review;" and their 8th plea of law (mentioned in Lord Ordinary's interlocutor) was that "the defenders were not bound to satisfy the production of any of the writs called for, and the action should be dismissed, with expenses."

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"*Edinburgh*, 11*th June* 1872.—The Lord Ordinary having heard counsel and made avizandum, and having considered the record and whole process, repels the 8th plea in law for the defenders, and, under reservation of the remaining preliminary pleas to be discussed along with the merits, appoints the defenders to satisfy the production within the next eight days."

The defenders reclaimed.

The SOLICITOR-GENERAL and MONCRIEFF, for them, cited *Shedden* v. *Patrick*, March 11, 1852, 14 D. 721, and *Ramsay* v. *Bruce*, Nov. 30, 1849, 12 D. 243.

WATSON and GUTHRIE SMITH, for the pursuer, were not called upon.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

Agents for the Pursuer—Muir & Fleming, S.S.C.

Agents for the Defender—M'Ewan & Carment, W.S.

Saturday, July 6.

MYLES *v.* AULD & GUILD.

Bankruptcy—Bankruptcy (Scotland) Act, 1856—*Trustee—Creditor—Assignation of Securities.*

A was sequestrated in September 1870, B was appointed trustee in the sequestration, and a creditor C lodged a claim, in which, *inter alia*, certain securities were specified and valued. In November 1870 C realised these securities, and some months afterwards B demanded a conveyance or assignation of the securities under the 65th section of the Bankruptcy Act, 1856. C refused; and in September 1871 B presented a petition to the Court to compel C to assign or convey the securities to him. The Court refused the petition, and *held* that, under section 65 of the Bankruptcy Act of 1856, the trustee is bound to demand the assignation or conveyance in due time, and that, if he fails to do so, the creditor is entitled to realise.

In September 1870 the estates of Mr James Henderson junior, accountant, Dundee, were sequestrated; and Mr David Myles, accountant, Dundee, was elected and confirmed trustee in the sequestration. In September 1871 the said David Myles presented a petition to the Sheriff of Glasgow, setting forth that Messrs Auld & Guild, accountants there, had claimed in the sequestration upon a debt due to them by the bankrupt, amounting to £3169, 16s. 4d., but that, in respect of their holding sixty £10 ordinary shares of the Caledonian Railway Company, belonging to the sequestrated estate, in security of their debt, they valued the security at £147, and after deducting that sum, claimed to be ranked in order to draw a dividend for the balance of their debt—viz., £3022, 16s. 4d., and were duly ranked as creditors for that sum. That the trustee subsequently called upon Messrs Auld & Guild to grant a conveyance or assignation of the security above mentioned, but that they declined to do so; and the trustee therefore craved the Sheriff to ordain them to do so, and that at the expense of the estate, in terms of the 65th section of the Bankruptcy Act.

The defence for Messrs Auld & Guild was:—"At and prior to the sequestration of James Henderson, the defenders had acted as his stockbrokers in Glasgow; and, as they were largely in advance for some weeks before his stoppage, they, for their own protection, and according to the practice of the Glasgow Stock Exchange, when a party is unable to pay for and take up shares, got the sixty £10 shares of the Caledonian Railway now in dispute transferred to their own (defenders') name. Being in their name, the defenders were entitled, according to the rules of the said Exchange, to sell and transfer them, and were liable for all calls made thereon.

"The valuation of said shares made in the claim at £2, 9s. was at that date their *bona fide* market value, but they slowly improved, and have done so ever since. A call was made of £1, 8s. in November 1870, which the defenders were not disposed to pay, and so add to their loss or advances on Henderson's transactions; and accordingly the defenders sold them in the market on 14th November 1870 at £2, 18s. (the purchaser to pay the call), the security having thus realised £174 instead of £147, the amount at which it was valued in the claim.

"The pursuer, as trustee, did not demand an assignation until he found the security was increasing in value, nor did he offer to relieve the defenders of the calls. The price now proposed to be paid is not a payment out of the first of the common fund of the estate, nor have the creditors in this instance been ranked in order to draw a dividend, as it is well known to the pursuer that no dividend can or will be paid out of the estate.

"The defenders are and have all along been willing to credit the estate with the difference between £174 and £147, being the increased value got out of the security, and even assuming that the pursuer was entitled to make the demand for an assignation in February last, not having timeously followed it up, he could only now claim the value as at 4th February (£250), and not a transfer of the shares, which at their current market price are now worth £327."

The Sheriff-Substitute (GALBRAITH) assoilzied the defenders from the conclusions of the summons, and annexed the following Note to his interlocutor:—

"*Note.*—There can be no doubt that the statement of law set forth in the petition is a correct statement, and that had the petitioner timeously made the demand now made, he might have succeeded. But to give effect to the prayer of the petition now would amount substantially to this, that when a creditor valued his security, the trustee was entitled to hold off and play fast and loose, selecting his own time for requiring an assignation of the security, or when the subjects happened to be of greater value in the market. It is very plain that the defenders, Messrs Auld & Guild, who are largely creditors of the bankrupt, were entitled, apart altogether from any rule of the Stock Exchange, but according to the rules of common fair dealing, to protect themselves by realising these shares, if realised in a fair market, and there is no suggestion or statement on the other side that they were not so sold. That being so, it follows that they are entitled to debit themselves, as against their credit on the estate, with the difference between £174 and £147. It would be to the

Sheriff-Substitute's mind an abuse of the bankruptcy statutes to hold that a trustee was entitled at his own will to select the time at which he would call upon the creditors for the assignation of their securities. The right time to ask such assignation is when the claim is lodged, or as soon thereafter as the trustee has to deal with it in ranking; and the fairness of that is very plain, for if the pursuer's contention were a correct one, the trustee would have, during the whole currency of the sequestration, a right to require an assignation, and the creditors who held the securities would have no right, if the contention in this case is sound, to make them in any way available. The Sheriff-Substitute is therefore clearly of opinion that the defenders acted fairly and within the spirit of the statute in dealing with these stocks, and that the petitioner, whether by oversight or other cause, has precluded himself from interfering with the defender's dealing."

The pursuer appealed to the Sheriff.

The Sheriff (H. G. Bell) adhered, and in his interlocutor pronounced, *inter alia*, the following findings:—"Finds that no dividend has been declared to be payable by the bankrupt estate; and it is on the contrary instructed by the state of affairs, No. 5/4, and the minutes in the Sederunt Book, that the whole assets will be greatly more than absorbed by certain preferable creditors: Finds that the pursuer did not follow up his requisition on the defenders by the present judicial procedure, to compel compliance with it, till upwards of seven months, his petition not having been presented till 25th August 1871, by which time the Caledonian Railway £10 shares had so advanced in value that sixty were worth £337: Finds that it is enacted by section 62 of the Bankruptcy Act 1856, that 'it shall be competent to the trustee, with consent of the Commissioners, within two months after an oath specifying the value of a security or obligation or claim has been made use of in voting at any meeting . . . . to require from the creditor making such oath a conveyance or assignation in favour of the trustee of such security, obligation, or claim, on payment of the specified value, with 20 per cent. in addition to such value;' and it is also enacted by section 65, being the first section under the statutory heading of '*Special rules as to ranking for payment of dividend*,' that 'the trustee, with consent of the commissioner, shall be entitled to a conveyance or assignation of such security' (that is the security on which the creditor has put a specified value), 'at the expense of the estate on payment of the value so specified out of the first of the common fund:' Finds that no requisition having been made by the pursuer under section 62, it seems extremely doubtful whether the provisions of section 65, which contemplate payment of the value of the specified security 'out of the first of the common fund,' can be held to come into operation until such fund has been ascertained and set apart for a division by the commissioners, in terms of the 125th section; and in the present case no dividend had been declared at the date of the requisition, nor has even yet been declared, the whole available assets being apparently swallowed up by certain preferable creditors: But, however this may be, Finds that there is nothing in the statute to prevent a creditor, who has in his affidavit valued a security held by him, from afterwards realising said security before the trustee has required an assignation to it, and in point of fact, the defenders did realise the security before any such requisition was made, and have offered to deduct from their claim, in addition to the deduction already made, the surplus value obtained: Finds that this is all they are bound to do, and it is a sufficient answer to the pursuer that what he now asks is *factum impraestabile*, he having no right to claim anything but the security itself, and not its proceeds, and having himself to blame for not having availed himself of his opportunity sooner: Therefore adheres to the interlocutor appealed against, dismisses the appeal, and decerns."

The pursuer reclaimed.

Watson and Balfour, for him, founded upon the 62d and 65th sections of the Bankruptcy Act.

The Solicitor-General for the defenders.

At advising—

Lord President—The prayer of this petition is "to decern and ordain the said Auld & Guild, and the said William Auld and James Wylie Guild, as partners foresaid, respondents, to grant a conveyance or assignation in favour of the petitioner, as trustee foresaid, of the security before mentioned, on payment of the said sum of £147, being the specified value of said security, and that at the expense of the said sequestrated estate, all in terms of section 65th of the said 'Bankruptcy (Scotland) Act, 1856;' reserving the petitioner's claim for loss and damage already sustained, or which may yet be sustained, in consequence of the respondents' wrongously and unwarrantably refusing or delaying to grant the conveyance or assignation above mentioned." Now, there is here no case under the 62d section of the Bankruptcy Act, and there is no tender of 20 per cent. in addition to the value of the security; and we are therefore not called upon to consider what a trustee can do under that section. We have to consider the provisions of the 65th section alone. That section provides, "that 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 the payment of the value so specified out of the first of the common fund." There is here no limitation of the time at which this must be done; and, on the other hand, there is no prohibition in the statute against a creditor holding a security, realising it, and making it available to pay the debt. Now, I hold that, as the statute does not forbid the creditor realising his security, the common law stands by which he undoubtedly is entitled to make his security available. And it is of great importance that it should be so in the class of securities which we have in this case, as they vary in value from day to day,—they may be double the value to day what they will be to-morrow. It would be a very serious matter if creditors holding securities over shares were prohibited for an indefinite period from dealing with these securities, so as to make them available for payment of debt. It is said that if the creditor wants to realise his security he is bound to give the trustee notice. Now, I think that notice is rather necessary on the other side, and that the trustee is bound to make up his mind at once whether or not he is going to take the security, and if he does not intend to do so he ought to give the creditor notice.

As to the terms of the prayer, it is *ad factum*

præstandum, but the thing asked for is sold, and the creditors would have to go to the market and buy new shares. Now, to compel them to do this would be practically to convert an action *ad factum præstandum* into an action for damages.

I am therefore of opinion that we should refuse this petition, but without adhering to the interlocutor of the Sheriff.

Lord Deas—There is here no requisition under the 62d section of the statute, and the action is not founded upon it, but upon the 65th section only. The question is, whether a creditor holding a security is bound to give notice to the trustee before selling the security? and I cannot find in the statute anything to prevent the creditor selling. No time is fixed by the statute within which the trustee must give notice, and the consequence of this is, that if the creditor cannot realise without notice, the time which he is prevented from realising is of indefinite duration. This might often result in the ruin of the creditor, for the creditor might be prevented from realising until the company whose shares he held became bankrupt. This ground is, in my opinion, alone sufficient to decide the question. I am of opinion that we should adhere to the interlocutor of the Sheriff.

Lord Ardmillan—I entirely concur that this petition should be refused. I think that the judgment of the Sheriff is well considered, and that we should adhere.

Lord Kinloch—This question is entirely under the 65th section of the statute. I think that under that section the trustee was bound to demand the assignation in due time, and that if he failed to do so, the creditor was entitled to realise. I also agree with your Lordship in the chair, that, as the creditors had realised, this was a case for an action of damages, and not for specific implement. I am of opinion that we should adhere.

Agent for the Petitioner—Laurence M. Macara, W.S.

Agents for the Respondents—Webster & Will, S.S.C.

Saturday, July 6.

MRS MARY ANNE DOUGLAS, PETITIONER.

Trust—Pupil—Maintenance—Allowance.

Trustees under a trust-disposition and settlement made a yearly allowance to each of two pupil children of the truster of £150, out of an estate worth about £900 a-year after reduction of burdens and necessary payments. The mother, who was also a trustee, presented a petition for the increase of these allowances, on account of the extremely delicate health of the pupils.

The Court refused the petition, and held that the circumstances founded on were not strong enough to warrant the Court interfering with the trustees.

This was a petition at the instance of the widow of the late Mr Douglas of Orbiston, who died in 1866, leaving issue of his marriage with the petitioner a son and a daughter, both in pupillarity, the son being eight and the daughter eleven years of age at the date of the petition. The petition proceeded on the following narrative:—"The said Robert Douglas was, at the time of his death, proprietor in fee-simple of the lands and estate of Orbiston, including the lands of Douglas Park, in the county of Lanark; and he was also fee-simple proprietor of the undivided moiety of an estate in Ceylon, called Sylvakanda. The Orbiston estate is of great value, especially on account of its mineral resources. The gross land rental of the estate, including the rent of the mansion-house furnished, is now, and has been since Mr Douglas' death, about £1390 a-year. The minerals, which consist of coal and ironstone, at present yield £1000 a-year of fixed rent. The mineral rental for the year to Whitsunday 1867 was £400; and for the next year, that to Whitsunday 1868, £700. Since Whitsunday 1868, down to the present time, it has amounted to £1000; and this rental will in all probability be largely increased, as the mineral resources of the estate, which are undoubtedly very large, have as yet been only partially developed." The gross rental of the estate, including minerals, is thus about £2300 a-year, and "the public burdens and interest on debt affecting the estate amount together to £610 a-year, so that the net rental of the Orbiston estate, inclusive of minerals, and of the rent of the furniture in the mansion-house, is about £1780 per annum." By antenuptial contract of marriage with the petitioner, Mr Douglas, who had not then succeeded to the estate of Orbiston, made the following provisions in favour of the petitioner and their children, viz.:—(1) He bound himself to provide and secure £4000 to her in liferent, and their children in fee. (2) He conveyed to her absolutely his household furniture and others, subject to a right of redemption by his heir on payment to her of £400. (3) He bound himself to pay to her £50 for mournings, and *interim* aliment corresponding to the rate of interest on said £4000. (4) The fee of said £4000 is declared to be payable to the children at the first term after the deaths of both spouses, and the majority or marriage of daughters and the majority of sons, and to bear interest from the term of payment. (5) Mr Douglas bound himself, and his heirs, executors, and successors whomsoever, "to aliment, entertain, and educate his said children suitably to their station, until the term of payment of their said provisions, or until they shall be otherwise provided for." (6) The legal provisions of both wife and children are barred.

By his trust-disposition and settlement, and codicils, the said Mr Douglas conveyed his estates in general terms to trustees, who are also appointed his executors. Of these, the petitioner, the Hon. Lord Mackenzie, one of the Senators of the College of Justice, and Alexander Wood, doctor of medicine in Edinburgh, now survive and act. The trust-purposes are the following, viz.:—(1) To pay debts, deathbed charges, and the trust expenses. (2) To pay to the petitioner £250 a-year, in addition to her liferent of £4000 under her contract of marriage. (3) To deliver to her his household furniture and others, for her absolute use. (4) To make payment of certain legacies, amounting in all to about £1000. (5) To hold the residue for his children, in the proportion of two-thirds to his son, and one-third to his daughter.

The trustees are directed, "if necessary, to realize and convert into money my whole estates, heritable and moveable, hereby conveyed, and to divide and allocate the said residue into the shares above mentioned, if there shall be more than one child,