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COURT OF SESSION.

Tuesday, October 23, 1917.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CALDWELL *v.* STEELE (HAMILTON'S TRUSTEE).

Bankruptcy — Sequestration — Discharge of Trustee — Objection by Creditor — Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *secs.* 152 *and* 158.

A trustee in a sequestration presented a petition for his discharge under the Bankruptcy (Scotland) Act 1913, section 152. A creditor objected and offered, with the use of the trustee's name, to take proceedings to recover funds which he alleged were still outstanding and might be made available. The Sheriff repelled the objections on the ground that an individual creditor had no *locus* to come directly and object before him, but must complain, under section 158, to the Accountant of Court. *Held* that the individual creditor had a *locus*, and, in the circumstances, petition for discharge *sisted*.

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20) enacts, section 152—"After a final division of the funds the trustee shall call a meeting of the creditors by an advertisement in the "Gazette," to be held not sooner than fourteen days after such publication, specifying the time, place, and purpose of holding the meeting, and by letters addressed by post to every creditor who has produced an oath as aforesaid, to consider as to an application for his discharge, and at such meeting he shall lay before the creditors the sederunt book and accounts with a list of unclaimed dividends, and the creditors may then declare their opinion of his conduct as trustee, and he may thereafter apply to the Lord Ordinary or the Sheriff, who, on advising the petition with the minutes of the meeting, and hearing any creditor, may pronounce or refuse decree of exoneration, and the Clerk of the Bills or the Sheriff-Clerk shall forthwith transmit to the Accountant a signed extract of such decree, which shall be entered in the register of sequestrations, and the bond of caution for the trustee delivered up." Section 158—"The Accountant shall take cognisance of the conduct of trustees and commissioners in all sequestrations, and in the event of their not faithfully performing their duties and duly observing all rules and regulations imposed on them by statute, Act of Sederunt, or otherwise relative to the performance of those duties, or in the event of any complaint being made to him by any creditor in regard thereto, he shall inquire into the same, and if not satisfied with the explanation given he shall report thereon to the Lord Ordinary or the Sheriff, who, after hearing such trustees or commissioners thereon, and investigating the whole matter, shall decide, and shall have power to censure such trustees or commissioners, or remove them from their office, or otherwise to deal with them as the justice of the case may require."

Henry Moncrieff Steele, chartered accountant, Glasgow, *respondent*, trustee in the sequestration of John Hamilton, shipbuilder, Glasgow, presented a petition in the Sheriff Court at Glasgow to obtain his discharge as trustee. The Right Honourable James Caldwell, *appellant*, a creditor in the sequestration, lodged a minute of objections.

The *objections* and *answers* set forth—"(Obj. 2) A final division of the funds of the estate of the bankrupt has not yet been made . . . In December 1915 the bankrupt presented a petition to this Court for his discharge. This was opposed by the objector. The Court of Session (Second Division), by interlocutor dated 20th June 1916, found that as a condition of the bankrupt being granted his discharge he should undertake, in such manner as to the Sheriff-Substitute should seem sufficient, to secure payment for behoof of his creditors, in satisfaction of their claims, the sum of £100 per

annum out of his salary or emolument, so long as the same amount to not less than £500 per annum, and in the event of said salary or emolument falling short of £500 per annum, the excess, if any, above £400 should be secured as above in lieu of said sum of £100. The above sums fall to be ingathered by the trustee on behalf of the creditors should the bankrupt prosecute his application for his discharge, and in any case the trustee falls to ingather that amount at least of the bankrupt's salary, emolument, and income. The amount of the excess stated in the foregoing interlocutor was the admittedly moderate amount asked for by counsel for the objector, but in any future application the amount will be subject to revision. The petition by the bankrupt is still pending in the Sheriff Court at Glasgow, having been remitted by the said interlocutor. As the bankrupt has not moved in the petition since the last-mentioned date the application of the trustee at this time is in any case premature. (*Ans.* 2) Denied that a final division of the funds of the bankrupt estate has not yet been made. The trustee produces a copy of the objector's receipt for the second and final dividend. The petition for the bankrupt's discharge has been withdrawn and notice given to the trustee thereof. The Court of Session proceedings are referred to. *Quoad ultra* denied. (Obj. 3) In the event of the bankrupt John Hamilton failing to prosecute his application for his discharge it is the duty of the trustee, in the interest of the creditors, to apply to the Court under section 98, sub-section (2), of the Bankruptcy (Scotland) Act 1913, or other provisions of the said Act, to have it determined whether the bankrupt's salary, emolument, and income are in excess of a suitable aliment to the bankrupt in view of his existing circumstances, and if the Court shall determine that they are, to fix the amount of the excess, and to order the same to be paid to the trustee as part of the property of the bankrupt falling under the sequestration. (*Ans.* 3) Denied. The estate has been distributed, and the trustee has no funds to prosecute the claim mentioned. . . . . (Obj. 16) On 14th March 1917 the objector's law agents wrote to the trustee renewing the objector's offer to find the funds necessary for the application to be made by the trustee so as to save him from all loss. The trustee is called upon to produce the said letter. The objector, as a considerable creditor and a commissioner, and in the absence of any expressed willingness on the part of any other creditors to contribute, hereby offers to undertake as *dominus litis* the whole responsibility with regard to the application which he is prepared to make with the aid of the trustee's name under section 98, sub-section (2), of the Act of 1913 or other provisions of the said Act, and to find security to the satisfaction of the Court to relieve the said Henry Moncrieff Steele personally as trustee and the said sequestrated estate of all expense and damage which may be incurred thereby, or to find security in such other terms as the Court may direct. (*Ans.* 16) The letter called for is herewith produced. The trustee has been advised by the law agent in the sequestration that there is no precedent for taking action to attack the personal earnings of the bankrupt after sequestration has been awarded, and that there is authority for the proposition that such action is not maintainable. But the trustee is willing, and hereby offers to the objector the use of his name and title to prosecute such action, provided he will undertake to proceed within a reasonable time, and grant and deliver to the trustee a proper bond of indemnity to free and relieve him of all expenses, judicial and extrajudicial, that may be incurred in connection with such action, including any expenses that may be awarded against the trustee, and also any damages in which the trustee may be found liable through any act done under cover of the said proceedings. In the event of the objector taking advantage of this offer the trustee is willing that the petition for discharge should, subject to the approval of the Court, be sisted for a time to permit the action desired by the objector being taken."

The appellant (objector) *pleaded* — "1. The petition for the bankrupt's discharge being still pending, and the judgment of the Court of Session being still unimplemented, a final division of the funds of the estate of the bankrupt has not yet been made, and the petition by the trustee for his exoneration and discharge is, in the circumstances stated, premature, and ought to be refused with expenses to the objector. 2. The trustee not having yet ingathered and divided all the funds belonging to the bankrupt's estate, the petition should be refused with expenses to the objector. 3. The trustee not having discharged the judicial functions of his office as trustee, in the circumstances before stated, should be found personally liable in the expenses of the petition."

The petitioner pleaded—"The objections, so far as material, being unfounded, and *quoad ultra* being irrelevant, the prayer of the petition should be granted and the objector found liable in the expenses caused by his objections."

On 1st August 1917 the Sheriff-Substitute (FYFE) exonered and discharged the trustee of his intromissions.

Note.—"The question which is here raised is a very interesting one, and so far as I know a novel point in bankruptcy upon which there is no reported authority. The question is whether in a sequestrated process an individual creditor has a *locus standi* to oppose, direct before the Sheriff or the Lord Ordinary, an application by a trustee in bankruptcy for his discharge.

"Although the stated objections and the argument which was submitted upon them appear to go that length, I hardly think that I need deal with the extreme view that a bankruptcy trustee is bound to remain in office. No man can be forced to continue to hold an office which he desires to vacate. It may be, of course, that the vacation of an office requires certain statutory formalities to be observed before the holder of the office can be officially relieved of it. But I think

there is no doubt about the general principle, which applies to a bankruptcy trustee as to anybody else, that a person holding any office is in the absence of express contract or statutory direction to the contrary entitled to say at any point of time 'I shall no longer hold this office.'

"The questions in the present case accordingly seem to be—(1) Are there any circumstances which ought to prevent the trustee being officially discharged of his office? and (2) If there are any such circumstances, is it competent for a creditor to bring them before the Sheriff or the Lord Ordinary direct, as the objecting creditor in the present has done?

"If it is competent, of course it follows that the Sheriff or the Lord Ordinary would require to make an order for proof, and to hear evidence in regard to objections stated by creditors to a trustee obtaining his discharge.

"In the present instance it happens that there is only one creditor objecting, but if the creditor in this instance is right in principle the Sheriff or the Lord Ordinary might in some sequestrations have to entertain objections stated by a hundred different creditors on a hundred different grounds, upon all of which inquiry would be necessary. If the principle which the objector here contends for is right it opens a vista of alarming possibilities in the administration of the Bankruptcy Statutes.

"I have considered very carefully the written objections, and the very able argument which the objector submitted in support of them, but I am unable to accept his proposition. I do not think he has a *locus standi* before me to object to the trustee being discharged if the trustee has observed the requisite statutory formalities, which in the present instance is not disputed, and if there is no adverse report upon his conduct from the Accountant of Court, which in the present case admittedly there is not.

"It has always been the policy of the Scottish Bankruptcy Statutes that a bankruptcy trustee shall in the discharge of his office be under the control of the Crown-appointed official known as the Accountant. He was in the Bankruptcy Act of 1856 called the Accountant in Bankruptcy, but he is now known as the Accountant of Court, the office of Accountant in Bankruptcy and Accountant of Court having been conjoined by the Judicial Factors Act of 1889. Under the Bankruptcy Act of 1913 the Accountant of Court has power of exactly the same nature, although somewhat more extensive, than the Accountant in Bankruptcy had in the Act of 1856.

"The most important part of the bankruptcy duties of the Accountant of Court is to supervise the trustee in the discharge of his official duty. Section 158 of the Bankruptcy Act specially expressly requires the Accountant to take cognisance of the conduct of the trustee (without any complaint being made by a creditor) and to see that the trustee observes the rules and regulations applying to the performance of his office. In addition to this general power the statute expressly makes the Accountant, not the Sheriff or the Lord Ordinary, the person who is to entertain complaints by creditors in regard to the conduct of the trustee. I think that what section 158 quite clearly contemplates is that the Sheriff or the Lord Ordinary should deal with the bankruptcy trustee only if and when his conduct has been adversely reported on by the Accountant of Court. Section 158 of the statute lays upon the Accountant, not upon the Sheriff, the duty of 'investigating' complaints against 'trustee in bankruptcy,' and I think that the express enactment of section 158, even taken by itself, expressly excludes the procedure which has been here adopted of a creditor appearing direct before the Sheriff to object to the trustee's discharge.

"This view seems to me to gain force if section 158 is read in the light of many sections of the Act, for the Accountant has very extensive powers and these he may exercise at his own hand.

"From beginning to end of a bankruptcy process supervision by the Accountant is the policy of the Bankruptcy Statute. For example, it may be pointed out that even if the creditors should be willing to make a bankrupt an allowance to carry on a business, which with a going concern it is often very wise to do, the allowance cannot be made without the concurrence of the Accountant (sec. 74). The Accountant at his own hand may require the trustee to convene a meeting of creditors (sec. 93). The concurrence of the Accountant is required before the trustee and commissioners can accelerate the payment of a dividend—a proceeding which creditors of course are always delighted to agree to. The Accountant may at his own hand report to the Lord Ordinary or the Sheriff any disobedience to his order by the trustee or commissioner (sec. 160). The Accountant at his own hand may report a bankrupt, or a trustee, or a commissioner to the Lord Advocate upon suspicion of fraudulent conduct (sec. 161). Under the Summary Sequestration Scheme of the 1913 Act the Accountant is the final court of appeal upon objections to the trustee's accounts or the fixing of his remuneration (sec. 176 (9)). A bankrupt cannot obtain his discharge without a report from the Accountant (sec. 149); and in a summary sequestration the Accountant is practically the arbiter in the matter of the trustee's discharge (sec. 173 (14)). In a great many important matters outside the range of the personal aspect the concurrence of the Accountant is necessary, as, for example, if he concurs in a sale of heritage by private bargain that practically precludes technical objection being taken to the title and saves the purchaser investigating the bankruptcy process, because 'the concurrence of the Accountant shall be conclusive evidence that the concurrence of the requisite majority of creditors has been obtained' (sec. 111).

"It is not therefore so surprising as it might perhaps at first sight appear that the Accountant should be interposed between an objecting creditor and the Court in this matter of the trustee's discharge.

"The objector here very strongly urges the general principle that every creditor has the right to appear at any stage in a sequestration process where creditors' interests are affected, and personally my sympathy is always with creditors being heard if their interests may be adversely affected. But that a trustee should vacate his office is not a circumstance which adversely affects the interests of creditors. If there is estate to be taken up, another trustee can be appointed to take it up, and as I have said there is no law to compel any man to continue to hold an office.

"A bankruptcy is entirely a statutory process, and creditors, like all others concerned, must observe the statutory directions and submit to the statutory restrictions. In my view the Bankruptcy Act in its whole spirit, as well as in the letter of its 158th section, precludes an individual creditor from stating direct to the Court objections to the discharge of a trustee. I think that the Sheriff or the Lord Ordinary is precluded from entertaining such objections as are here stated unless they are brought to the notice of the Court in a report from the Accountant.

"I accordingly sustain the plea-in-law stated for the trustee."

The objector appealed, and argued—The Sheriff-Substitute had erred, as an individual creditor could competently object to the discharge of a trustee. A trustee was only entitled after a final division of the funds to proceed with an application for his discharge—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 152. In the present case the trustee admitted the existence of an outstanding asset which he had failed to ingather. The appellant desired to take proceedings with a view to recovering this outstanding asset in name of the trustee, who appeared to countenance this step provided he was kept *indemnis*. But the Sheriff-Substitute having granted a discharge to the trustee, any mandate to raise proceedings the latter might give to the appellant had fallen. The provisions of section 152 of the Act had thus been completely disregarded by the Sheriff-Substitute, and accordingly his interlocutor should be recalled.

The respondent argued — Although the Sheriff-Substitute's ruling that the appellant had no title to appear and object to the discharge of the trustee was unsound, the appellant was wrong in founding on section 152 of the Act as his remedy. The position of the sequestration fully justified the trustee's application for discharge. The whole estate with the exception of this asset had been distributed, and thus all the conditions of the statute had been complied with. The only remedy open to the appellant was to obtain the Accountant's intervention under section 158 of the Act, whereby the trustee could get an order on the bankrupt for the delivery of any asset. The appellant had not availed himself of the remedy thus provided by the Act. Counsel cited *Denny Brothers, &c.* v. *Board of Trade*, (1880) 7 R. 1019, 17 S.L.R. 694, and *Grubb* v. *Perth School Board*, (1907) 15 S.L.T. 492.

LORD JUSTICE-CLERK—[*After dealing with a question which is not reported*]—The application by the trustee for his discharge bears to proceed under the 152nd section of the Bankruptcy Act. That section begins by saying that after the final division of the funds the trustee shall take steps to obtain his discharge. But the funds here have not been fully distributed, and the only plea which the trustee attaches to his application is—"The pursuer's duty being ended, and the creditors being satisfied with the conduct of the pursuer, he should be discharged." The Sheriff-Substitute took the view—for which I think there is no justification—that an individual creditor cannot oppose an application for a trustee's discharge, and that he must proceed under section 158 of the Bankruptcy Act by lodging a complaint with the Accountant of Court in terms of that section.

We were informed that the objecting creditor did apply to the Accountant, and that in his report the Accountant says—"The Accountant begs to note that at a final meeting of creditors which authorised the trustee's application for discharge, a protest was recorded on behalf of the Right Honourable James Caldwell, a creditor for £500, and his mandatory voted against the resolution. It may be for the Sheriff to determine whether intimation of the petition when it is presented ought to be made to Mr Caldwell and opportunity given him of being heard in the proceedings." Accordingly the Sheriff-Substitute, by interlocutor dated 9th March, ordered intimation to be made to Mr Caldwell. The view therefore that Mr Caldwell had no *locus standi* seems to me quite unfounded, and in point of fact Mr Sandeman did not support the judgment upon that ground.

But he supported the judgment upon the ground that the objector ought to have proceeded under section 158. I do not think that was necessary at all. I think the objector was entitled to appear before the Sheriff-Substitute and state any objections to the trustee getting his discharge, and the Sheriff-Substitute ought to have dealt with these objections on their merits. It is, I think, plain therefore that the Sheriff-Substitute was not entitled to grant the trustee's discharge, but there is upon record (article 16) an offer by the objector to the effect that if the trustee lends him his name he is willing to take proceedings to recover the outstanding estate, and the trustee apparently was willing to agree to that, because I do not think there is any substantial difference between what the trustee put forward in his answer 16 and what the objector stated in his objection 16.

I think we should recal the interlocutor of the Sheriff-Substitute and sist the application by the trustee for his discharge in order that the course which Mr Caldwell proposes may be taken, and that during the period of sist we should allow Mr Caldwell either to arrange with the trustee or to lodge in process the bond of indemnity he proposes in answer 16.

LORD DUNDAS concurred.

LORD SALVESEN—[*After dealing with a question which is not reported*]—The Sheriff-Substitute has disposed of the application by the trustee for a discharge on a ground which counsel for the respondent admits to be untenable. The Sheriff-Substitute's view is that a single creditor has no *locus standi*. I think the Sheriff-Substitute must have entirely overlooked the provision in the section under which this application is brought, because it is a condition of the trustee being entitled to his discharge that he has made a final division of the estate, and there is a provision for any creditor appearing and being heard on an application by the trustee for his discharge. Mr Caldwell being admittedly a creditor has therefore a *locus standi* to propone any relevant objection to the trustee's discharge, and the relevant objection which he does propone is that the trustee has not ingathered the whole available estate, and he presents a *prima facie* case in support of that objection. In face of that, to grant the trustee's discharge, and proceed upon the footing that nobody entitled to be heard objected to the application, was to treat it as if it were an application without opposition.

As regards the question whether Mr Caldwell was not bound to select some other remedy, it does not appear to me that he was bound to take the course of having the trustee censured or removed. He, as I understand, disclaims any desire to have him censured or removed. He wishes the trustee to remain in the saddle so as to distribute any assets which as yet have not been ingathered and which Mr Caldwell is willing to ingather on his own responsibility but in the name of the trustee. There may be difficulties in the procedure which Mr Caldwell will have to adopt, and he will, no doubt, carefully consider what his best line of action will be, because, as Mr Sandeman pointed out, the estate said to have been acquired consists to a certain extent of income which is more or less precarious and is derived from the personal services of the bankrupt, and therefore is not a fund which can be so readily attached as an alimentary provision exceeding the amount necessary for aliment. That, however, is a matter for Mr Caldwell's consideration. If he fails in recovering for the estate any assets, the trustee will have been justified in the position he took up, and the expense of failure will fall on Mr Caldwell under the offer which he has made, and without which I should not have considered his objection at all. If, on the other hand, Mr Caldwell does recover estate which ought to be distributed by the trustee, then the trustee ought not to be discharged until he has completed the performance of all his duties. Primarily Mr Caldwell will recover in name of the trustee; the trustee will then have the control and distribution of the amount recovered in terms of the provisions of the Bankruptcy Act, whatever they may be. It will be for him to administer the estate that is recovered, and for that purpose he must remain in office.

I think Mr Caldwell should have a reasonable time in which to institute the necessary proceedings in the name of the trustee, and if he fails to do so within such time the trustee will be entitled to move to have his discharge granted.

LORD GUTHRIE—[*After dealing with a question which is not reported*]—In regard to the trustee's discharge I agree with your Lordships that, in view of the offer and acceptance on record by the trustee and Mr Caldwell respectively, the Sheriff-Substitute was premature in taking the course which he did. I do not think, however, it is fair to say that the Sheriff-Substitute held absolutely that Mr Caldwell had no *locus standi* before him in the matter of the trustee's discharge. Rightly or wrongly he seems to have held that Mr Caldwell was entitled to intervene in this matter, but must do so in the way which the statute points out, namely, first, at all events, by lodging a complaint with the Accountant, and then if the Accountant is against him he could come before the Sheriff in the ordinary way. But however that may be, I do not find this question of the offer and acceptance referred to in the Sheriff-Substitute's interlocutor, and I take it that the matter was really dropped out by both parties and not brought before the Sheriff-Substitute at all. At all events, it seems not to have been pressed upon him, for if it had been I cannot imagine that he would not have referred to it. But there it is on the pleadings, and I agree that the proper course is that which your Lordship proposes.

The Court recalled the interlocutor of the Sheriff-Substitute, sisted the application by the trustee for his discharge for a period of three months, and continued the cause.

Counsel for the Appellant—Party. Agents—Curran & Stewart, W.S.

Counsel for the Respondent—Sandeman, K.C.—Gentles. Agent—Robert Millar, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, August 31.

(Before the Lord Justice-General, the Lord Justice-Clerk, and Lord Cullen.)

DOLLAN *v.* M'INTYRE.

Justiciary Cases—War—Military Service Acts 1916 (5 *and* 6 *Geo. V, cap.* 104), *sec.* 2, *and* 6 *and* 7 *Geo. V, cap.* 15, *sec.* 5—"*Conditional Exemption*"—*Condition that Work of National Importance be Obtained Outwith a Certain Area.*

The Military Service Act 1916 enacts—Section 2 (3)—"Any certificate of exemption may be absolute, conditional, or temporary, as the authority by whom it was granted think best suited to the case, and also in the case of an application on conscientious grounds, may take the form of an exemption from combatant service only, or may be condi-