Friday, January 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MONKHOUSE *v.* MACKINNON.

Bankruptcy—Deliverance of Trustee where no Dividend—Res judicata—*Act* 19 *and* 20 *Vict. cap.* 29, *secs.* 126 *and* 127.

Held, where a trustee proceeding under section 126 of the Bankruptcy Act admitted a claim but declared no dividend, and intimated this deliverance to the creditor, that it was not incompetent for him, six years thereafter, to issue a second deliverance under section 127 declaring a dividend and rejecting the claim.

The following circular to creditors and trustee's deliverance was on 12th August 1874 issued by William Mackinnon, trustee on the sequestrated estates of Hannay & Sons, and of the individual partners of that firm:—

"Sir,—As trustee on the sequestrated estates of Hannay & Sons, ironmasters in Glasgow, as a firm or company, and of Robert Hannay, of Rusco, residing in Ulverston, Lancashire; Robert Hannay jun., ironmaster in Glasgow; and Thomas Hannay, ironmaster there, the individual partners of said firm or company of Hannay & Sons, as such partners and as individuals, I beg to intimate—

(1) That an account of my intromissions with the funds of the estates, brought down to the 28th ult., and states of the funds received and of those outstanding as at the same date, have been made up and examined by the commissioners in said estates, in terms of the statute.

(2) That I have examined the claims of the several creditors who have lodged their oaths and grounds of debt on or before the 28th ult., and made up lists of those creditors entitled to be ranked on the funds of said estates, and also of those whose claims have been rejected in whole or in part.

(3) That the commissioners have postponed the declaration of a dividend until the next statutory period.

"Of all which intimation is hereby given in terms of the statute.

"Annexed I beg to hand you copy of my deliverance on your claim.—I am, Sir, your obedient servant, "WILLIAM MACKINNON, *Trustee.*

"*Copy of Trustee's Deliverance.*

"D. L. M'Allum & Co., iron and commission merchants in Newcastle-upon-Tyne, per affidavit and claim, dated 2d June 1874, claiming to rank for

Acceptance by Hannay & Sons, dated 10th March 1873, at four months, for	£326	9	10
Difference between contract price and price agreed upon to repurchase 4170 tons No. 4 pig iron at 29/ a ton . .	6046	10	0
Carry forward,	£6372	19	10
Brought forward,	£6372	19	10
Difference between contract price and price agreed upon to repurchase 264[4] tons puddled bar at 47/6 . .	627	9	6
	£7000	9	4
Less contra account . .	692	10	7
			£6307 18 9

"*Remarked by Trustee.*

"The trustee admits this claim to a ranking on the funds of the estate under deduction of £4, 15s. 7d., being the rebate of interest at 5 per cent. from the date of sequestration, 28th March, till the due date of bill. "WILLIAM MACKINNON."

On 7th June 1880 Mackinnon as trustee pronounced another deliverance, which was in the following terms:—"In respect that the claim by the National Bank of Scotland, amounting to £4436, 1s. 5d., for acceptances of D. L. M'Allum & Co. to Hannay & Sons, has not yet been withdrawn, the trustee rejects this claim to that extent, and ranks the claimant only for the balance of £1867, 1s. 9d., said acceptances being the true obligation of D. L. M'Allum & Co.; and the same not yet having been retired by them, the same falls to be deducted from their claim as lodged."

M'Allum & Co. had been rendered bankrupt, and G. B. Monkhouse, their assignee in bankruptcy, appealed to the Sheriff against this second deliverance, pleading—"The trustee on the said sequestrated estate having admitted and duly ranked the appellant's claim to the extent of £6303, 3s. 2d., he is not now entitled to alter or modify his judgment, and the deliverance complained of ought to be recalled with costs."

The respondent Mackinnon pleaded, *inter alia*—"No dividend having been declared or paid by respondent, he was entitled and bound to issue the deliverance appealed against, and the same being competent and well founded, the appeal should be dismissed with expenses."

The provisions of sections 126 and 127 of the Bankruptcy Act of 1856 (19 and 20 Vict. cap. 79), upon which the question mainly turned, are quoted in the opinion of the Lord President, *infra.*

The Sheriff-Substitute (ERSKINE MURRAY) pronounced this interlocutor—"Finds that the respondent Mackinnon, trustee on the estate of Hannay & Sons, pronounced at the time required under the 126th section of the Bankruptcy Act 1856 a deliverance in terms of that section, admitting the present claim to a ranking: Finds (2) that the dividend was, however, postponed, and has been indeed postponed for several years, and when at last it has been announced, and the notification under the 127th section fell to be made, the respondent has notified a rejection, for grounds stated by him: Finds (3) that appellant has raised the plea of *res judicata:* Finds in law that on the whole that plea is not well founded; therefore repels the same, allows to both parties a proof of their averments, and to appellant a conjunct probation; grants diligence against witnesses and havers, and assigns the 28th day of January next, at 10·30 a.m., as a diet of proof."

He appended this note:—"The question raised

by the first plea of the appellant, which has been repelled, raises a very difficult point indeed. The difficulty arises from the fact that the statute is at variance with itself. In the course of its progress through the Legislature alterations have apparently been made, the effect of which upon other sections has not been contemplated, and thus arise incongruous results.

"Under the old Act the trustee was not bound, as in the 126th section, to examine the oaths and grounds of debt, and admit or reject them in writing, and draw up lists of the creditors admitted or rejected, unless a dividend was to be made. A difficulty like that in the present case could not have arisen. But under the Act of 1856 the words 'if a dividend is to be made' having been omitted, it became the duty of the trustee, irrespective of the declaration of a dividend, to reject or admit each claim at the time provided for in the 126th section, irrespective of the declaration of a dividend. If the dividend is not postponed, then the trustee's judgment becomes final and conclusive, so far as that dividend is concerned, in fifteen days from the date of the *Gazette* notice of the dividend under the 127th section. But what is the case when, as here, the dividend is postponed? According to the appellant's contention, the admission or rejection of a claim in these circumstances is a 'deliverance of the trustee,' under the 169th section, appealable, and possibly (though of this there may be doubts) even amendable, by the trustee himself within fourteen days, but after that date becoming final. What, then, is the effect of that finality? According, at first sight, to common sense, the trustee's first decision must mean something, and must have some effect; it cannot be mere empty air. It appears to be a judgment applicable to the first dividend, the declaration of which is only postponed. And in this view what is subsequently to be done by the trustee at the time of the actual declaration of the dividend is simply to send a recapitulation or copy of the judgment already pronounced to the claimant. According, on the other hand, to the respondent's contention, the first decision can have no effect at all; the only real admission or rejection being the notification of admission or rejection which under the 127th section the trustee is bound to make to each claimant when he is actually announcing the dividend. There is a great deal to be said for this argument, for it rather appears that under the statute when a dividend is postponed the admission or rejection of each claim falls practically to be made twice; and it would seem strange if it was intended that the decision should be appealed twice with regard to the same dividend. The presumption would certainly be that it was intended that such an appeal should only be made once. If, therefore, it comes to be inquired which of the two is the proper time for an appeal, the Sheriff-Substitute is, on the whole, led to the conclusion that the latter admission or rejection is the proper time, as the Act distinctly lays down that if that second admission or rejection is not appealed, the judgment of the trustee becomes final *quoad* that dividend, while no such statement is included in the 126th section. And if the later period is the real period when any appeals are to be taken, it rather seems that up to that final notification by the trustee he should have power to modify the conclusions at which he had formerly arrived, just as he has in the case of a second dividend. There are some awkward points involved. For instance, if a claim is originally rejected under the 126th section, would the claimant be entitled to lodge a new claim for the postponed dividend? Apparently under the respondent's contention he could, as the first judgment did not really fix the parties entitled to a dividend. But, again, this seems impossible, as the list of the creditors entitled to draw the first dividend is made up by him at the earlier period even though the dividend is postponed; and he apparently has no right to add thereto. Perhaps a solution of the difficulty may be found in the fact that section 126, while providing for admission or rejection, does not provide for any notification of the admission or rejection to the claimant; and it may thus be fairly maintained that the admission or rejection under section 126 is a matter only for the consideration of the trustee and commissioners, with a view to the expediency of the declaration of a dividend, and is not a matter regularly intended for the cognisance of the individual claimant, who is not regularly notified of the fact till the dividend comes to be declared. He has, in fact, nothing to do with the matter till he receives notification under section 127, which he can appeal even though he has taken no notice of an adverse deliverance given under section 126. No doubt it may be answered, that though the later period is the appealing time, all that the trustee should then have done was simply to notify the decision formerly made, and that he has no right under section 127 to examine the oaths at that time at all, or either to admit or reject them. But, on the whole, it seems that if till that time the trustee is not bound to notify his decision to the claimant, he must be held also to retain the power of modifying it. The Sheriff-Substitute has therefore, although with very great hesitation, repelled the plea of *res judicata* and allowed a proof."

Monkhouse appealed to the Court of Session.

The arguments of parties sufficiently appear from the opinions of the Court, *infra*.

At advising—

Lord President—The interlocutor now under review was pronounced upon an appeal from the deliverance of the trustee in the sequestration of Hannay & Sons. The claim disposed of by that deliverance was for £6307, 18s. 9d. on the part of a trustee or assignee in bankruptcy in England on the estate of D. L. M'Allum & Co. The deliverance appealed against bore that—"In respect that the claim by the National Bank of Scotland, amounting to £4436, 1s. 5d., for acceptances of D. L. M'Allum & Co. to Hannay & Sons, has not yet been withdrawn, the trustee rejects this claim to that extent, and ranks the claimant only for the balance of £1867, 1s. 9d., said acceptances being the true obligation of D. L. M'Allum & Co.; and the same not yet having been retired by them, the same falls to be deducted from their claim as lodged."

The appellant in the Sheriff Court stated this as his first plea-in-law—"The trustee on the said sequestrated estate having admitted and duly ranked the appellant's claim to the extent of £6303, 3s. 2d., he is not now entitled to alter or modify his judgment, and the deliverance com-

plained of ought to be recalled with costs." That plea is, as the Sheriff-Substitute represents it, substantially one of *res judicata*. The deliverance of the trustee, which is said to constitute the *res judicata* upon this claim, was issued upon 12th August 1874, and certainly bears to be a deliverance upon this claim of D. L. M'Allum & Co., and to admit the full claim of £6307, 18s. 9d., subject only to a deduction of a rebate of 5 per cent. from the date of the sequestration. The question comes to be, whether upon a construction of the statute that deliverance finally disposed of the claim in so far as the First Division is concerned, and whether the trustee is therefore precluded from reconsidering it?

The position of the sequestration at the time when the first deliverance was pronounced was this—Four months had expired since the date of the sequestration, and the commissioners had proceeded under the 125th section of the statute "to audit his accounts and settle the amount of his commission, and authorise him to take credit for such commission in his accounts with the estate." They had then proceeded to consider whether or not to declare a dividend, and their decision was to postpone it. In the words of the section they are authorised to "declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors." If they resolve that no dividend shall be declared, there are provisions in the 134th section in regard to the manner in which it is to be postponed. That was the conclusion to which the commissioners came, and apparently there was no reason whatever for the immediate disposal of the claims.

It rather seems that the policy of the Bankrupt Statutes generally is, that the trustee should not proceed to consider the claims of creditors with a view to ranking until it has been seen whether the estate is to yield a dividend. If there is to be no dividend, such a proceeding would be only expensive and unnecessary. And accordingly the Bankruptcy Statute of 1839 (2 and 3 Vict. c. 41), sec. 104 (the section corresponding to the 126th section of thel ater statute) enacts, "that if a dividend is to be made, the trustee shall proceed to examine and admit or reject claims, and make up a list of creditors entitled to a dividend." The peculiarity of the 126th section of the later statute is, that the words "if a dividend is to be made" are left out, and the section stands—"The trustee shall also, within the said fourteen days, examine the oaths and grounds of debt, and in writing reject or admit them or require further evidence in support thereof, for which purpose he may examine the bankrupt, creditor, or any other party on oath relative thereto; and in case he shall reject any claim, he shall in his deliverance state the grounds of such rejection, and he shall complete the list of creditors entitled to draw a dividend, specifying the amount of their debts, with interest thereon to the date of sequestration, and distinguishing whether they are ordinary creditors or preferable or contingent, and he shall make up a separate list of any creditors whose claims he has rejected in whole or in part."

It is contended by the appellant that the omission of these words clearly indicates that the Legislature intended that the trustee should proceed to perform the duty imposed by the 126th section whether a dividend was to be declared or not. The question therefore is, whether the trustee did validly and effectually proceed to examine and reject or admit claims, and make up a list of creditors entitled to payment of dividend, and whether accordingly the appellant's claim was then disposed of, so as to preclude the trustee from going back upon the decision he then pronounced, and coming to a different conclusion?

Reading the 126th section by itself, I am not surprised that the Sheriff-Substitute experienced a great deal of difficulty in coming to a determination. But when the 127th section is read along with it, that difficulty seems to me to disappear. When we look at it, we are led to the conclusion that there has been loose, and what I may call rather bungled, legislation upon the matter, but that nevertheless it is not intended that the trustee shall dispose of the claims of creditors until he is ready to declare a dividend. It must be observed that while the 126th section imposes upon the trustee the duty of making up a state of the claims, and provides for his making a deliverance thereupon, it does not contain any provision as to how the deliverance is to be given effect to. It is not provided that there is to be any intimation of it to the creditors. If the 126th section were to be literally followed, the trustee would retain in his own hand the state of claims, and the other materials upon which he has proceeded, and further, the deliverance he has pronounced upon them. If so, there would plainly be no opportunity for creditors to complain against an adverse decision. The only section which provides for an intimation of the deliverance and a right of appeal is the 127th. And when we come to look at it it is quite impossible to hold that anything can be done under it until the dividend is declared. It provides that "the trustee shall, within eight days after the expiration of such fourteen days, give notice, in the *Gazette* published next after the expiration of such fourteen days, of the time and place of the payment of the dividend, and also notify the same by letters put into the post-office on or before the first lawful day after the said fourteen days, addressed to each creditor, in which he shall specify the amount of the claim and proposed dividend thereon, and when he has rejected any claim he shall notify the same to the claimant by letter as aforesaid, which letter shall also contain a copy of his deliverance and specify the amount of the claim; and a certificate by the trustee, or an execution by a messenger or sheriff-officer, that such letters have been put into the post-office shall be sufficient evidence thereof." Let us observe what under this section is the only mode in which a trustee is entitled to make his deliverance thereon to the creditors. It is by sending a post-letter addressed to each creditor, in which the amount of the claim, if it be admitted, and of the proposed dividend thereon, is to be specified; and if it be rejected, it is by sending a letter to that effect, along with a copy of the deliverance rejecting it. It is plainly impossible to comply with that provision till the dividend is declared, because the notice to the creditors is to be of a similar date with the notice in the *Gazette*, and it has, further, to contain the amount of the dividend to be allowed. So, without going further, section 127 proves conclusively that no

deliverance can be intimated until a dividend has been declared. The 127th section therefore cannot come into operation until the declaration of the dividend, and so there is no occasion for the trustee to proceed under the 126th section until that period also. If he were to proceed, that course would be productive of nothing but a latent deliverance, which would be entirely useless.

And when we look further at section 127 the matter is still clearer. It continues—"And if any creditor be dissatisfied with the decision of the trustee, he may appeal by a short written note to the Lord Ordinary or to the Sheriff; but if no such note be lodged with and marked by the Bill Chamber or Sheriff-Clerk (as the case may be) before the expiration of fifteen days from the date of the publication in the *Gazette* of the said notice, the decision of the trustee shall be final and conclusive so far as regards that dividend; and in case the claim have been rejected, such dividend shall be without prejudice to any new claim being afterwards made in reference to future dividends, but which new claim shall not disturb prior dividends." There again we have a form for and conditions of the appeal which the creditor is to have when his claim has been rejected. The appeal must be lodged within fifteen days after notice in the *Gazette* of the time and place of payment of the dividend—a period which can never occur in the present case, according to the appellant's construction of the statute, because there was no such *Gazette* notice published, and the right of appeal would therefore be taken away.

But in answer to that it is contended that the 169th section provides a right of appeal in every case. But that is only where there is no special provision, as in the present case, in which the right is given under the 127th section. It would not be an appeal under the 169th section if it complied with the terms of the 127th, and if it did not comply with the provisions of the 127th section it would not be admissible, because it must be taken within the fifteen days. It is therefore quite clear that until proceedings are taken under the 127th section the creditor has no intimation of the deliverance and no opportunity of appealing. Therefore any proceeding under the 126th section which is not followed out by proceedings under the 127th, and the setting in motion proceedings under the 126th without a dividend being declared, is idle and inconsequent.

I am therefore of opinion that the Sheriffs were right, and that their judgment should be adhered to.

Lord Mure—I am of the same opinion. The question is a very simple one. We are dealing with a statutory matter, and therefore what has been done can be final only if it was done in terms of the statute. At the time when this deliverance was made no dividend had been declared, and as far as I understand no deliverance has yet been declared. Now, it appears to me that what the trustee did was not a statutory proceeding at all, and that there has been no deliverance within the meaning of the provisions of the statute, because no dividend had been declared. The statute authorises a deliverance only when a dividend has been declared. The 123d section provides that the creditor shall produce his oath and grounds of debt two months before payment of the first dividend. Indeed, the whole matter of claims, it is contemplated, shall be determined with reference to a dividend to be declared. The 126th section shows how creditors and their claims are to be dealt with by the trustee with a view to the declaration of a dividend. The 127th makes the proceedings final, provided that a dividend has been declared. I entirely concur in your Lordship's construction of the statute, and need not repeat what you have said.

Now, what has the trustee done? The position of matters has, I understand, not yet reached the point at which a dividend fell to be declared. The National Bank put in their claim, as they were quite entitled to do, under the 123d section, at any time within two months of the declaration of the first dividend. I think it was within the power of the trustee to admit that claim—whether it is a good claim depends on the merits of the case, on which the Sheriff-Substitute has allowed a proof.

Lord Curriehill concurred.

Lord Deas and Lord Shand were absent.

The Court adhered.

Counsel for Appellant—Kinnear—Ure. Agents—Ellis & Blyth, W.S.

Counsel for Respondent—Pearson—Dickson. Agents—J. W. & J. Mackenzie, W.S.

Saturday, January 29.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

ATHYA *v.* CLYDESDALE BANK

Bankruptcy—Trust-Deed—Accession—Conduct of Creditor held not to amount to Accession so as to Bar him from thereafter Insisting in his Full Claim.

A person who had become insolvent granted a trust-deed for behoof of his creditors, among whom was a bank, to which he was indebted on bills current at the date of the trust-deed. The bank did not formally accede to the trust-deed, but lodged a claim with the trustee, who after notice rejected it in respect of the non-accession of the bank. Several years thereafter, but before the bills were prescribed, the bank raised an action against the debtor for their amount. He having by this time been discharged by his other creditors—*held* that the bank had not acquiesced in the trust-deed so as to bar their right of action.

On 28th August 1876 John Athya, sole partner of the firm of John Athya & Company, grain merchant, Glasgow, executed as such sole partner and as an individual a trust-deed for behoof of his creditors in favour of James Wyllie Guild as trustee. The creditors of the firm, with the exception of the Clydesdale Banking Co., to which Mr Athya was indebted to the amount of £12,185, 10s. 5d. on a number of bills granted by him, formally acceded to the trust-deed, which contained a provision that the question of the terms