Saturday, November 10.

FIRST DIVISION.

[Bill Chamber, Lord Gifford.

DELVOITTE, DEVER, GRIFFITHS, & COMPANY *v.* JACKSON.

Bankruptcy—Bankruptcy (Scotland) Act (19 *and* 20 *Vict. cap.* 79 *sec.* 91—*Bankrupt's examination.*

Questions put by a creditor to a bankrupt at his statutory examination which the Court *refused* to allow, on the ground that the creditor's object was to show whether the claims of another creditor on the estate were well founded, rather than to settle the exact condition of the bankrupt's estate.

William Montague Baillie, residing at Oban, became bankrupt, and his estate was sequestrated in the year 1877. The Credit Company of London claimed to be ranked as creditors on the estate for a sum of upwards of £33,000, for money lent on various securities. At the statutory examination of the bankrupt before the Sheriff of Midlothian, on the 3d September 1877, Delvoitte, Dever, Griffiths, & Company, also creditors on the estate, proposed to ask the following questions:—"What is the amount of the Credit Company's claim against you? What value did you receive, and what security do the Credit Company hold for it?" These questions were objected to on behalf of the trustee, in respect that the answer to the first was contained in the state of affairs and affidavits, and that the second and third questions amounted to an investigation of a particular claim, and so were contrary to the purpose of the statute.

The Sheriff sustained the objection, and the Messrs Delvoitte, &c., appealed to the Lord Ordinary in the Bill Chamber. His Lordship adhered to the deliverance of the Sheriff, and added the following note to his interlocutor:—

"*Note.*—The Lord Ordinary agrees with the Sheriff that the question objected to, or rather the three questions objected to, are incompetent in the present statutory examination of the bankrupt.

"Although it may sometimes be difficult exactly to define the limits within which the statutory examination of a bankrupt, under section 87 and subsequent sections of the Bankrupt Act, ought to be confined, and although *in dubio* the Lord Ordinary would be disposed to allow considerable latitude to the examining creditors, still there seems to be no reasonable doubt that the examination ought not to be converted into a precognition of the bankrupt upon oath, with the view either of setting up or of cutting down the individual claims of particular creditors who propose to rank upon the estate. See Bell's Com., vol. ii. p. 325 (M'Laren's edition).

"The primary object of the examination undoubtedly is to enable the trustee and creditors to discover and realise the bankrupt's estate for distribution, and although this may occasionally involve questions regarding the validity of the claims of particular creditors, that is not the primary purpose of the examination. At an after period, when the trustee is required to examine the claims of the creditors, and to reject or admit them to a ranking, special power is given to the trustee by another clause of the Act (the 126th) to examine the bankrupt and others relative to the claim, in order to enable the trustee to decide upon their validity. The Lord Ordinary holds therefore that, without attempting to draw the line too finely, the present examination should be confined to explanations regarding the bankrupt's estate and conduct generally, and this for the benefit of the whole creditors; at least that it should not include a precognition at the instance of one creditor specially directed to cut down or to discover grounds for cutting down the claim of another creditor. There would be no limit to the examination if, in the presence of the Sheriff, every creditor were to be allowed to interrogate the bankrupt, not for the purpose of discovering estate or assets, but solely for the purpose of setting up his own claim, or of setting aside the claim of any other creditor in the future ranking. The words of the statute are perhaps a little ambiguous, but a strong indication is given in section 90 of what was intended, for the persons who may be examined other than the bankrupt, are described as those 'who can give information relative to his estate;' and in section 91 they, as well as the bankrupt, are required to answer all lawful questions relating to the affairs of the bankrupt. The Lord Ordinary does not think that this includes questions relating merely to the ranking of the creditors upon the estate when finally realised. It was not averred by the appellants that the bankrupt had refused to be precognosced extrajudicially, and it was stated on the bankrupt's behalf that he was quite ready to give extrajudicially to the appellants any information which they required.

"If the third question objected to had been framed so as to elicit whether the bankrupt had empledged any property either to the appellants or to others, which property is not mentioned or disclosed in the state of affairs, the Lord Ordinary would have allowed that question, and questions to this effect may be put yet."

The appellants reclaimed.

Authorities—*Barstow* v. *Hutcheson*, Feb. 21, 1849, 11 D. 687; *M'Kay* v. *M'Laughlan*, Feb. 24, 1863, 1 Macph. 440.

At advising—

LORD PRESIDENT—In my opinion the interlocutor of the Lord Ordinary is perfectly right. It is sometimes difficult to discriminate between competent and incompetent lines of inquiry, and no doubt the 91st section of the Bankruptcy (Scotland) Act 1856 is stated in somewhat general terms—"The Bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt, and the Sheriff may order such persons to produce for inspection any books, account-papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs," &c. If this section were to be taken in its most extensive sense, the examination might comprehend an examination into the claims of every creditor on the bankrupt estate. The words of the Act really mean that questions are to be put with the view of finding out where the estate of the bankrupt is. But if one creditor is to be allowed to direct attention to the claim of another, and to put questions

affecting the validity of that claim, the examination would soon come to be merely a wrangle among the creditors. So in this case, when the one party had exhausted their ingenuity in casting doubt on the claims of the Credit Company, the Company would come and bring a charge against the party who had opposed them; and so it would really come to be a series of duels between the creditors conducted under the name of an examination.

As to the special circumstances of the case, there are three questions recorded, and the line of examination is clearly nothing but an investigation into the merits of the claim. There are elements in those questions which might, had the questions been differently put, have formed a competent line of inquiry. Had it been asked, "You have received money from the Credit Company. What have you done with it?" the question would have been legitimate. But that is a totally different line of inquiry to the one actually taken, and it has a different object in view, for it is not disguised that the object was to find out whether the claim of the Credit Company is well founded. That object is not legitimate, whereas the other was. On that distinct ground the Lord Ordinary has based his interlocutor, and I consider his conclusion the right one.

Lords Deas, Mure, and Shand concurred.

The Court adhered.

Counsel for Creditors (Reclaimers)—Fraser—Rhind. Agent—W. Officer, S.S.C.

Counsel for the Trustee (Respondent)—Maclean. Agents—Lindsay, Paterson, & Co., W.S.

Saturday, November 10.

SECOND DIVISION.

SPECIAL CASE—NAIRN'S TRUSTEES *v.* MELVILLE AND OTHERS.

Succession—Conditio si sine liberis—*Heritable and Moveable—Implied Intention.*

A testator conveyed his estate to his four children in liferent, and further provided that on the decease of the longest liver of them it should be made over to the child or children of the liferenters "who shall then be surviving, *per stirpes*, in four equal portions or shares, the child of each of my said son and daughters, or in the event of there being more than one, the children of each equally among them, receiving one share." One of the testator's grandchildren, an only child, predeceased the liferenters, leaving a family. *Held* that the share of the estate, now entirely consisting of heritage, which would have fallen to him had he survived the liferenters was divisible among all his children, it being clearly the intention in the testamentary deed that an heir-at-law should not succeed to the exclusion of other children.

Observed that a direction in a testamentary deed to divide an estate which consists entirely of heritage among children indicates an intention to realise.

By trust-disposition and settlement executed by James Nairn, residing in Kirkcaldy, dated 14th February 1845, and recorded 4th February 1847, he disponed all his heritable and moveable estates to certain trustees, with sundry exceptions, and appointed his trustees to be his executors.

The third purpose of the trust was "that the rents and produce of the remainder of my said means and estate shall be paid in equal portions to Michael Nairn, my son, Isabella Nairn or Melville, Agnes Nairn, and Margaret Nairn, my daughters, share and share alike, and failing any of them without children, to the survivor or survivors of them equally, share and share alike, declaring that if any of my said son or daughters, Isabella, Agnes, or Margaret, shall die and leave a child or children, the child, and in the event of there being more than one the children, of each equally shall receive the same share of said rents and produce that would have fallen to the parent if alive," &c.

The fourth purpose provided "that on the decease of the longest liver of my said son and three daughters last named, my said trustees shall convey and make over the whole remainder of my said means and estate to the child or children of my said son Michael and my said daughters Isabella, Agnes, and Margaret, who shall be then surviving, *per stirpes*, in four equal portions or shares, the child of each of my said son and daughters, or in the event of there being more than one the children of each equally amongst them, receiving one share, and in the event of any of my said son or daughters last named dying without leaving a child or children, the share destined to the child or children of such predeceaser shall in like manner be divided amongst the child or children of those who shall have issue *per stirpes* as aforesaid."

The truster died on 19th October 1845, leaving no more moveable estate than was sufficient to pay his debts and the expenses of the trust. He left heritage of the value of about £161. 10s. a-year. The first parties in this case were his trustees.

The truster was survived by three of his children, Michael Nairn, Agnes Nairn, and Margaret Nairn. Isabella Nairn or Melville had predeceased him, leaving an only child, the Reverend Charles Melville. After the truster's death the rents of the trust-subjects were collected and paid equally to Michael Nairn, Agnes Nairn, Margaret Nairn, and the Reverend Charles Melville. Michael Nairn died in 1858, and the share of the rents subsequently falling to him had since been paid over to his children equally. Neither Agnes Nairn nor Margaret Nairn was ever married. After Margaret's death, which took place on 1st January 1874, the rents of the trust-subjects were paid equally to Agnes Nairn, the Reverend Charles Nairn Barker Melville, and the children of Michael Nairn. The Reverend Charles Melville died testate on 25th December 1875, and Agnes Nairn died testate on 17th August 1876, and in consequence of her death the residue of the trust-estate fell now to be conveyed and divided in terms of the foresaid fourth trust-purpose.

The eldest son and heir-at-law of the Reverend Charles Melville was Charles James Melville, aged fifteen, who was the second party to this case. His other children, along with their *curator bonis* and factor *loco tutoris*, were the third parties.