Saturday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WRIGHT *v.* GUILD (JOHN INNES WRIGHT & CO'S TRUSTEE).

Bankrupt — Examination — Trustee — Bankruptcy (Scotland) Act (19 & 20 *Vic. c.* 79) *sec.* 92—*Delay of Bankrupt's Examination pending Result of Criminal Trial of a Partner—Incriminating Questions.*

It is no ground of objection to a question put during the examination of a partner of a bankrupt firm by the trustee upon the estate that the answer may incriminate another partner of that firm, even when that partner is in custody waiting his trial for an offence arising out of his partnership transactions, and no plea that the examination will tend to the prejudice of the latter will justify its postponement.

Bankrupt—Examination—Discretion of Trustee whether conducted in Public or Private.

The 92d section of the Bankruptcy (Scotland (Act 1856, (19 & 20 Vict. c. 79), leaves it entirely in the discretion of the trustee upon a bankrupt estate to determine whether a bankrupt's examination shall take place in public or in private.

Question, Whether the Court could interfere with the trustee's discretion even upon the allegation that he had acted oppressively.

This was an appeal against a deliverance of one of the Sheriff-Substitutes of Lanarkshire (ERSKINE MURRAY), upon an objection taken to a question put to William Scott in the course of his examination as a bankrupt. Mr Scott was a partner of the firm of John Innes Wright & Co., whose estates were sequestrated on 23d October 1878. Mr J. Wyllie Guild was subsequently appointed trustee. Mr Scott appeared for examination before the Sheriff on November 21st, 1878. at which date his partner, Mr Wright, was in custody upon a charge of theft, fraud, &c., alleged to have been committed by him as a director of the City of Glasgow Bank. Mr Wright appeared at the diet of examination by a procurator, and moved for an adjournment of the examination till after the result of the criminal trial, but the motion was refused. Mr Scott on examination deponed that his firm was in debt to the bank to the amount of £297,950.

The trustee subsequently put the question—What is the first account, in the aggregate amount, of £291,914, 3s. 1d.? It was objected for Mr Scott that this line of examination might inculpate him, but the objection was repelled: thereupon it was objected, for Mr Wright, that the line of examination might incriminate him, and an adjournment was asked for as before. This the Sheriff-Substitute refused to grant, and an appeal was taken for Mr Wright.

No appearance was made for Mr Scott in the Court of Session. Counsel for the appellant in that Court asked as alternative to an adjournment that the examination should proceed in private, and contended that the terms of the 92d section of the Bankruptcy Statute plainly indicated that an examination should as a rule be conducted in private. The clause of the section in question bore, that "if the trustee shall make an application to that effect, the bankrupt and such other persons shall be examined in open court." Mr Scott had no wish to conceal anything.

The respondent argued.—1. The question had no tendency to incriminate any one. 2. If it had, it was immaterial, for the objection was by a third party. *Sawers* v. *Balgarnie*, 17th December 1858, 21 D. 153. The question whether an examination should take place in private or not was left to the discretion of the trustee, and the Court therefore could not interfere, unless there was something amounting to oppression on the trustee's part. There was none alleged here, and the trustee stated that it was for the interest of the estate to hold the examination in public.

At advising—

LORD PRESIDENT—There has been a very strong profession on the part of Mr Scott of a desire to give the trustee all possible information, and the trustee has very fairly admitted that Mr Scott exhibited willingness to do so. But that goes a very little way towards the disposal of the question before us. An objection was taken to the examination on the ground that the question put, or the line of examination which the trustee was about to pursue, was calculated to criminate not the person under examination but his partner. That objection is now departed from, but if it had been insisted in it would have been a sufficient answer to say that the question objected to could not incriminate anyone, and therefore the objection is premature. But the objection now taken is this—it is taken by the partner of the gentleman who is being examined, and is to this effect—"Lest I should be prejudiced by anything said by my partner, I wish his examination postponed till after the criminal trial where I am to be tried for very serious offences, or, if not, I wish his examination to take place in private."

Now, as regards the first proposition, it is quite out of the question. The Sheriff, trustee, and all concerned are bound to go on with the bankrupt's examination on the earliest possible day. Nothing can justify any indefinite or extensive postponement.

The second proposition, that the examination should take place in private, raises a question on the 92d section of the statute. That section is intended to vest in the trustee the discretion of having the examination in public or in private. I do not think the Sheriff has the power of controlling the trustee in the matter, for the words are—"If the trustee shall make an application to that effect, the bankrupt and such other persons shall be examined in open Court." These are words of imperative meaning. I shall not enter on the question whether the Court might interfere if the trustee were using this power oppressively, for there is no suggestion of such misconduct here. Except in a case of that kind, the trustee is clearly master of this question, and he has intimated that it is not for the interest of the bankrupt estate that the examination should take place in private.

LORD DEAS and LORD MURE concurred.

LORD SHAND—The motion made by the appellant's agent was to delay the examination of Mr Scott, and that application was rested on the

ground "that the trustee now proposes to ask questions regarding the details of an account, that account being the subject of a criminal charge against Mr Wright." The objection substantially is that if the witness is allowed to go on something may be said that may be used in a criminal charge, not against the witness but against his partner. Now, it is a valuable provision of our law that a person cannot be called upon to criminate himself, but it is a novel suggestion that a third party—I do not speak of parties in the relation of husband and wife—shall come forward during the examination of a witness and say "this examination shall not proceed, for the evidence of this person may lead to a criminal charge against me." There is no ground whatever in our law for such a proposition.

The only question that remains is whether the examination should proceed in private. This is a question that should be determined by the trustee, and the considerations which have been suggested by the counsel for the appellant might very well and very properly be entertained by the trustee. The Sheriff cannot interfere with the trustee's discretion, and it would be exceedingly difficult, to say the least, for this Court to interfere.

The Court therefore dismissed the appeal.

Counsel for Appellant—J. G. Smith—Dickson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—C. J. Guthrie. Agent—Lockhart Thomson, S.S.C.

Tuesday, December 10.

FIRST DIVISION.

[Lord Adam, Ordinary.

CHRISTIE, PETITIONER.

Entail—Provision to Widow—Aberdeen Act (5 *Geo. IV. cap.* 87), *sec.* 1—*Effect of Mineral Rents in computing Widow's Provisions.*

In estimating the annual rental of an entailed estate for the purpose of ascertaining the amount of the one-third part of the free yearly rent which the first section of the Aberdeen Act allows to be charged thereon as a provision to the widow of an heir of entail, the rent payable under a mineral lease current at the time is to be taken *in computo*, provided it can be said to have a "reasonable permanence."

A mineral lease for twenty-one years, two of which had run at the date of the death of an heir of entail, was thrown up by the tenant in virtue of a break in his favour in the seventh year of its currency, as he found that there were no minerals to work. No new tenant had been found five years afterwards. *Held* that the rent under that lease fell to be taken into account in estimating the annual rent of the estate with a view to fixing the amount of provision to the widow of the deceased heir.

Braithwaite Christie, the petitioner, was heir of entail in possession of the estate of Baberton, and Mrs Christie, the respondent, was widow of Alexander Christie, who died on 7th August 1868, and who was the previous heir in possession of the estate.

In virtue of the powers conferred by the 1st section of the Aberdeen Act, 5 George IV., cap. 87, Mr Alexander Christie had granted in favour of the respondent two bonds of annuity, dated respectively 1st December 1864 and 1st April 1867, which, amounting as they did to £375 yearly between them, exceeded the sum of one-third of the free yearly rent or value of the estate which he was entitled to grant.

The free agricultural rental of the estate amounted to £764, 16s. 8d.; the minerals upon it were let to Mr Gowans by a lease dated 26th January and 2d February 1866. The rent was £200 per annum, the first half-year's rent being payable at Lammas 1867 for the half-year preceding, and the next at Candlemas 1868, and so during the currency of the lease. It was further thereby stipulated that the first year's rent should not be exacted, but that if the tenant removed any minerals from the ground during that period, he should pay £100 in name of rent. The lease further contained a break in the tenant's favour on giving six months' notice prior to any term of Candlemas occurring at the end of the third, seventh, or fourteenth year of the lease.

Mr Gowans in 1870 brought a reduction of the lease, on the ground that the minerals thereby let were not workable to profit. That case was decided against him in the Court of Session, on the ground that by the special terms of the contract he had undertaken the risk of profit; and in the House of Lords, upon that ground, and also upon the further ground that there had been no failure of the subject let, and that there was in law no implied warranty that the subjects should be workable to profit.—*Gowans* v. *Christie*, Feb. 8, 1871, 9 Macph. 485; H. of L., Feb. 14, 1873, 11 Macph. 1. Mr Gowans accordingly took advantage of the second break in the lease, and put an end to it at Candlemas 1873.

The minerals had not since been let, or worked; and the petitioner averred that there were not now, and never were, minerals on the estate capable of being worked to profit, or, in other words, minerals of any yearly value. The respondent averred that there were then, and were now, minerals in the estate of the yearly value at least of the rent paid by Mr Gowans.

So long as Mr Gowans continued to pay rent for the minerals, no question arose between the parties. An annuity of £300 was paid to the widow, as being one third of the yearly rent or value of the estate, but this sum was made up by including the rent paid by Mr Gowans in the yearly rent or value of the estate; and this rent having ceased to be paid, Mr Christie presented this petition to have the annuity restricted to one-third of the rental of the estate, maintaining that the rent should never have been taken into account.

The sum agreed opnu between the parties as the sum falling to be paid to the respondent, if the mineral rent was included, was £300, whereas if it were deducted the sum would be £242, 4s.

The Lord Ordinary (ADAM) allowed an inquiry as to the value and extent of the minerals in the estate, adding a note, which, after narrating the facts, proceeded:—