Tuesday, February 28.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILLAR (LORD NAPIER AND ETTRICK'S TRUSTEE) *v.* LORD DE SAUMAREZ.

Bankruptcy—Sequestration—Vesting Order—Tantum et Tale—Bankruptcy Act 1856 (19 *and* 20 *c.* 79), *secs.* 102 *and* 103—*Prior Security.*

The effect of sec. 103 of the Bankruptcy Act is to put the trustee in the same position as regards property acquired by the bankrupt after the date of sequestration as that in which he is placed by sec. 102 with regard to property possessed by the bankrupt at the date of sequestration. The trustee takes the property in both cases *tantum et tale* as it stood in the bankrupt, and it is therefore irrelevant, in dealing with an application for a vesting order under sec. 103, to consider the validity of preferential claims or prior securities asserted by creditors over the bankrupt's estate.

The estates of Lord Napier and Ettrick, who succeeded his father in the title, and in the entailed estates of Thirlestane and others, on December 19th 1898 were sequestrated on December 7th 1894, and Robert Cockburn Millar, C.A., was thereafter confirmed trustee thereon.

On 21st December 1898 the trustee presented a petition under sec. 103 of the Bankruptcy Act 1856, craving the Court "to declare all right and interest in the said entailed estate to which the said . . . Lord Napier and Ettrick became entitled as aforesaid to be vested in the petitioner as trustee foresaid as from the date of the succession thereto of the said Lord Napier and Ettrick."

Answers were lodged by Baron de Saumarez, who averred that he was a creditor on the estate of the bankrupt for £1800 or thereby, and in particular for a sum of £1500 which he had lent to the bankrupt in 1889 on security of a bond and disposition in security granted by the bankrupt to him, dated 12th and recorded in the Register of Sasines 16th January 1889. The respondent also averred that there were presently pending before the Sheriff of Chancery two petitions at the instance of the trustee, one in his own name for infeftment in the entailed estate, and one in that of the bankrupt for service as heir of entail, and a third petition at the instance of the bankrupt himself for service as heir of entail. In these circumstances the respondent submitted "that the petitioner's claim is excluded by the said bond and disposition in security, and by the publication thereof in the Register of Sasines. He further submits that the petitioner is not entitled to insist in this petition in view of the proceedings presently pending before the Sheriff of Chancery, or at all events that said proceedings must be first disposed of. In any view, the respondent maintains that in any procedure to follow upon said petition, or in any order to be pronounced therein, his rights under the said bond and disposition in security should be secured in priority to the petitioner, and that his said rights should be saved and reserved entire."

The bond founded on by the respondent contained an obligation on the part of the granter, immediately on the succession to the lands opening to him, "to make up and establish in my person complete titles thereto." There was also a declaration that "all titles that may be thus or otherwise expede in any person shall *ipso facto* accresce to this bond and disposition in security, which shall be as valid and effectual to all intents and purposes as if granted or renewed after the opening of the succession, or after the completion of such titles." There was a further declaration that the bond should not affect the lands in any way not consistent with the deed of entail under which they were held.

The Bankruptcy Act 1856 (19 and 20 Vict. c. 79), sec. 102, enacts that "The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him or any succeeding trustee for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor to the effect following: . . . 2nd, The whole heritable estate belonging to the bankrupt in Scotland, . . . subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible."

Section 103 enacts that "If any estate, wherever situated, shall after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof or succession thereto for the purposes of this Act." The section further enacts that upon a petition by the trustee the Lord Ordinary "shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee . . . to the same effect as is hereinbefore enacted in regard to the other estates."

Mr William Cargill, S.S.C., to whom the Lord Ordinary remitted the petition and answers, reported as follows:—"It humbly appears to the reporter that the pending petitions before the Sheriff of Chancery have no bearing on the present petition, and that it is unnecessary to qualify the proposed interlocutor as suggested. The petitioner can only take the property *tantum et tale* as it stood upon record; besides, the vesting order bears to be granted in terms of the Bankruptcy Act 1856, under which the rights of creditors are sufficiently protected."

On 28th January 1899 the Lord Ordinary (PEARSON) dismissed the petition.

Note.— . . . "As the compearing creditor's title is a security writ, and the reversion is in the trustee, I should have been disposed to think that the petition might have been granted under reservation (if necessary) of the question of priority, so as to enable the trustee to obtain an active title to what is undoubtedly vested in him, and to try the question of preference in some more convenient process. The argument before me, however, was not conducted upon this footing on either side.

"The petitioner does not assent to such a reservation, and indeed it would not suit his avowed purpose. His object is not to obtain an active title to the reversion, nor even to obtain an active title to the whole, subject to such right as the creditors may be found to have, but to obtain a declaration which he will be able to use in the Chancery proceedings to cut out the creditor by obtaining himself first infeft. In his view it is a race of diligence, his duty to the general body of creditors being to prevent by every means in his power the title of the creditor from being validated *accretione* through the infeftment of the bankrupt.

"Accordingly I address myself to the merits of the question, which were fully argued.

"It seems clear that the sequestration did not carry any interest in the entailed estate to the trustee until the succession opened. Further, the bond and disposition in security was duly published to all concerned by its registration in the sasine register, even although the registration did not operate as an infeftment. It follows that when the trustee on the opening of the succession became vested in the bankrupt's personal right, he did so in the knowledge of the right (still personal) of the creditor in the bond, Now that right was not merely a right to a *spes successionis.* It was that and something more, for it was constituted by a deed which is habile not merely to carry the expectancy, but to carry the eventual right as soon as the succession opened, though that right would remain personal until the bankrupt should be infeft. Further, this is not a case where the creditor has omitted any step which he could have taken to render his right more complete.

"The creditor's case does not depend upon the fact that he holds the bankrupt's obligation to procure himself infeft. If it did, it might be a good answer to him to say that that was a collateral personal obligation, which could not stand against a trustee in bankruptcy. His case is, that he, having a right from 1889 under a deed which the trustee cannot challenge, and the trustee having no right at all until December 1898, when the succession opened, the trustee takes the personal right of the bankrupt under burden of the prior personal right of the creditor. In this view it is not a race of diligence between persons having independent rights, but a restriction on the bankrupt's own interest, which the trustee cannot disregard, and which indeed, on the principle of *tantum et tale*, affects the interest of the trustee. This it is said either bars the trustee from obtaining himself first infeft, which is his object in this petition, or at least furnishes a reason why the Court should not aid him in doing so, and therefore amounts to cause shown why the petition should not be granted.

"But the creditor carries his argument further. He points to the publication of his right in the register of sasines as inferring knowledge on the part of the trustee that this prior title existed; and he maintains that even if the trustee should succeed in procuring himself first infeft, he could not hold to the advantage, on the principle of those cases where a disponee first infeft was obliged to yield to a prior personal right of which he had knowledge.

"To all this I have heard no satisfactory answer on the part of the trustee. It might have been sufficient for him to deprecate the introduction of these questions, and to content himself with moving for such a declaration as would put him in a position to have them decided in another process. But this, as I have said, is very far from being his contention. He objects to any reservation of the question of preference, and asks for a decision of it in his favour now, on the ground that in this way alone can his purpose be effected. Indeed, he goes the length of contending that he already has a real right preferable to the creditor, and merely seeks to have that right declared. This contention is based on the terms of the 102nd section, whereby the heritable estate is vested in him to the same effect as if the several decrees of adjudication there mentioned had been pronounced in his favour, 'and recorded at the date of the sequestration,'—that is (in the present case) at the date of the succession. But this cannot, I think, refer to recording the decrees in the register of sasines, since, as is noted by Professor Goudy in his work on bankruptcy (p. 270), such decrees were not registrable therein for the purpose of infeftment and completion of title until after the date of the Bankruptcy Act 1856.

"The question then is, how is this position to be dealt with? If it had been clear that the petition would result only in the trustee obtaining an active title to enable him to try conclusions with the creditor, I should have granted the prayer. If parties had been agreed as to this, there would have been no difficulty. If the petitioner had so put his case, I should have decided the point—possibly in his favour. But no doubt for sufficient reasons he repudiates this construction of his petition, and will not consent to what (on this hypothesis) would have been the harmless reservation of the question of preference. Nor does the petitioner ask for a sist of the petition if I should not be prepared to grant it *hoc statu.* The creditor indeed suggests, as an alternative to his main argument, that it should be sisted until the issue of the proceedings before the Sheriff of Chancery. But the petitioner does not assent to this, as he desires to use the declaration obtained under the petition as a ground for

getting a warrant from Chancery to procure himself infeft. This being so, and dealing with the petition as importing all that the petitioner says it does, I have no alternative but to dismiss it.

"I think the creditor has shewn cause why it should not be granted *hoc statu*, and the petitioner does not move (even alternatively) that it should be sisted."

The petitioner reclaimed.

The arguments of parties were almost wholly directed to the questions whether the respondent held a good preferential security over the bankrupt's interest in the entailed estate, and whether that security would be ousted by the Court granting decree in terms of the prayer of the petition without any qualification. The petitioner cited *Inglis* v. *Mansfield*, August 10, 1835, 2 S. & M'L. 203, *per* Lord Brougham, 332; *Miller* v. *Wright*, July 5, 1836, 14 S. 1087; *Taylor* v. *Charteris and Andrew*, Nov. 1, 1879, 7 R. 128; and *Reid* v. *Morison*, March 10, 1893, 20 R. 510. The respondent cited *Edmond* v. *Gordon*, Feb. 26, 1858, 3 Macq. 116; *Fleming* v. *Howden*, July 16, 1868, 6 Macph. (H.L.) 113; *Trapes* v. *Meredith*, Nov. 3, 1871, 10 Macph. 38; and *Stodart* v. *Dalzell*, Dec. 17, 1876, 4 R. 236.

Lord President—The 103rd section of the Bankruptcy Act is to be read along with the 102nd section, and it appears when they are considered in that connection that the scheme or system provided is very complete, very logical, and very safe. Section 102 has, by the time we come to section 103, vested in the trustee whatever was in the bankrupt at the date of sequestration. Section 103 contemplates the case of the bankrupt succeeding to something subsequent to the date of sequestration, and as I read section 103, all that it does is to apply the attachment of the estate to this new accession to the bankrupt's fortune. The words of the section are very carefully chosen. They do not profess to make the estate, whatever it is, form part of the sequestrated estate. They merely say that the Court shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee to the same effect as is hereinbefore enacted with regard to other estates.

Now, upon that I observe that the words *tantum et tale* are written across that section — that is to say, there is no attempt to amplify or enlarge what comes to the trustee beyond what the bankrupt had. If the bankrupt has much the trustee has much, if the bankrupt has little the trustee has little. But the effect of the declaration is merely specifically to apply to the new succession the general provision of section 102, and that section declares in so many words that all securities or antagonistic rights shall remain exactly where they were.

In the present case it is common ground that a succession has opened to Lord Napier owing to the death of his father, and thus that he is heir of entail entitled to the lands and estate of Thirlestane. What is the objection to section 103 being given effect to? It is this. Some-one comes forward and says—"I hold a bond for £1500 which was granted by the present Lord Napier when he had merely a *spes successionis*, and he bound himself to infeft me in the lands of Thirlestane when he came into possession of them." If that be his right, he shall have it entirely unaffected by the declaration which we are asked to make. On the other hand, the trustee must at least be allowed to have the reversion after satisfying the creditor's rights whatever they may be. And all that has been argued to us in support of the right of this particular creditor seems to me to be totally beside the question. If you prove that he has much, the trustee will have correspondingly little, but all that the trustee asks is that such right as belongs to the bankrupt shall belong to him. That and nothing more is asked. I confess to thinking that the creditor has exaggerated the importance and misunderstood the effect of this section. He cannot pretend to more than he had in relation to the bankrupt. The trustee is entitled to all that the bankrupt had, and any argument as to the conflict between those rights or their comparative value is not *hujus loci*.

I think therefore that we should recal the Lord Ordinary's interlocutor, and remit to his Lordship to grant the prayer of the petition. I should say that I do not think there is any occasion for us to insert the qualification so anxiously appealed for by the respondent. I think it would be a very unnecessary reflection on the statute, which reserves all rights antagonistic to those of the bankrupt.

Lord Adam—I concur.

Lord M'Laren—Under the 102nd section of the Bankruptcy Act (with which we are much more familiar than we are with the 103rd) it was not considered necessary that the right of the trustee should by an order of Court be made specific as regards the whole property belonging to the bankrupt at the date of the sequestration, although it was not overlooked that questions might arise, for the settlement of which under section 104 a power is given to any person aggrieved to apply to the Court.

But then coming to the property acquired by succession or otherwise during the subsistence of the sequestration, it is reasonable that application should be made to the Court to vest the trustee. There is not the same clearness and certainty regarding what comes to the bankrupt in this way as there is concerning what is possessed at the date of sequestration.

I agree with your Lordship as to the effect of section 103, namely, that it simply puts the trustee in the same position as to property subsequently coming to the bankrupt that section 102 does as to property already belonging to him, and that the trustee takes everything *tantum et tale* as it stood in the bankrupt's person.

I confess I do not share the respondent's apprehensions, because if he has a good title now preferable to that of the trustee, there are ample facilities under the Act whereby

he may validate it, and nothing now done can prevent their exercise.

LORD KINNEAR was absent.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to grant the prayer of the petition.

Counsel for the Petitioner—Campbell—Q.C. — Craigie — Chree. Agents — J. A. Campbell & Lamont, C.S.

Counsel for the Respondent—Clyde—A. A. G. Stewart. Agents—W. & F. Haldane, W.S.

Wednesday, March 1.

FIRST DIVISION.

[Sheriff of Ayrshire.

MURNIN *v.* CALDERWOOD.

Expenses—Process—Stated Case under the Workmen's Compensation Act 1897.

This was a case stated by the Sheriff-Substitute of Ayrshire at Kilmarnock (Hall) under the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), which declares —Schedule II. sec. (14) (c)—that it shall be competent to either party to an arbritation to require the Sheriff "to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session." At the opening of the debate the Court called the attention of parties to the fact that the case, though it stated the facts and the questions of law for the opinion of the Court, did not set forth the determination of the Sheriff upon any question of law as required by the schedule. Parties agreed that the case must go back to the Sheriff for amendment, and the respondent moved that he should be found entitled to expenses, on the ground that the appellant alone was responsible for the form of the case, and that it was not incumbent on the respondent to keep the appellant right. The Court, however (*absente* Lord Kinnear), expressed the view that both appellant and respondent were responsible for the preparation and adjustment of the case, and that neither party was therefore entitled to expenses. The case was accordingly remitted to the Sheriff-Substitute to amend the same by setting forth the question of law determined by him, and his decision thereon.

Counsel for the Appellant—Guy. Agents —Clark & Macdonald, S.S.C.

Counsel for the Respondent — Cook. Agents—Simpson & Marwick, W.S.

Friday, March 3.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ALEXANDER *v.* JOHNSTONE.

Trust—Liability of Trustee for Imprudent Investment — Speculative Investment — Neglect.

A testamentary trustee lent a portion of the trust-funds to the Greenock Harbour Trust, which subsequently became insolvent, upon the security of the rates, duties, revenues, and property of the Trust. The trust authorised loans on debenture bonds of any parliamentary trust in Scotland, and the loan in question admittedly fell within this class.

Held (*aff.* judgment of Lord Kyllachy) that the investment was not a prudent one, and that the trustee was liable to make good the loss accruing thereby to the trust-estate, on the ground that an examination of the accounts of the Harbour Trust at the date when the investment was made would have disclosed that the character of the security for the loan depended upon the success as a commercial enterprise of certain new works which the Trust was about to construct.

Observed also that it was immaterial in these circumstances whether or no the trustee had made investigations into the financial position of the Harbour Trust.

By his trust-disposition and settlement the late Mr Charles Alexander, who died in 1879, conveyed his whole estate, heritable and moveable, to trustees for the purpose, *inter alia*, of paying to his widow such sums as they should think proper for her maintenance and for the bringing up of her children.

The trustees were authorised to invest the trust-estate "upon good heritable property in Scotland . . . or upon any of the Government stock of Great Britain or the United Kingdom, or on debenture bonds of any municipal or parliamentary trust in Scotland." The trust-disposition and settlement contained a declaration that the trustees "shall not be liable for omissions, errors, or neglect of management, nor *singuli in solidum*, but each shall be liable for his own actual intromissions only."

On 16th October 1880 the trustees lent £2000 of trust-funds to the Greenock Harbour Trustees for a period of seven years from the following Martinmas at 4 per cent. They received from the Greenock Harbour Trustees in return therefor an assignment under the Greenock Harbour Act 1872, sec. 34 and sec. 38, sub-sec. (3), purporting to assign to them "all and sundry the rates, duties, and other revenues of the Trust, and the works and property of the Trust, payable or belonging to the Trust."

The Greenock Harbour Trust was announced to be insolvent on 11th May 1887,