King's College of Aberdeen, Feb. 23, 1741. (Elchies voce Trust, No. 11.) Coms. of Berwickshire, June 18, 1678, (1351.) Merchant Company of Edinburgh, Aug. 9, 1765, (5750.) Magistrates and Council of Stirling, July 6, 1774, (5755.) Campbell and M'Intyre, June 12, 1824. (3 Shaw and Dunlop, No. 93.) M'Kenzie's Observations, 1633, c. 6. Town of Edinburgh, July 12, 1694, (9107.) and Nov. 22, 1698.'—Fountainhall.

April 25, 1826.

SPOTTISWOOD and ROBERTSON, JOHN THOMAS, Solicitors.

No. 12.

C. FERRIER and J. WHITE, Appellants.—*Adam—Robertson.*
J. BERRY and his Trustee, Respondents.—*Montague—Keay.*

Bankrupt—Stat. 54. *Geo. III. c.* 137—*Sequestration.*—Held (affirming the judgment of the Court of Session), 1. That an affidavit emitted in relation to a claim on a sequestrated estate, by a bankrupt under sequestration, and not by his trustee, is irregular; and, 2. That after a claim has been rejected, and no complaint made in due time, the party claiming has no right to object to a composition agreed to by the other creditors, but is only entitled to the composition so agreed to in the event of establishing that a debt is due to him.

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1ST DIVISION.

MR BERRY, a merchant in Glasgow, having become bankrupt, his estate was sequestrated, and a trustee chosen. The mode of procedure directed by the statute 54 Geo. III. cap. 137, was followed out; and, at the usual period, the bankrupt, after making offer of a composition of 2s. per pound, amended it by offering 2s. 11d. per pound, payable at fifteen months, and guaranteed by a cautioner. This amended offer the creditors, at a meeting regularly called for the purpose, entertained as reasonable; and thereafter, at a meeting held in terms of the statute, unanimously accepted. A petition was then presented to the Court of Session, praying that the composition might be approved of, the sequestration declared to be at end, the trustee exonered, and the bankrupt discharged. Along with this petition the trustee lodged a report, stating that Berry had complied with the requisites of the statute, and a certificate, that the whole of the creditors who had claimed to be ranked, had, without exception, agreed to accept the offer of composition.

After intimation had been made in usual form, the case was put to the roll, when appearance was entered by Ferrier, trustee on the sequestrated estate of the Scotch Patent Cooperage Company, and by White, one of the partners thereof, who craved

April 25, 1826. and obtained leave to give in answers to the petition for exoneration and discharge.

Previous to his bankruptcy, Berry had been for some time trustee on the sequestrated estate of the Cooperage Company; and after he had managed the trust for some years, he resigned, and Ferrier succeeded him. Neither Ferrier nor White had lodged any claim, or made any appearance, during the proceedings leading to or terminating in the acceptance of the composition offered by Berry; but at this stage a claim was entered, accompanied by an affidavit, emitted not by Ferrier, but by White, who deponed, that 'the said John Berry is justly addebted, resting, and owing to the individual sequestrated estate 'of the deponent, and to the sequestrated estates of the Scotch 'Patent Cooperage Company, and individual partners thereof, 'arising from acts of intromissions and omissions, the sum of '£13,288, 12s. besides interest; independent of which sum, 'from the malversation and misconduct of the said John Berry, 'as trustee foresaid, regarding the patent of the cooperage ma-'chinery, for which £2000 a-year was agreed to be paid, where-'by a loss has been sustained to the said sequestrated estates to 'that amount annually, for upwards of nine years, making in 'whole the sum of £18,000 sterling, besides interest.' This claim was rejected by the trustee and commissioners as vague and unsupported—no particulars being specified, and no vouchers referred to.

Thereafter, a new affidavit was taken by White, claiming the same sum, in the character and on the grounds above mentioned, but valuing and deducting a separate security for above £2700, which had been omitted in the first oath. With this a statement of the items of the claim was given, entitled 'State 'of the claims at the instance of the Scotch Patent Cooperage 'Company, and individual partners thereof.' This claim, also, Berry's trustee and the commissioners rejected, on the ground that 'the statement is vague and unvouched, and appears on 'the face of it to be altogether fallacious.'

Against these judgments so rejecting these claims, neither Ferrier nor White complained. An action of count and reckoning was then raised by Ferrier against Berry, concluding for payment of what balance might appear to be due to him; and on failure to make due count and reckoning, then to pay the sum in the claim and affidavit.

Thereafter, the trustee, in making up a view of Berry's estate at one of the statutory periods, stated the claim to be inadmissible, and against this no complaint was made either by Ferrier

or White. In the meantime, they lodged answers to the petition for exoneration and discharge, and this being followed by replies and duplies, the Court approved of the composition, found Berry discharged of all his debts contracted prior to the date of the sequestration, except as to payment of the composition, and found Ferrier and White liable in the expense incurred in opposing the petition.

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Ferrier and White having reclaimed, 'the Court, on the 4th 'February 1825, refused their petition, reserving to the said 'Charles Ferrier his right to a composition with the said John 'Berry's other creditors in the present sequestration, to such 'amount as he may be able to constitute in his action of compt 'and reckoning against the said John Berry, as former trustee 'on the Scotch Patent Cooperage Company's estates.' *

Lord President.—The main question here is, whether Ferrier is entitled to appear as a creditor in this sequestration. I am satisfied that he has no right to appear. Berry's conduct may have been loose, but I see no ground for imputing anything like fraud. Besides, his conduct as trustee was never complained of to the Court.

Lord Hermand.—I never saw such an attempt as is here made by Mr Ferrier. No oath has been taken by him, and he alone was the competent party to take it. We cannot admit this species of delegation in taking the oath. Such as it is, the oath is very extraordinary. I cannot conceive how any man could have ventured to take such an oath. Besides, the claim was rejected, and this was not complained of, and I think it was properly rejected.

Lord Gillies.—I rather think White was the party by whom the oath was to be emitted. But it is needless to enter upon that point, as the claim has been finally rejected, and therefore no vote in respect of it can be sustained.

Lord Craigie.—I am quite clear that Ferrier, as trustee, was the only party who could competently emit the affidavit. The opposition to this discharge has been very improperly maintained, and has been productive of much injury to the creditors, by depriving them in the meanwhile of their composition, and it has imposed a grievous hardship on the bankrupt.

Lord Balgray.—I am also of opinion that the oath is quite irregular. White was not the proper party to emit it. If Mr Ferrier could not take an oath of verity, why did he not take

* See 3 Shaw and Dunlop, No. 169.

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Ferrier and White appealed.

Appellants.—The Court, unless with the concurrence of nine-tenths of the creditors in number and value, had no power to discharge Berry on payment of a composition. But, adding the appellants' claim to the claims ranked, the concurrence amounted to little more than a half. In support of their claims, the appellants produced the books of the Cooperage Company; and if other documents are awanting, that is the fault of Berry himself, who, while acting as trustee, neglected to make up the requisite inventories, valuations, &c. Besides, where a claimant has not in his power to produce written documents, an oath of verity, and a signed copy of the account claimed, is statutory evidence to the effect of affording a qualification to vote. It was time enough to object when the Court took up the consideration of the trustee's report. The trustee did not, in making up a scheme of ranking and division, reject the appellants' claim, for no such scheme was made up, or dividend declared; and, under the statute, it was unnecessary to complain by petition. It was not imperatively necessary for Ferrier to take the oath. The conduct of Berry himself, rendered it indispensable for White to make the affidavit of verity. Besides, his conduct, both as an individual and trustee, has been so culpable, and marked by such a dereliction of duty, as not to entitle him to a discharge on payment of a composition. It is unwarranted by law and statute, to discharge a judicial trustee upon payment of a composition on his intromissions with the funds of the estate committed to his charge.

Respondents.—The claim is utterly vague, and unsupported by evidence. It resolves into an unliquidated claim for damages, and, in hoc statu, cannot stand in the way of the approval of the composition and discharge. If a sum should be decerned for in the count and reckoning, the appellants will receive their composition, in terms of the reservation in the judgments. Besides, the appellants have not qualified themselves as creditors in the manner required by the statute. Ferrier ought to have taken the oath, and not White, who is not a creditor of Berry.

But even if the claim had been good, it was not brought forward tempestive; and, at all events, its rejection ought to have been complained of by a petition to the Court.

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The House of Lords ordered and adjudged that the interlocutors complained of be affirmed, with £200 costs.

Lord Gifford.—My Lords, there was a case heard in the course of last week, of Ferrier against Berry, in which an appeal was brought to your Lordships against certain interlocutors of the Court of Session; by which interlocutors the Court of Session approved of the composition offered and agreed to, in terms of the bankrupt law; declared, that all proceedings in the sequestration should cease; exonered the trustee of his intromissions; ordained his bond of caution to be given up; found Mr Berry discharged of all debts contracted prior to the date of the sequestration, except as to payment of the composition in terms of the bond, and found the appellants liable in the expense incurred. I will not detain your Lordships, by going at any length into this case, but will only state, that the respondent Mr Berry, having become a bankrupt under the 59th sect. of the statute, to which I have alluded, (54 Geo. III. c. 137,) made a proposition to his creditors, of a composition of 2s. 11d. in the pound. It appears that he had originally proposed a less sum; but at a regular meeting convened under that section, a proposition of 2s. 11d. per pound was made, and was approved of by nine-tenths of the creditors; indeed by all the creditors who were present; and it appears that in pursuance of that section of that statute, Mr Berry petitioned the Court of Session, stating the proposition he had thus made, and praying that the Court of Session would approve of this composition, in terms of the statute.

My Lords, it appears, that Mr Berry had, himself, some years before, been a trustee under a sequestration issued against the property of the Scotch Patent Cooperage Company. Having become trustee in the year 1816, he resigned the office in 1820, and Mr Ferrier, the appellant, became trustee in his stead. It appears, that from the year 1820 to the year 1822, Mr Berry continued to carry on business, when, as I have already stated to your Lordships, he became a bankrupt. No proceedings whatever took place under the sequestration against the Scotch Patent Cooperage Company, to call Mr Berry to account for his intromissions, or his conduct as a trustee. Mr Ferrier, the appellant, who was at that time the trustee, did not take any part at the meeting, which I have stated to have been regularly held at the time the composition was accepted, but on the 1st June 1822, when the Court was about to be moved to approve of the composition and grant a discharge, a claim was lodged with the trustee, together with an oath of verity, in the name of one of the appellants, Mr White, styling himself 'late one of the partners of the Scotch 'Patent Cooperage Company,' which stated a debt to be due to that Company from the respondent Mr Berry, in respect of his intromissions

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and malversations as trustee for the Cooperage Company, amounting to £31,288, 12s. 5d. This was not claimed as for a debt due from Mr Berry in respect of any specific transaction in business, but it was claimed generally, for his intromissions and malversations as trustee under that sequestration—that amount of loss being alleged to have been sustained by his negligence as trustee. It appears that a meeting of the trustee and commissioners was held to take this claim into their consideration, and that they rejected the claim. A second claim was then made, making a deduction of £2700 from the first claim. That claim was also rejected. No petition was preferred to the Court of Session quarrelling with the decision of the trustee and commissioners, but still Mr Ferrier contended, that having this claim against Mr Berry's estate, he was entitled to oppose this composition before the Court of Session, as being (in consequence of his being trustee of this sequestrated estate of the Scotch Patent Cooperage Company) a creditor who had a claim to this amount against Mr Berry.

It will be necessary for me to state to your Lordships the 59th clause of the statute 54th George III. It enacts, 'That in case at the meeting held 'immediately after the second examination of the bankrupt, or at any sub- 'sequent meeting, called by the trustee with consent of a majority of the 'commissioners, the bankrupt or his friends shall make a proposal of com- 'position to the creditors, and shall offer caution to the satisfaction of nine- 'tenths of them, both in number and value, assembled at the said meeting 'for such composition upon his whole debts, as the said nine-tenths in 'number and value, so assembled, shall think just and reasonable, the trus- 'tee shall appoint another meeting, &c.; and if at the meeting so appoint- 'ed, it shall be the opinion of nine-tenths of the creditors there assembled, 'both in number and value, that the offer should be accepted of, a report 'of the proceedings relative thereto, shall be forthwith made up by the 'trustee, and transmitted to the clerk of the sequestration in the Court 'of Session for the approbation of the Court; and if the Court, upon con- 'sidering said report, and hearing any objections that may be stated by 'opposing creditors, shall find the proposition reasonable, and that the same 'has been assented to, not only by nine-tenths in number and value of 'the creditors who attended by themselves, or others authorised by them, 'at the meeting last mentioned, but by nine-tenths of all the creditors who 'have produced grounds of debt, or interests, or oaths of verity, an act or 'order shall be pronounced to that effect, and the bond of caution which 'must be previously lodged in the clerk's hands, shall then be given up 'to the trustee for behoof of the creditors, the whole expense attending 'the sequestration being at the same time paid or provided for, to the 'satisfaction of the Court, by the bankrupt or his friends, after which all 'proceedings in the sequestration shall cease, and the said act or order 'shall declare the trustee exonered, and the bankrupt discharged, except 'as to the payment of the composition.'

Now, my Lords, there is no doubt in this case that the composition had been approved of by the nine-tenths of the creditors who were pre-

sent at the meeting, which had been convened in pursuance of this section of the statute. It appears, that there were creditors to the amount of £50,000 approving of the composition; but it is to be observed, it is not only necessary that nine-tenths of the creditors should approve of the composition, but that the Court of Session should be satisfied that creditors to the amount of nine-tenths had concurred, whether creditors to the amount of nine-tenths had been present at the meeting or not. The question, therefore, in this case before the Court of Session, was, whether, under the circumstances, was this creditor within the meaning of this enactment; did the appellant show grounds for establishing such an interest as entitled him to oppose this composition? Now, my Lords, the Court of Session were of opinion, upon the result of the discussion before them, that this gentleman did not come within this section. They were of opinion, that this claim, on the part of Mr White, was properly dismissed, and they were of opinion, from the nature of the demand in this case, that Mr Ferrier was not entitled to oppose this composition.

My Lords, the 53d section, which relates to the oath of verity, enacts, 'that in every such oath, the creditor deponing shall specify every security he holds for his debt, whether on the estate of the debtor or other obligants, and shall swear that he holds no other security than is mentioned in his oath, otherwise his oath shall not be received by the trustee as sufficient, nor his claim be sustained; and the oaths of verity upon debts required by this act may be taken before any Judge Ordinary, or Justice of the Peace; and, where any creditor is out of the kingdom of Great Britain and Ireland, or is under age, or incapable to give an oath, in all such cases, an oath of credulity by the agent, factor, guardian, or other manager, taken in the same manner, shall be sufficient.' Now, my Lords, in this case, the oath was taken, not by Mr Ferrier the trustee, not by any person describing himself as the agent of Mr Ferrier, but by one of the bankrupt partners; and the majority of the Court of Session say, that that was not sufficient. My Lords, it does appear to me, after the greatest attention to that which has been advanced at your Lordships' bar in this case, that the judgment in the Court of Session was perfectly right; and under all the circumstances of the case, considering that the composition had been accepted by creditors to so great an amount, that the claim of this gentleman, Mr White, had been twice rejected, and that there had been a formal application to the Court of Session, the appellant ought not lightly to have appealed from it. It does appear to me, that he is not a creditor within the language of the 53d section, who has produced grounds of debt, or interest, or oath of verity, to entitle him to oppose this composition.

My Lords, it was further urged at your Lordships' bar, that, even if it were not so, the Court of Session had not exercised a wise discretion in allowing the composition. It is urged at very great length, in these papers, that Mr Berry had misconducted himself most grossly as a trustee under the sequestration against the effects of the Cooperage Company. My Lords, with respect to his conduct as a trustee, no regular complaint

April 25, 1826. appears to have been made against him upon that ground, even during the whole time he continued trustee. But the question in the Court of Session was, whether, under the circumstances of the case, the proposition made by the bankrupt, with the approbation of his friends, was a reasonable proposition, and whether the composition was a reasonable composition. There certainly is nothing presented to your Lordships, upon which you can infer that this was not a reasonable proposition. Under these circumstances, I see no ground whatever for impeaching the decision of the Court of Session; and when your Lordships recollect that this is a case under the bankrupt laws against an individual whose proposition has been approved of by nine-tenths of his creditors, and having been brought before the Court of Session, has been approved of by them, though I think your Lordships will be of opinion, that it is most salutary and useful that your Lordships should possess the jurisdiction of reviewing the decisions of the Court of Session, I apprehend your Lordships will think, whenever such a case is brought before you (unless it be satisfactorily made out on the part of the appellant that the composition offered by the bankrupt is unreasonable), those who have entered into a litigation, and who are not contented with the decision of the Court of Session, but bring the bankrupt, without just cause, to your Lordships' bar, shall not put that bankrupt to expense, but that the appeal shall be dismissed, with costs to be paid by the appellant. I shall therefore humbly move your Lordships, that this judgment be affirmed, with £200 costs.

Appellants' Authorities.—54th Geo. III. c. 137.—2 Bell's Com. 378. 495—Act of Sed. 14 Dec. 1805, § 15.—Fraser *v.* his Creditors, 5th April 1786 (11793)—4 Ersk. 3. 27.—1 Bell's Com. 464.

Respondents' Authorities.—2 Bell's Com. 360. 376. 494.—vol. i. 565.—Ronald M'Nicol, 1821.

RICHARDSON & CONNELL—MONCRIEFF & WEBSTER—Solicitors.