Counsel for the Petitioner—D.-F. Mackintosh—Dickson. Agent—J. Smith Clark, S.S.C.

Counsel for the Respondents — Sol.-Gen. Robertson—M'Kechnie. Agents—Watt & Anderson, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Sheriff-Substitute, Glasgow.

BRASH AND ANOTHER *v.* HOEY (ARNOTT'S TRUSTEE).

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 90 *and* 91—*Examination of Third Parties.*

A bankrupt, shortly before his bankruptcy, consigned goods to a person, who was examined in the process of sequestration by the trustee. The account sales sent by the consignee to the bankrupt showed that the goods had been consigned on sale or return, but the consignee deponed that he had taken them over at the market price, which he had paid, less "commission and guarantee," to the trustee. *Held* competent for the trustee to ask the consignee how he had disposed of the goods.

The Bankruptcy (Scotland) Act, 1856, provides by section 90 that "The Sheriff may, at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others, who can give information relative to his estate, on oath." . . . Section 91 provides—"The bankrupt and such other persons shall answer all such lawful questions relating to the affairs of the bankrupt." . . .

This was an appeal against a deliverance of the Sheriff-Substitute (ERSKINE MURRAY) at Glasgow, in the sequestration of William Arnott, corn factor, Glasgow.

In the process of sequestration there were examined on the 15th December 1887 before the Sheriff-Substitute, Alexander Brash and F. J. Miller, the individual partners of Alexander Brash & Company, flour merchants, Glasgow and Dublin. In his examination by D. G. Hoey, C.A., Arnott's trustee, Alexander Brash deponed as follows—"I am a flour importer in Glasgow and Dublin. I have been doing business with the bankrupt. We have had a good few transactions, amounting to several thousand pounds. The document now shown me is an account sales of 200 bags of flour. I now exhibit the advice of sale in one of my books. It is as follows:—Wm. Arnott, Esquire, 17th February 1887. We beg to advise sales on your consignment as undernoted, 92 Daluth A., 32/6. There is another entry in the same account sales of 108 bags Daluth A. flour, at 29/6. There is also an advice note for that, but it has come out very faintly in the copy. I also exhibit an entry for these goods in my ledger. Being asked to produce the book from which the ledger was posted—*Depones*—I now exhibit my invoice book. (Q) To whom did you sell these goods?—(A) I took over the goods at the market price. The document now handed to me is an account sales of 200 bags Daluth A. flour, forwarded from Glasgow to Dublin. That was a sale to myself. I took over the flour at the market price, and Mr Arnott never objected to the market price. (Q) What did you do with those goods when you took possession of them?—(A) I have got some of them yet. (Q) I want you to show me the disposal of them in your books?—(A) I have already shown you a statement of the disposal; that is the custom and method of rendering account sales. [The trustee repeated his question, and on the agent for Mr Brash objecting, the Sheriff-Substitute adjourned the diet."] The account sales of this transaction was in these terms:—

"ACCOUNT SALES of 200 bags Daluth A. Flour, forwarded from Glasgow to Dublin, and sold by the undersigned for account of WILLIAM ARNOTT, Esq., Hope Street.

1887.

Feby. 17. By 92 $\frac{9}{10}$ bags Daluth A Flour, at 32/6 per 280 lbs.	£74 15 0	
May 15. By 108 bags Daluth A Flour, at 29/6 per 280 lbs.	79 13 0	
	£154 8 0	
Less 1¼ per cent. of Disc., ..	1 18 7	
		£152 9 5
CHARGES.		
17/2/25/5/87. To Cartage on 92 bags, ..	£0 3 5	
,, Insurance (fire), ...	0 3 10	
,, Postages and Petties, ..	0 3 10	
,, Commission and Guarantee, 2½ per cent., ..	3 16 3	
		4 7 4
Nett proceeds, ...		148 2 1
By Bill, ...		140 0 0
At Wm. A.'s cr., ... E. & O. E.		£ 8 2 1

"*Glasgow, 8th Octoler* 1887.

ALEX. BRASH & Co."

On 25th May 1887 Brash & Company had sent the following advice note to the bankrupt—

"Dublin, 25/5/1887.

"William Arnott, Esq.,
Hope Street, Glasgow.

Dear Sir,—We beg to advise the sale of the undernoted:—

200 0/140 bags Iroquois, at 28s., store and quay.
108 0/140 ,, Daluth A. at 29s. 6d., ,,
100 0/280 sks. Sterling at 25s. 6d.. ,,
100 0/280 ,, Royal Rose at 29s. 6d., ,,
126 0/140 ,, Hertford at 25s., ,,

"The above prices are all per 280 lbs., less the usual 1¼ of discount. A/c sales will follow in due course. The Shipping Coy. stored some 150 bags of the Iroquois, being pressed for room.—Yours faithfully. ALEX. BRASH & Co.
J. M.

"*P.S.*—We have still left to sell for your account
228 0/140 bags Hertford.
250 0/140 ,, Socrates."

With reference to this transaction Mr Brash at his adjourned examination on 27th January 1888, deponed as follows—"Being shown letter of his firm, dated 25th May 1887—*Depones*—That is an advice of sale. That includes the remainder of the 92 Daluth A.—108 bags Daluth A. also mentioned in my former deposition. (Q) Have you any advice that you took any of these goods over?—(A) No. We did not advise Mr Arnott that we took over the goods, but—(Q) But what? [No answer.] There is a discount taken off the price in the account sales No. 51, 1¼, and in addition to the discount there is a guarantee

commission taken off below, 2½ per cent. The object of the guarantee commission is to guarantee the debt, I suppose. (Q) To guarantee you against loss?—(A) To guarantee against loss. That is a charge by me for guaranteeing Mr Arnott against loss by the debtor. (Q) And yet you say that you yourself are the debtor?—(A) That is the usual form. (Q) You still say that you are the debtor, that is for guaranteeing yourself?—(A) I took over the goods."

On 28th December 1887 Brash & Company had written as follows to Arnott's trustee:—"Dear Sir,—As we are balancing our books for the year, enclosed please find our cheque for £42, 19s. 7d., to square Wm. Arnott's a/c.—Yours faithfully, ALEX. BRASH & Co." The trustee replied in these terms:—"Dear Sirs,—On my return to town I have your cheque p. £42, 19s. 7d., on a/c of the estate of William Arnott, corn factor, which came to hand during my absence, and which cheque is placed to your credit.—Yours faithfully, D. G. HOEY, trustee."

To this Brash & Company replied on 12th January 1888 in these terms:—"Dear Sir,—We are in receipt of yours of y'day. Our cheque for £42, 19s. 7d., was sent in settlement of our account, not to a/c of it, and you must either accept it on that footing or return it. The receipt as to credit of a/c is returned herewith.—Yours faithfully, ALEX. BRASH & Co."

On 17th January 1888, the trustee returned Brash & Company's receipt for £42, 19s. 7d.

When in the course of his examination by the trustee Mr Brash deponed that he took over the flour at the market price, the trustee proceeded to put this question—"What did you do with those goods when you took possession of them?" The question was objected to on behalf of the witness on the following grounds—"(1) In respect that it does not relate to the bankrupt's affairs, being with reference to the disposal of the goods after they had been bought in by Mr Brash; (2) that it was urged by Mr Hoey, not in his capacity of trustee, but on the instructions and in the interests of Messrs Kufeke, Morrison, and Barbour, creditors, who were opponents of witnesses' firm, and with the object of prying into the firm's business and obtaining the names of the customers; (3) that the information had been offered to the trustee for his own use, but declined; (4) that all claims by the bankrupt and by his trustee against witnesses' firm had been settled, and the documents were in the trustee's possession; and (5) that the question, if of any value, is an attempt to cut down settled claims."

The Sheriff-Substitute repelled the objections, on condition the trustee consigned the cheque for £42, 19s. 7d.

In the examination of Francis Miller, the other partner of Brash & Company, the same question was put by the trustee, and the objections repeated and repelled by the Sheriff-Substitute.

Brash & Company appealed to the Court of Session under section 170 of the Bankruptcy (Scotland) Act 1856, and prayed the Court to recal the deliverance complained of.

Argued for the appellants—The question asked by the trustee was too inquisitorial, and was not suited for an examination in bankruptcy. It was an attempt to get a precognition under oath of a debtor of the bankrupt, and was not a lawful question under section 91 of the Act of 1856—*Maclaren* v. *Maclehose*, Bell's Oct. Cases, p. 75; *Redpath* v. *Forth Marine Insurance Company*, July 20, 1844, 6 D. 1438; *Pollock* v. *King*, Dec. 3, 1844, 7 D. 172; *Paul* v. *Laing's Trustees*, Feb. 21, 1855, 17 D. 457; *Burnet* v. *Calder*, June 14, 1855, 17 D. 933; *A.B.* v. *Binney*, June 4, 1858, 20 D. 1028; *Sawyers* v. *Balgarnie*, Dec. 17, 1858, 21 D. 153. The appellant was not bound to give the trustee information which might be used against him. It was settled law that such a question could not be put to a creditor of the bankrupt—*Delvoitte & Company* v. *Baillie's Trustee*, Nov. 16, 1877, 5 R. 143. The same rule applied to a debtor. The goods were consigned to the appellants, and were taken over by them at current market rates, and the trustee was not entitled to press his inquiry further.

Replied for the respondent (the trustee)—As a general rule the Court would allow both the trustee and the Sheriff a wide discretion in enquiring as to the whereabouts of the bankrupt's estate, for the process was really a judicial precognition rather than an examination of witnesses. No case could be cited in which such a question was disallowed in the case of a debtor of the bankrupt. The party here was indebted to the bankrupt in about £43, therefore the cases cited by the other side did not apply—they were all cases of creditors, not of debtors. It was relevant and desirable for the trustee to know where these goods had gone to.

At advising—

LORD PRESIDENT—This is a somewhat special case, but the question raised by it is of considerable importance. The appellant Alexander Brash when under examination gave the following evidence—[*His Lordship here read the passages in Brash's evidence given above*].

Now, observe what all this comes to. The account sales show this transaction to be nothing else but a sending of goods on sale or return in the ordinary course of business. 200 bags of flour in all were sold; 92 on 17th February 1887 at 32/6, and 108 on 15th May at 29/6, and the usual charges were made on the proceeds of the sale, and also a commission and guarantee at 2½ per cent. was claimed.

If the account sales are correct, then the transaction was simply a consignation of goods to Brash & Company on sale or return, where the position of the consignee is that only of agent for the sellers.

But then the appellant contradicts himself, because having in his account sales stated that he sold the flour consigned to him in two lots on the 17th of February and the 15th of May for behoof of the bankrupt, he goes on in his evidence to say that he took over the goods himself at the market price. I think in such circumstances the trustee is quite entitled to know where the goods were at the time the appellant was being examined, because it is quite possible that upon inquiry it may be found that these 200 bags of flour really belonged to the bankrupt estate, and that it is the duty of the trustee to follow them and bring them into the sequestration. The trustee may also discover that these goods are really worth more than they are said to have been sold for, or than the market price at the time when they were said to have been sold.

In such circumstances is the trustee not entitled to ascertain from the examination of Brash where these goods at present are? I think he is quite entitled to find this out if he possibly can. Nor is it a sufficient answer to say that any such inquiry is incompetent, because at some future date the subject-matter of the inquiry may become the subject of a litigation. This flour may be the subject of some future litigation, but the possibility of this cannot preclude the trustee from finding out if possible where it at present is stored. In the case of creditors of the bankrupt it is well established that an inquiry of this kind cannot be made, but in the case of debtors it is different. If we refused such an inquiry as is here asked, trustees on bankrupt estates would often find it very difficult if not impossible to recover and bring into the sequestration considerable portions of the estate.

I think in this case we ought to follow the Sheriff-Substitute, and repel the objections to the questions asked by the trustee.

Lord Adam and Lord Kinnear concurred.

Lord Mure and Lord Shand were absent from illness.

The Court refused the appeal.

Counsel for the Appellants—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Respondent—Goudy. Agent—Lockhart Thomson, S.S.C.

Tuesday, March 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.

NICOLSON AND OTHERS (BROWN'S TRUSTEES) *v.* BROWN.

Trust—Title to Sue—Process.

One of eight beneficiaries interested in the fund *in medio* in a multiplepoinding brought for the distribution of a trust-estate, stated as an objection to the condescendence of the fund *in medio* that it did not include a sum of £600 said to be due to the estate by one of the trustees. In answer the trustees explained that they were satisfied they could not prosecute the claim with any hope of success, and produced documents in support of that view, but they offered to give the objector their instance on his finding security for the expenses of the proceedings. *Held* that this was all the trustees could be required to do, and objection *repelled.*

By mutual disposition dated 7th April 1880 Mr and Mrs Thomas Brown disponed their whole estate, heritable and moveable, to David Nicolson and others, as trustees, for the purpose, *inter alia*, of dividing the residue among their children, or their issue, at the death of the surviving spouse. Mrs Brown died on 14th July 1884, and her husband on 18th April 1886, survived by seven children, and the family of an eighth.

After Mr Brown's death it appeared there was a sum of £600, which had been lent by Mr Brown to Mr Nicolson, one of the trustees, and was still due by him at the date of Mr Brown's death, which had not been handed over to the trustees. On inquiry it appeared that the sum was repaid by Mr Nicolson on 13th August 1884, as follows—A sum of £300, 4s. 8d. was retained by Mr Nicolson as the amount due to him by Mr Brown under a bond of caution and relief dated 26th March 1881, and letter of guarantee by Mr and Mrs Brown dated 12th July 1884, whereby Mr Brown had undertaken to be responsible, jointly along with his son Robert Kerr Brown, for any loss that might be incurred in connection with the business of hotel-keeper carried on by him (Robert Kerr Brown) at the Bursar's Hotel, Aberdeen, but that only to the extent of £400. The loss upon that business so long as it was carried on amounted to £600, 9s. 5d., and in terms of the bond Mr Brown's share, which was, however, restricted by Mr Nicolson to one-half of the loss, was satisfied as above narrated. The balance of the debt of £600, being £299, 15s. 4d., was then repaid to Mr Brown by Mr Nicolson, and appeared from Mr Brown's books to have been invested by him in shares of the Distillers' Company, which were included in the inventory of Mr Brown's estate.

The trustees entered into possession and management of the estate on the death of Mrs Brown, and on 22nd October 1884 they held a meeting, at which Mr Brown was present, and gave up a statement of his estate, and of the securities upon which it was invested. These securities were thereupon transferred to the names of the trustees, who thereafter paid the income of them to Mr Brown until his death, as directed by the mutual deed.

On Mr Brown's death, questions having arisen among the eight beneficiaries as to their respective rights, the trustees brought a multiplepoinding, in which the amount of the fund *in medio* as set forth in the condescendence was stated at £2713. There was also a statement in the condescendence giving the amounts of certain advances made to the beneficiaries, with interest thereon, which the trustees proposed to deduct from the shares of residue effeiring to each.

Objections were lodged to the condescendence of the fund *in medio* by Mrs Thomas Brown junior, the widow of one of the children, for herself and her children. She stated her objections under three heads, the second of which set forth that the above mentioned sum of £600 fell to be included in the fund, being an asset of the estate as at the death of Mrs Brown, at which date the trustees entered into possession of the estate. There were allegations that Mr and Mrs Brown had been induced to sign the letter of guarantee of 12th July 1884 under false representations, and there were other averments pointing to a reduction both of that document and of the discharge and settlement of the Bursar's Hotel transactions, which took place on 13th August following.

These averments proceeded upon the ground that previous to these dates Mr Nicolson had granted to Mr Robert Kerr Brown a discharge of the whole liabilities in connection with the hotel, which document was produced. It was further denied that the £299, 15s. 4d. was applied as stated by the trustees.

In answer the trustees produced the documents