declarator that the pursuer was entitled to an assignation from the defender of a bond and disposition in security for £1000 granted by the bankrupt Macdougall in in her favour over subjects in Glasgow.

The bankrupt's estates were sequestrated on 23rd June 1900, and the pursuer was thereafter appointed trustee thereon.

On 29th January 1901 the defender lodged an affidavit and claim on the sequestrated estate, under section 65 of the Bankruptcy (Scotland) Act 1856, in which she valued the security held by her under the bond referred to at £850, and claimed a ranking for a dividend on the balance of £150.

On 31st December 1901 the pursuer adjudicated on the claims lodged in the sequestration, and the defender was admitted to a ranking in terms of her claim under deduction of the value put by her on her heritable security. The pursuer's adjudication on this claim was not appealed against, and became final.

On 22nd January 1902, before any dividend had been paid by the pursuer, he intimated to the defender that he and his commissioners had resolved to take over her bond above referred to in terms of section 65 of the Bankruptcy Act 1856.

On 25th January 1902 the defender, through her agent, withdrew the claim lodged by her in the sequestration in so far as it related to the bond over the subjects in main street. The pursuer thereupon informed the defender's agent that it was too late for the defender to withdraw her claim, he having adjudicated thereon.

In the present action the pursuer averred—" (Cond. 7) The pursuer is ready and offers to pay the said sum of £850, with any interest and charges the defenders may establish to be due to them under said bond and disposition in security, in exchange for the conveyance or assignation thereof, which is to be at the expense of the sequestrated estate, all in terms of said section 65. The defenders were not entitled to withdraw their claim at the time they attempted to do so, to the effect of preventing the pursuer from demanding an assignation or conveyance of said security subjects in terms of the resolution."

The pursuer pleaded—" (1) The defender having in her affidavit and claim put a value of £850 upon her security, the pursuer became entitled to a conveyance or assignation thereof, and having validly claimed the same, is entitled to declarator of his right thereto, with expenses. (2) The pursuer having become entitled under section 65 of the Bankruptcy Act 1856 to a conveyance or assignation of said security, the defender should be ordained to grant the same, and failing her doing so the security falls to be adjudged to the pursuer."

The defender pleaded—" (2) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (3) The defender having validly withdrawn her claim to rank in the sequestration in so

far as regards the bond of £1000 referred to in the said claim, the pursuer is not entitled to enforce an assignation of the said bond, and the defender should be assoilzied, with expenses."

On 25th February 1903 the Lord Ordinary (KINCAIRNEY) found and declared in terms of the declaratory conclusion of the summons.

*Opinion.*—"A question of some interest and novelty in bankruptcy law, but not of much importance to the parties, is raised in this case. The question is whether when an heritable creditor has lodged a claim for ranking under section 65 of the Bankruptcy Act, and when he has, in accordance with that section, valued his security, and when the trustee has admitted the claim to rank, and the creditor has not appealed, the creditor can afterwards withdraw that claim, with the effect of disentitling the trustee to an assignation of the heritable bond, and of disabling him from realising the security.

"The question has arisen in the sequestration of Robert Macdougall, property agent, Glasgow. His estates were sequestrated on 23rd June 1900. On 29th January 1901 affidavits and claims were lodged with the trustee by Mrs Lockhart. Her claim, as set forth in the account annexed to it, is stated thus—

To amount of bond granted by the bankrupt, dated 4th and recorded	October 1895	-	-	-	£1000	0	0
Deduct estimated value of security	-	-	-	-	850	0	0
					£150	0	0
Amount in extract decree	-				25	19	7
					£175	19	7

It is stated in the affidavit that the security was valued for the purposes 'of voting and ranking' at £350. But there is no question about voting in the case. The sole question is about ranking. The case does not relate at all to section 62, which provides for the valuation of heritable securities for the purpose of voting, but only to section 65, which provides for ranking.

"The trustee dealt with the claims lodged with him on 31st December 1901, and on that day he admitted the defender's claim. It is averred and not denied that this decision on the claim was duly intimated, and in the absence of any averment to the contrary I take for granted that the requirements of the statute as to notice were duly satisfied.

"This deliverance might have been appealed from to the Lord Ordinary or the Sheriff (section 127), but no appeal was taken. Section 127 provides that if it be not appealed from within the time allowed it 'shall be final and conclusive so far as regards that dividend.'

"On 25th January 1902 the law-agent of Mrs Lockhart wrote on her behalf to the trustee—"I hereby withdraw the claim lodged by her in the sequestration so far as it relates to her bond." The trustee replied that it was too late to withdraw the claim. That is the question which this action has been brought to try.

"Section 65 provides as follows—[His Lordship quoted the section].

"No dividend has been paid to the defender, and I do not find it averred that the trustee made any express demand for a conveyance or assignation of the security before he received the letter by the defender's agent purporting to withdraw her claim.

"I understand the defender to maintain that, not having received any dividend, she is still entitled to withdraw her claim and realise her bond for her own benefit. The question seems to me to be a difficult one, and no authorities having any material bearing on it were quoted at the debate. I have not found any, with one important exception, viz., the case of *Henderson's Trustees v. Auld & Guild*, July 6, 1872, 10 Macph. 946, which requires serious consideration.

"In that case the facts were that Henderson's estates were sequestrated in September 1870, and Auld & Guild claimed to be ranked as creditors for £3022, 16s. 4d., after deducting £147, the market value of shares which they held in security. On 21st January 1871 the trustee admitted the claim, but called on Auld & Guild to assign the shares, as required by the statute. Auld & Guild, however, had sold the shares for £174 on 14th November 1870. That must have been after the claim was made, although the report does not distinctly say so. The trustee (the report says) did not follow up his requisition until 25th August 1871, when the shares had risen to the value of £337. Apparently he then followed it up by an action in which he demanded an assignation of the shares. Practically he claimed in that action the whole enhanced price of the shares. The decision, affirming the judgment of the Sheriff, was in favour of the creditors, and negatived that claim. But the Sheriff in his judgment finds that the creditors had offered to deduct the full value received by them when they sold the shares, i.e. £174. It is not distinctly found whether they were bound to do that, but it was said that that was all they were bound to do. Something was said about the fluctuating value of the security in this case, but I am not able to see that on principle it does not apply to a case in which the security valued is an heritable bond. From this case, and in particular from the opinion of the Lord President, it appears that the mere claim, with a valuation and deduction of securities, in terms of section 65, had not the effect of transferring the property of the security from the creditor to the trustee. Indeed, it is clear that nothing could do that except a deed of transference by the creditor. Further, it appears that there is nothing in the 65th section, although the claim has been followed by a ranking, which can operate to prevent the creditor from realising the security if he have an interest to do so, and if the trustee unduly delays. But there is nothing in this case which can lead to the conclusion that the creditor could, in the ordinary case (when there is no question of undue delay or of enhancement of price arising from such delay),

withhold from the trustee the price realised by the sale as a *surrogatum* for the security.

"The case seems not to be without application to this case, but it differs from it materially. It does not decide that the creditor can go back on his claim and plead as if no such claim has been made.

"I do not know of any authority for saying that he can. I do not say that a creditor might not withdraw his claim or modify it before the trustee's judgment on ranking had been pronounced; but after ranking it appears to me that, unless he appeals, he loses his remedy so far as concerns the first dividend. This seems to result from section 121.

"It was further maintained by the defender that section 65 could not be applied, because it provides that the trustee should pay the value of the security 'out of the first of the common fund.' It was suggested or maintained that there was here no common fund, and it was said that there could not be, because there was no true estate. I should wish to say that this argument derives weighty support from the judgment of the Sheriff, which was approved of and adhered to in *Henderson's Trustees*.

"But I am not prepared to take that view in this case. It seems enough that the pursuer avers that he is ready to pay the value which the creditor put on her security, and I do not think I am concerned with the source from which he derives the means of doing so. Of course he will not be entitled to the assignation concluded for unless he tenders, in return for it, the sum of £850 with interest and the expenses offered.

"I think the proper course will be to decern in terms of the declaratory conclusion, and appoint the pursuer to lodge a minute stating the payments which he is ready to make."

The defender reclaimed, and argued—The pursuer's delay in adjudicating on the claim lodged was due to the fact that there was no trust estate, and while there was no trust estate the pursuer could not comply with the provision of sec. 65 of the Act. Claims lodged could be withdrawn at any time, or at least so long as no dividend had been accepted. The pursuer's demand for an assignation was not made *debito tempore*—*Henderson's Trustee v. Auld & Guild*, July 6, 1872, 10 Macph. 946, 9 S.L.R. 598. The value put upon the security when the defender's claim was lodged had ceased to be the true value by the time the pursuer demanded an assignation, and the offer contained in the statement of the defender's claim had fallen before it was accepted by the pursuer's demand.

Argued for the respondent—The distinction which the Act drew between the valuation of a security for purposes of voting and the valuation for purposes of ranking made it clear that the latter was intended to be final—Act 1856, secs. 59, 62, and 65. There would be no meaning in the statute if a creditor was free to meet a

demand by the trustee for an assignation of his security under sec. 65 by saying that he was no longer of the opinion which he held when he declared the value; such freedom would be to the prejudice of the general body of creditors, because if exercised it would upset all the calculations on which the trustee had proceeded so far.

LORD JUSTICE-CLERK—I am of opinion that the judgment of the Lord Ordinary is right. The discussion has brought out that the contention of the creditor, the defender in this action, would be unfair to the general body of creditors. Sec. 62 of the Act deals with the case of a security valued for the purpose of entitling a creditor to vote at a meeting. In such a case it is the interest of the creditor to place a low value on his security so as to increase his voting power on the debts due to him and unsecured, and provision is made for the trustee acquiring the security on payment of 20 per cent. more than the value put upon it. But the present case falls not under sec. 62 but under sec. 65, which deals with the ranking of claims for payment of dividends. The Lord Ordinary has correctly interpreted this section as meaning in effect that the creditor offers his security to the trustee at the value he has put upon it. If the trustee accepts, it is then too late for the creditor to withdraw. If he could, it would give him too great an advantage, for the trustee having made his calculations on a consideration of the claims and of the available assets—including the security so valued—it would be to the prejudice of the general body of creditors if by withdrawing his offer a single creditor could upset all the calculations on which the trustee's acceptance of his offer was based. It was admitted that the trustee, having intimated his acceptance, could not go back on it, and it would be strange if it were then still open to the creditor on his part to resile from his share of the bargain.

LORD YOUNG—I am of the same opinion. I do not think the case is attended with much difficulty, although it afforded opportunity for some interesting arguments and illustrations on both sides. I cannot regard the question raised as of much general importance, and the Lord Ordinary informs us that it is not of much importance to the parties. I do not think that cases of this sort are likely to occur often, because the creditor of a bankrupt debtor is not likely to put a value on a security which he holds, and swear that it is just and reasonable, without careful consideration of the matter. Cases are imaginable where considerable injury may be done to a creditor who has put a value on his security which turns out to be far below its value as at the time when an assignation of it is demanded by the debtor's trustee, but such cases are very unlikely to happen in real practice.

On the whole matter I think the conclusion at which the Lord Ordinary has arrived is the right conclusion, and that his judgment ought to be affirmed.

LORD TRAYNER—I agree in the judgment of the Lord Ordinary although I am not sure that I concur in all the reasons he gives for it in his opinion. I understand the Lord Ordinary to say that the trustee having adjudicated upon the reclaimer's claim, and no appeal having been taken against the trustee's deliverance, that it was then too late for the reclaimer to withdraw her claim. If this is the view of the Lord Ordinary I cannot concur in it. As at present advised I think that any creditor claiming in a sequestration may in ordinary circumstances withdraw his claim at any time before receiving a dividend upon it. But I think the reclaimer was barred from withdrawing her claim in this case when she proposed to do so, not because of the trustee's deliverance admitting her claim, but because of what was done by the trustee thereafter. It appears to me that the 65th section of the Bankruptcy Act of 1856 in effect amounts to this—that when a creditor in a sequestration values a security held by him for the purpose of ranking, he virtually offers that security to the sequestrated estate at the value put upon it. Like every other offer it needs acceptance to make it a bargain. The 65th section does not limit the time within which the acceptance must be given, but until it is given I think the creditor may withdraw the offer by withdrawing his claim. After acceptance the bargain is completed, and neither the creditor on the one hand nor the trustee on the other can resale. Now, in this case, the creditor claimed for a ranking, and valued her security at £850. That claim was duly adjudicated on by the trustee, who admitted the claim on 31st December 1901. Admitting the creditor to her ranking, however, did no more than intimate that the trustee did not question the propriety of the creditor's valuation of her security, and if matters had remained in that position the creditor would have been entitled then to withdraw the claim. But according to the admission made at the bar the trustee intimated to the creditor on 22nd January 1902 that he would take over the security in terms of section 65. That I regard as due acceptance of the creditor's offer, and prevented the creditor thereafter from withdrawing her claim as she proposed to do.

LORD MONCREIFF—I agree in the judgment of the Lord Ordinary, but I think that he is right on the ground stated by Lord Trayner. I think that the time at which the offer is accepted and an assignation demanded by the trustee is what is to be looked to. If a first dividend has been paid and nothing has been said by the trustee as to taking an assignation to the security, I think that the creditor is entitled to re-value his security with a view to a second dividend, though not with a view to the first—my impression is that it has been so decided. But if the trustee has demanded an assignation of the security I think it is too late for the creditor to withdraw.

The Court adhered.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—W. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defender and Reclaimer—Guthrie, K.C.—Constable. Agent—Andrew Gordon, Solicitor.

Tuesday, June 2.

## FIRST DIVISION.

GRANT'S TRUSTEES v. LEITH HAY.

*Servitude—Thirlage—Multures—Submission and Decreet-Arbitral Commuting Multures—Succeeding Heir of Entail not Bound—Entail—Thirlage Act 1799 (39 Geo. III. cap. 55), sec. 14.*

In 1828 two proprietors, one of whom was the heir of entail in possession of lands astricted to a mill belonging to the other, for the purpose of preventing the delay and expense attendant upon prosecuting to a conclusion certain proceedings which had been initiated under the Thirlage Act 1799 for commutation of the thirlage, entered into a submission, under which the arbiter pronounced a decret-arbitral finding that, in lieu of the mill multures and other prestations then exigible by the proprietor of the mill, and as compensation for the said right of thirlage, certain annual payments of money and meal should be made by the proprietor of the astricted lands to the owner of the mill. The payments were regularly made down to 1892. The astricted lands were held in strict entail by four successive heirs of entail down to 1900, in which year they were duly disentailed.

Held that the present proprietor of the mill was not entitled to exact the annual payments in question from the present proprietor of the astricted lands, in respect (1) that the submission and decret-arbitral of 1828 were not binding upon the subsequent heirs of entail in the astricted lands who were not parties thereto, and (2) that the origin of the annual payments being admittedly referable to the contract and decret-arbitral of 1828, which was not binding on the owner of the astricted lands, the presumption that the payments were attributable to a valid title was excluded, and that therefore the continuance of the payments for a period exceeding forty years could not create a prescriptive right to exact such payments.

This was a special case, in which the parties were (1) the testamentary trustees of the late Robert Grant of Druminnor, Aberdeenshire, proprietors of the estate of Druminnor and, *inter alia*, of a thirl mill situated on said estate, known as the mill of Barflatt, and mill lands and multures thereof; and (2) Charles Edward Norman Leith Hay of Rannes and Leith Hall, Aberdeenshire, proprietor of the lands of Kirkhill, includ-