REPORTS OF CASES

DECIDED IN

THE SUPREME COURTS OF SCOTLAND,

AND IN

THE HOUSE OF LORDS ON APPEAL FROM SCOTLAND;

BY

[HOUSE OF LORDS, ETC.]
W. H. DUNBAR, ESQ. ADVOCATE;

[FIRST DIVISION]
JAMES CAMPBELL, ESQ. ADVOCATE;

[SECOND DIVISION]
F. L. MAITLAND HERIOT, ESQ. ADVOCATE.

BEING

A CONTINUATION OF THE SCOTTISH JURIST.

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1825, § 47, it is provided,—'That if it shall be made to appear to the Jury Court that a party has abandoned his suit; or if the pursuer, or the party appointed to stand as pursuer before the Jury Court, shall not proceed to trial within twelve months after issues have been finally prepared; or if, after having given or received notice of trial, the pursuer does not appear at the trial, and proceed with his evidence, unless reasonable cause for such delay, or for his failing to appear, is shewn to the satisfaction of the Jury Court, it shall be competent to apply to the Jury Court *to remit the case back to the court from whence it came*, and that such court shall hold the party as confessed, and proceed therein as in other cases in which the parties are held as confessed.' This regulation seems to have been framed to save absent parties from the severe enactment of the statute of 1815, before quoted, whereby it is declared, that verdicts, after being returned and final, shall not be questioned anywhere; with which view, it is provided by the act of sederunt, that when a party does not appear at the commencement of a trial, it shall be competent to the Court (instead of impannelling a jury for verdict,) to remit the case to the Court of Session to hold the defaulter as confessed. If that course was imperative, then the taking of a verdict was erroneous, and the whole subsequent proceedings would be liable to challenge. As this ground, however, is not taken by the pursuers, it probably admits of a satisfactory answer."

At advising,

Lord Justice-Clerk.—The Lord Ordinary has on one point proceeded on a mistake. In his note, he founds on the act of sederunt 29th November 1825, but he has not had in view that that act is repealed by the subsisting act of sederunt regarding jury trial.

Lord Medwyn.—I am afraid this case cannot stand. I think it is impossible to get the better of the acts of sederunt, which provide the only competent mode for having verdicts and interlocutors set aside.

Lord Moncreiff.—I am compelled to be of the same opinion. I have no notion that a party, after decree is pronounced, can, on discovering that his agent had no license, turn round and ask the Court to overturn their own decrees. I think the law of Scotland has gone quite far enough in overturning decrees in absence; and at any rate this was not a case in absence.

Lord Cockburn.—I am of the same opinion. I consider this as a desperate attempt to overturn all the legal and recognized forms of law.

Lord Justice-Clerk.—I look on the verdict here as a good verdict taken according to the prescribed forms of Court. It must stand, if not objected to in the regular way. I offer no opinion on the question whether the status of the pursuer is finally determined by this verdict or not. The only point before us at present is as to the competency of reduction in the circumstances of the case, and I think the action is totally incompetent.

The Court accordingly *assoilzied* the defenders.

Pursuers' authorities.—Miller, 27th Nov. 1801; Dict. 12,176. Leith, 7th June, 1822. Clark, 17th Nov. 1825. Petrie, Nov. 1817, unreported. Wilson, 5th March 1823.

Defenders' authority.—Lumsden, 18th December 1834.

Lord Ordinary, Cuninghame.—*Act.* Rutherfurd, Henderson; James Bell, S.S.C.. *Agent.*—*Alt.* Lord Advocate (M'Neill), Moir; W. Young, W.S., *Agent.*—R. *Clerk.*—[F.L.M.H.]

14*th December* 1844.

First Division.—(J.C.)

No. 38.—John Jopp, W.S., *Petitioner*, *v.* Sir Andrew Leith Hay of Rannes, Knight, M.P., *Respondent.*

Bankrupt—Statute 2 and 3 Vict. c. 41—Sequestration—*A petition for the sequestration of a landed proprietor, stated that he "is or has been a trader," and the proof instructed that he was owing numerous debts contracted during his being in trade—Held that the statement in the petition was sufficient; and,* opinion, *that any one who has contracted debts prior to or coeval with his trade, which remain undischarged, is liable to sequestration.*

Trust—Contract—Bankrupt—Sequestration—*Circumstances in which held that accession to a trust-deed by a minority only of the creditors of the truster, binding them to abstain from diligence, did not bar an acceding creditor from applying for the truster's sequestration, the* bona fides *of the contract and deed of accession having been violated by the truster, and a non-acceding creditor being in* cursu *of obtaining an illegal preference.*

Mr John Jopp, W.S., presented a petition for the sequestration of Sir Andrew Leith Hay of Rannes, which stated,

"That the petitioner is a creditor of the said Sir Andrew Leith Hay to the extent of £4313. 2. 7. sterling, conform to oath and vouchers herewith produced. That the said Sir Andrew Leith Hay is or has been a banker, and an underwriter or an insurance-broker in Aberdeen, and as such falls within the description of persons contained in the act 2d and 3d Victoria, cap. 41, entituled, 'An Act for regulating the sequestration of the estates of bankrupts in Scotland,' whose estates may be sequestrated, and is not within any of the exceptions mentioned in said act."

This petition was opposed by Sir Andrew.

It appeared, from the affidavit relative to this petition, that Sir Andrew Leith Hay had granted a promissory-note, dated 22d March 1836, payable on 20th June following, to Alexander Jopp, advocate in Aberdeen, on account of the late Andrew Jopp's representatives, amounting, with interest and expenses, to £4313. 2. 7. sterling.

Evidence was also produced in the course of the proceedings, that Sir Andrew had subscribed the contract of copartnery of the Aberdeen Town and County Bank, upon 2d February 1825; and that he had also subscribed the contract of copartnery of the Aberdeen Fire and Life Assurance Company, upon 25th November 1825. He ceased, however, to hold shares in the bank on 17th January 1833, and to have any interest in the assurance company on the 16th February 1827. Various extracts of decrees, of adjudication, of constitution, and *in foro*, and a dishonoured bill, dated respectively in 1824, in 1830, in 1832, in 1837, and in 1840, in favour of different parties, were produced by the petitioner, and it appeared that for many years Sir Andrew had been much embarrassed in pecuniary matters. It also appeared that Sir Andrew, in consequence of his difficulties, had executed a trust-disposition, dated 5th March 1840, whereby, in consideration of the obligations, &c., specified in a relative deed of agreement or accession by his creditors, he disponed in trust to William M'Kenzie of Muirton, Esq., W.S., John Anderson, Esq., W.S., and Erskine Douglas Sandford, Esq., advocate, his lands of Rannes, &c., as contained in two deeds of entail. The main object of this trust was to enable the creditors of Sir Andrew Leith Hay to try the validity of the entails of his estates in the most effectual manner. There were inserted in this trust-deed the names of the creditors, for whom it bore to be granted, which were 113 in number, and the sums due to them, amounting to about £86,400.

On this trust-disposition the trustees were infeft.

A relative deed of accession was made out, but was only subscribed by a few of the creditors, of whom Mr Jopp was one. The debts of the acceding creditors amounted together to £13,000. The deed of accession concluded with the following clause:

"Finally, we consent and agree for ourselves, respectively and individually, to suspend all diligence, real or personal, against Sir A. L. Hay, and the said lands and others, until the final conclusion of the said action, or whilst the same is *bona fide* defended and insisted in by an heir of entail, contained in the destination expressed by the said deeds of entail."

An action was subsequently raised by the trustees,

in the joint names of Sir A. L. Hay and themselves, for trying the validity of the entail; and, on 20th December 1842, an unanimous decision was pronounced by the Court sustaining the entails.

On 16th October 1844, an adjourned meeting of the agents of Sir Andrew Leith Hay's creditors was held, at which it appears from the minute,

"The meeting having considered the said minute and report, and that the acceding creditors decline to supply the requisite funds for prosecuting an appeal to the House of Lords of the judgment of the Court of Session, are of opinion that no farther proceedings can be had under the trust-deed and deed of accession for the benefit of the acceding creditors."

"In the above circumstances, Mr Smith" (as agent for one of the acceding creditors,) "and Mr Johnston" (as agent for Mr Jopp,) "for their respective constituents, withdraw their adherence and accession from the trust; and in so far as their said constituents are respectively concerned, authorize the trustees to cancel the trust-deed and infeftment thereon, or to denude themselves thereof in favour of the truster; reserving to the said creditors, as they are now released from the deed of accession, their full powers to pursue and follow out such measures as they may be advised for recovery of their separate debts."

Pending the present proceedings, however, the agent of Sir A. L. Hay intimated to the opposite agent an intention to present an appeal to the House of Lords against the decision of the Court of Session. And it was alleged by Sir Andrew that he was prepared, at his own expense, to prosecute the appeal.

It appeared, however, that, subsequently to the execution of the trust-deed above mentioned, a disposition and assignation had been granted in favour of Duncan Davidson, Esq. of Tillychetly, by the North of Scotland Assurance Company in Aberdeen, with consent and concurrence of Sir A. L. Hay and Mrs Mary Leith or Mitchell and husband, whereby, for farther security of a variety of large debts due by Sir Andrew, and assigned by the North of Scotland Assurance Company to Mr Davidson, the assurance company, with consent and concurrence foresaid,

"sell, assign, dispone, and make over, to and in favour of him, the said Duncan Davidson, his heirs or assignees, heritably but under reversion, according to law, all and whole the lands, baronies," &c. of Rannes.

Upon his infeftment on this disposition, Mr Davidson, in April 1844, raised and executed a summons of maills and duties against Sir A. L. Hay and his tenants in the estate of Rannes.

When answers had been lodged for Sir A. L. Hay to the petition for his sequestration, and the case had been debated, the Lord Ordinary pronounced the following interlocutor:

"*9th December* 1844.—The Lord Ordinary appoints the petition and answers, with the productions now printed by the parties, to be boxed, with the view of reporting the same to the First Division of the Court; and grants warrant for enrolling in the Inner-House rolls.

"*Note.*—This application, under the 2d and 3d Victoria, cap. 41, for sequestration, is resisted by the debtor on various grounds. The 15th section of the act permits him to shew cause why sequestration should not be awarded; and as a variety of grounds were stated, the Lord Ordinary, on the 26th of November, allowed answers to be lodged, and such productions as were founded on to be made. The case was again partially argued on the 3d of December, when the Lord Ordinary intimated his intention of reporting the matter to the Court, and made avizandum with the debate.

"There is no form of process specially applicable to a case of this description. But while the Lord Ordinary allowed answers to the petition, he did not think it proper to grant the motion of the respondent for the preparation of a record, and thus create delay. Neither did it appear to him expedient to decide the cause during the sitting of the Court, the award or refusal of sequestration being a matter of such pressing importance as he humbly thought more fitting for the immediate authoritative determination of the Inner-House."

Argued for Mr Jopp—

It is sufficient, under the words of the statute, to aver that the bankrupt is or has been a trader. Sir Andrew carried on business as a banker and underwriter for eight years. The documents produced prove that many debts contracted while Sir A. L. Hay was a trader remain undischarged, and though these are not specially founded on in the affidavit of the petitioning creditor, they are competent evidence of that conclusive fact. It is quite fixed that it is not necessary that the debt on which a petition for sequestration proceeds should be itself a trading debt. No personal exception can be founded to the petition on the trust-deed and deed of accession, because a small minority of the creditors only acceded to the trust-deed, and because the purpose of the trust is at an end, that purpose being merely to try the validity of the entails of Sir A. L. Hay's estates, and there being no obligation on the creditors to proceed farther with the entail question, which was manifestly desperate. The creditors have never acknowledged the steps said to be taken by Sir A. L. Hay towards presenting an appeal. Besides, the disposition to Mr Davidson was contrary to the *bona fides* of the contract created by the trust and deed of accession, and the improper preference over the other creditors which he was thereby *in cursu* of acquiring justified the present application.

Argued for Sir A. L. Hay—

The debt in the promissory-note was a debt of Sir A. L. Hay's father, for which he was in no way liable till he signed the promissory-note, which was in 1836, whereas he ceased to be a trader in 1833. The mere fact that a man who has left trade has trading debts unsettled, will not warrant a creditor whose debt is not a trading debt to apply for his sequestration. This application for sequestration states that the bankrupt is or has been a trader; but that is unwarrantable. The creditor's statement must be precise. By availing himself of the provisions of the 7 Geo. iv. c. 67, the petitioner might have learned at the stamp-office whether the bankrupt was or was not at present a member of the Aberdeen Bank Company. He could also have learned whether he was a member of the insurance company. The respondent is a member of neither. Mr Jopp's debt, as his affidavit proves, was neither a trading debt nor a debt contracted during or prior to the bankrupt's trade. It cannot, therefore, support this petition. By the trust-deed and deed of accession, Mr Jopp is barred, by personal exception, from making this application. The purpose of the trust was not finally ended, as the judgment of the House of Lords was not taken.

At advising,

Lord Justice-General.—On considering the act of parliament, I see no objection to the form and shape of this application for sequestration. The party whose sequestration is applied for is properly described. And as to the other view, rested by the objector on the case of Ogilvie, which he has cited, that is unavailing, for that case shews that it is sufficient that the petitioning creditor's debt is a debt due coeval with the trade carried on by the bankrupt. Then with regard to the objection founded on the trust. The general rule is, that the whole creditors must accede to such a trust, to prevent the adoption of such a measure as the present. The question, however, is, whether the clauses in the trust-deed itself are of such a nature as to preclude Mr Jopp from applying for sequestration? But before going into this, it is important to notice that there was no general accession of the creditors to this trust-deed. There is an enumeration of the names of a large number of creditors, whose debts amounted to upwards of £86,000. But the debts of the few creditors who accede amount only to £13,000. Would it not be a most serious thing to say, considering the small number of acceding creditors, that no change of circumstances, (such, for instance, as has actually taken place in this case,) should entitle these creditors to interfere for the protection of their interests? Why, from the nature of this gentleman's estate, if the trust had been indefinite in point of

time, the whole estate might have been dissipated, while these creditors would have been forced to lie by without being able to do any thing to protect their interests. The object of the trust in this case was to try the validity of Sir Andrew Leith Hay's entail. Now, with regard to the preceding remark, the last clause of the deed of accession of the creditors is material. It appears to me a matter of doubt whether asking the authority of law to get the means and estate of this gentleman sequestrated is a pressing of diligence against him in the sense of that clause. But that which is most material is the act of Sir Andrew Leith Hay himself. The disposition and assignation in favour of Mr Duncan Davidson would have been of no consequence, indeed, had Sir Andrew Leith Hay not concurred in it. But he gives his consent and concurrence to it. If his estate had been unentailed this would have been equivalent to an absolute conveyance to Davidson. He has thereby done what is a breach of the *bona fide* object of this trust in relation to the creditors acceding to it, and for whose benefit it was intended. And, accordingly, we find that Mr Davidson, in virtue of this act and deed of Sir Andrew Leith Hay, is at this moment using means for effecting a preference over the other creditors. Taking into view the whole of the objections which have been urged, I see nothing to prevent this application being granted, on the authority of the cases cited to us, and especially that of the Marquis of Huntly.

Lord Mackenzie.—I concur with your Lordship. The steps taken by this unfortunate gentleman are such as to give an improper preference to Mr Davidson, to which the other creditors, by the fact of their accession to this trust, are not obliged to submit. I have no doubt that, in Ogilvie's case, the debts which the judges speak of as trading debts did not mean only debts contracted in trade, but debts contracted prior to or during a man's having the character of a trader. Accordingly, we find it no uncommon case for a man to be sequestrated individually while the trading company or copartnery of which he is a member or *socius* remains perfectly solvent. It is the man's character of a trader which renders him liable to sequestration. At the same time, there is do doubt that a man may lose that character of trader; as for instance by a regular discharge.

Lord Fullerton.—I concur. There is nothing here to prevent the application of the ordinary rule. In the deed of accession to this trust, it is true that there is a peculiar clause which is not very common, viz., to abstain from all diligence real or personal. Now, it is true that that might have prevented an acceding creditor, by personal exception, from insisting upon the present application, or from other diligence, had matters remained as at the execution of the trust and deed of accession; but when the race of diligence had commenced, and a non-acceding creditor was *in cursu* of obtaining a preference, (in this instance through the act of the truster himself,) I do not think the acceding creditors could be prevented from protecting themselves, and taking steps to secure the estate for the general benefit of the creditors. As to the other points, I concur with your Lordships. The case of Ogilvie is not in point; for here this unfortunate gentleman had contracted innumerable debts during his trading, while he had the character of a trader, which are still resting-owing.

Lord Jeffrey.—I concur. It is clear that, in the meaning of the sequestration statute, debts prior to or coeval with the trade of the debtor, are in the same situation with the peculiar debts connected with the trade. Here the debtor is by description a trader—he therefore may be sequestrated. All the debts against him, whether business debts or personal debts, are to be considered, as to the time of contracting them, in relation to the debtor's character of a trader: And he is obviously overwhelmed with debts contracted whilst he was a trader. Then, with regard to the trust and deed of accession, that is substantially a mere agreement by the acceding creditors to contribute funds for trying a legal question, accompanied, it is true, by the infeftment of trustees. There must be throughout the whole proceedings a concurrence by the creditors, express or tacit. This is not a trust-conveyance from which any thing can be got while it lasts. As soon as these creditors give, as they naturally here give, notice that they withdraw from what they agree to do, they supersede the trustees, and the trust is at an end. There is besides a breach of the *bona fides* implied in the contract; for while Sir Andrew Leith Hay alleges the proceedings to be still in dependence, and the acceding creditors are thus prevented from operating payment out of his estates, he gives a particular creditor a means of effecting a preference to their disadvantage. I therefore agree in thinking that the objections ought to be repelled.

The Court accordingly pronounced the following interlocutor:

"Remit to the Lord Ordinary to award sequestration in common form, and to proceed accordingly."

Authorities for Petitioner.—Statute 2 and 3 Vict. c. 41, § 8 and 12. Bell's Com. ii. 316, 521. Dick *v.* Lyall, 28th Jan. 1815; F. C. 180. Lugton *v.* Molle, 31st May 1831; 9 Shaw, 647.

Authorities for Respondent.—Ireland, Feb. 1833; 5 S. and D. 173; *ante*, vol. xv. p. 99. 7 Geo. iv. c. 67, § 2, 4, 6. Baillie *v.* Grant; 8 S. and D. 778; 6 W. and S. 40. Ogilvie and Co. *v.* Simpson and Todd, 4th March 1837; 15 S. and D. 746.

Lord Ordinary. Robertson.—*Act.* Rutherfurd, Hector; Jopp and Johnston, W.S., *Agents.*—*Alt.* Maitland, Handyside; J. H. Burnett, W.S., *Agent.*—*N. Clerk.*—[J.C.]

14*th December* 1844.

SECOND DIVISION.—(F.L.M.H.)

No. 39.—Captain ALEXANDER GRANT, *Petitioner*, v. COSMO INNES, *Respondent.*

Minor—Curator—Custody of Minor—*After a summons for choosing curators had been raised and executed, the Court refused a petition praying, that the minor might be put into a situation for doing so deliberately and of her own free will.*

Miss Isabella Baillie Grant, a child four years old, was, on her mother's death, in the year 1834, sent home from India by her father to the care of her maternal aunt, Mrs Innes. In 1842, her father, Mr Grant, died. His agent in Madras, Mr Arbuthnot, in communicating his death, requested Mr Innes to allow himself to be appointed as tutor to the child. Mr Innes was shortly thereafter appointed factor *loco tutoris* by the Court. With the exception of a short time, when Miss Grant was at a boarding-school near Melrose, she had resided all along with Mr Innes.

In November 1844, on the girl's attaining puberty, a summons for choosing curators was raised and executed. A second summons for the same object was raised in Miss Grant's name by the petitioner. While matters were in this state, Captain Grant presented a petition praying, that the Court would appoint a fit and proper person with whom Miss Grant might reside until a day fixed by the Court,

"so as to afford to her a reasonable opportunity of deliberately, and of her free will, making a choice of curators."

At advising,

Lord Justice-Clerk.—After not only one summons, but two summonses for choosing curators are raised, the petitioner presents this petition, which appears to me wholly uncalled for. All parties are, by the summons, called to appear and see the curators chosen; and the Court will see that the choice is the free uncontrolled act of the minor. There is no sign of any improper interference with the minor at present; and even if there were, the remedy would be applied in the process for choosing curators that is already depending. I think the petition should be dismissed.

Lord Medwyn.—I am of the same opinion. If the petitioner has any ground for suspecting the girl will not exercise her free will, his whole object will be obtained in the regular process.

Lord Moncreiff.—I am compelled to be of the same opinion. I consider the petition to be utterly uncalled for, in the circumstances stated in it, and unnecessary. If there is any reason for objecting after the curators have been appointed at the sight of the Court, the petitioner may then apply. I can't see the least foundation for supposing the minor will not exercise her uncontrolled choice. A summons for choosing curators was raised before the petition, which I think must be refused.

Lord Cockburn.—The fact of the service of a summons is a sufficient answer to this petition. If not for that, and we were