COURT OF SESSION.

Thursday, June 18.

FIRST DIVISION.

CALLUM (LAKE'S TRUSTEE), PETITIONER.

Sequestration — Sale by Trustee — Payments to Trustee to Account—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 114, 116, 117.

A trustee in a sequestration sold by direction of the creditors given at the meeting after the examination of the bankrupt, as provided in section 114 of the Bankruptcy Act 1856, heritable property belonging to the estate, the articles of roup being executed by him as trustee. He thereafter induced the purchaser, before the title was delivered, to make him certain payments to account of the price, and absconded, leaving the transaction unsettled. *Held* that the purchaser in settling the price with his successor was entitled to credit for the payments to account, since he was in safety to pay without waiting for a scheme of division to be made up under section 116.

Sequestration—Advances on Security of Heritable Bond — Bankruptcy — Advances subsequent to date of Sequestration.

Advances made on heritable security subsequent to the debtor's sequestration *held* not to be covered by the security.

An investment company made advances to a builder who was about to erect certain buildings, in security of which he granted a cash-credit bond and disposition in security. The builder became bankrupt before the buildings were completed. At the date of his sequestration a portion only of the sum contained in the bond had been advanced to him, but subsequently thereto the investment company employed the remainder of the money agreed to be advanced in completing the buildings. *Held* that the sums expended subsequent to the sequestration were not covered by the security.

In May 1882 Henry Lake, builder, granted to the Standard Property Investment Company, Limited, a bond of credit and disposition in security over ground at Joppa, on which he was about to erect two semi-detached villas; the company agreed relatively thereto to allow him a cash-credit to the extent of £800 under certain limitations and conditions. Lake bound himself to erect two self-contained dwelling-houses on the subjects in terms of plans by architects named, to be completed by 30th September 1882. In the event of his bankruptcy or insolvency the trustee or creditors were not to have the benefit of the cash-credit, and the account was to close. In the event of his death, bankruptcy, insolvency, or neglect to proceed with the work, the company were to be entitled after certain intimation to close the cash-credit account, and sell the subjects in virtue of the powers in the bond of credit and disposition in security, or in their option to complete the buildings, "either wholly or partially, and the sums to be so expended by them, and all interest due thereon, shall form real liens and burdens on the same along with the amount advanced under the cash-credit account declaring that in the event of the said cash-credit being closed as provided for by this article the balance due to the first party shall bear interest at the rate mentioned in the preceding article, and that all sums which may be advanced by the first party on or towards the completion of the said buildings shall bear interest at the same rate."

Lake was sequestrated in December 1882, the villas being still unfinished.

At the date of the sequestration £575 of the agreed on £800 had been advanced by the Company.

G. S. Ferrier was elected trustee. He reported to the creditors that it would require £400 to finish the buildings. He applied to the Company for the balance of the £800. They declined to pay the money to him, but agreed to pay it to the contractors on obtaining an undertaking from them to finish the buildings, and they obtained an undertaking by them on 2nd March 1883 agreeing to finish the work to be done by them respectively "against payment by the Company of the still unadvanced balance of the loan of £800." The company then advanced the sums of £100 on 6th March, and £125 on 4th May 1883. These sums were handed over by the Company to Ferrier conform to receipts signed by him as "George S. Ferrier, trustee," and which bore that these sums were "received by me on behalf of the contractors who have agreed with the Standard Property Investment Company, Limited," and that the sums contained in them "I shall hand to said contractors in payment of work to that amount done in terms of their said agreement."

Ferrier also obtained, on the guarantee of himself and certain of the principal creditors, a loan of £200 from the Commercial Bank, which was to complete the money required to finish the buildings.

The houses having been finished, were by instructions of the creditors, given at the meeting subsequent to the bankrupt's examination, exposed for sale by auction, and James Goldie bought one for £520. The other was subsequently at an adjourned sale sold for £440. By the articles of roup the price was to be payable to "George Sanderson Ferrier, the trustee foresaid, or his successors."

The transaction was not settled at Whitsunday 1883 (when Goldie got possession), and Ferrier informed Goldie that there were difficulties about the title with regard to an allocation of feu-duty, and on the statement that the company were pressing for payment of interest induced him to pay to account on 11th August 1883 £20, and on 25th September 1883 £70, and on 5th February 1884 £150 (in all £240), granting receipts for these sums as trustee in Lake's sequestration.

Ferrier afterwards absconded, and left his affairs in confusion. J. P. Callum, C.A., was appointed trustee in succession to him.

This was a petition by Mr Callum for approval of a scheme of ranking and division of the estate. The scheme gave Goldie no credit for the £240 paid as above-mentioned, and brought out against him a sum amounting with interest from Whitsunday 1883 to £578, 10s. 8d., being the price of the house with interest, and against the purchaser of the other house, including similar interest, £464, 17s. 6d.

Among the liabilities was brought out £898, 18s. 2d. as due to the company, thus giving them credit for the whole advance of £800 with interest.

The Bankruptcy Act 1856 provides by sec. 114—"That if a public sale of the heritable estate [of the bankrupt] be resolved on [at the meeting of creditors held after the bankrupt's examination, or at a meeting called for the purpose], such sale shall be made by auction at the upset price, and in the manner which shall be fixed by the trustee with the consent of the commissioners."

Section 116 provides that "It shall be the duty of the trustee to make up a scheme of ranking and division of the claims of the heritable creditors and other creditors on the price of the heritable estate sold, and such scheme of ranking or division shall be reported by him to the Lord Ordinary or either Division of the Court of Session, and the judgment thereon shall be a warrant for payment out of the price against the purchaser of the heritable estate."

Section 117 provides that "the Court may grant interim warrant for payment out of the price against the purchaser of the heritable estate."

Goldie lodged answers, narrating the large payments by him to Ferrier, amounting as above detailed to £240. He maintained that he was entitled to credit for these payments with periodical interest thereon. He tendered payment of the balance of the price with interest, and of the feu-duty in arrears on receiving a formal title.

The Investment Company also appeared, and contended that the scheme should be approved. They admitted the payments to Ferrier, and contended that they had been lost by his absconding.

Argued for Goldie—This was a sale under sec. 114 of the Bankruptcy Act of 1856, for it was a sale by the trustee, and not by a secured creditor, and the purchaser was bound to pay the price to him, and was entitled in return to obtain a good title. He was entitled to have the sums advanced to the trustee deducted from the price of the house. (2) At the date of the sequestration only £575 was advanced by the investment company, and no sums advanced after the sequestration were covered by the bond. The disposition was only in security of advances prior to the sequestration, and so only the £575 was covered by it.

Argued for the Investment Company—(1) A loss had occurred through Ferrier absconding, which ought to be made good by Goldie, as he should not, under sec. 116, have paid any part of the price except by order of the Court. A scheme of ranking and division should have been prepared before the money was paid. (2) The money advanced after the sequestration was absolutely essential; there would have been no surplus to the bankrupt estate and otherwise.

At advising—

Lord President—This was a sale in terms of the 114th section of the Bankruptcy Act of 1856—that is to say, it was a sale by the trustee alone, and in this respect it differed from a sale completed under the 112th or 113th sections. Under the 112th section a heritable creditor whose right is preferable to the trustee may sell in terms of his security notwithstanding the sequestration, and by the 113th section the sale may take place by the trustee with the concurrence of the heritable creditors, the articles of roup being executed by the trustee with consent of the secured creditor, "and the price shall be paid by the purchaser to the party legally entitled thereto, and in so far as not paid at the time of the delivery of the conveyance it shall be consigned in bank . . . which payment or consignation shall free and discharge the estate sold, and the purchaser, from the security of the consenting creditor, and from all securities postponed to the security of such creditor."

Now, it is clear that none of these provisions can have any application to a sale under sec. 114, and very obviously, because when the sale is by the trustee alone it becomes a simple contract between the purchaser and the trustee, and the payment of the price is made to the trustee, but such a payment will not have the effect of discharging the estate from all its securities in the manner that articles of roup with the consent of creditors under sec. 113 would accomplish. The articles of roup here provided by their third article that payment of the price was to be made to the trustee at Whitsunday 1883, and in such a case when once the price has been paid by the purchaser nothing further remains to be done except to prepare a scheme of ranking and division, and to give effect to any preferences which may be found to exist. That is the duty of the trustee as laid down in the 116th section.

It was contended by Mr Lorimer that the scheme of ranking and division was to be made up by the trustee before the price was paid by the purchaser, and the words upon which he founded in support of this view are to be found at the close of the 116th section, and are as follows:—"And such scheme of ranking and division shall be reported by him to the Lord Ordinary or either Division of the Court of Session, and the judgment therein shall be a warrant for payment out of the price against the purchaser of the heritable estate." Now, I do not find in the words of this section anything to favour the view I have just referred to. I think that this section was intended as a safeguard to a purchaser, that if he made payment upon a scheme of ranking and division, it should be a good payment, and that so far as he was concerned he would be safe, but I cannot see anything in the section which requires that a scheme of ranking and division must be made up before the purchase price can be accepted from the purchaser by the trustee.

Let us now look at the facts of this case. The entry was to be at Whitsunday 1883, up to which time, and indeed for some time after, the trustee was not in a position to tender a good title, or to grant a discharge of the burdens upon the property.

The purchaser was under no obligation to make any payment to account, but he had the money lying ready to hand over whenever he could get its equivalent in the shape of a clear title. To save interest running against him, he made payment in August and September of sums to account amounting in all to £240, and there can be no possible doubt that these payments were made to the trustee as part of the purchase

price of the house, while it is equally clear, I think, that the purchaser in making these payments took it for granted that he would ultimately get a good title and a discharge of the burdens.

In so acting the purchaser did nothing wrong or risky, except in so far as he assumed that the trustee could give him a clear title. If the trustee was not in a position to give a clear title, that became one of the risks he ran in making this payment to account. The purchaser now discovers that there is a heritable security over this property in the form of a cash-credit bond for £800, but that at the date of the bankrupt's sequestration a certain proportion only of that £800 had been advanced, and that the amount due at that date was £525. It appears that the heritable creditors thereafter advanced various sums of money to certain contractors in order to secure the completion of the buildings, and it is now sought to turn these sums so paid into advances covered by the cash-credit bond. That however is a proposal which cannot for a moment be entertained; the only sum which is covered by the bond is the £525, which was advanced to the bankrupt prior to the date of his sequestration.

The decision of your Lordships, if you should be of the opinion I have just expressed, will involve some modification in the scheme of ranking and division submitted by the trustee but I do not anticipate that any difficulty will arise in giving effect to these alterations.

Lord Mure concurred.

Lord Shand—If the view of the various sections of this statute which has been urged upon us on behalf of the Standard Property Investment Company had been a sound one, I should have felt that there was a good deal of force in their argument. It has been urged that sections 116 and 117 are of universal application, and that no payment of the price is to be made by the purchaser until a scheme of ranking and division has been prepared, judgment upon which is to be a warrant for payment against the purchaser of the heritable estate.

I cannot, however, adopt the view taken by the company of the purport of these sections of the statute. I think that these sections were inserted for the protection of purchasers, and in order that interim warrant might on cause shown be granted for the payment of preferable claims out of the price of the estate.

In the ordinary case the trustee grants the disposition, and the purchaser is not bound to wait for a warrant of Court before making payment of the price. Here the purchaser was taken bound to pay the purchase price at Whitsunday, the time specified in the articles of roup. In return for the price he was entitled to have a clear title, in which was included a discharge of the heritable securities on the subjects.

The risk he ran in making advances to the trustee was that he might have, as in the present case, to take the title subject to such securities as might be over it. He so took it, and now he discovers that there is an existing security for £525.

There were certain collateral transactions between the heritable creditors and third parties, but it is impossible that these can in any way be made, as has been suggested, to increase the securities attaching to this heritable subject. It is impossible for the company to maintain here, as they have attempted to do, that these advances by them are to be made good by the purchaser.

Lord Adam—So far as I can see, the purchaser here was entitled, if he had chosen, to have paid the whole of purchase price of the subjects at Whitsunday 1883 under the risks which have been referred to by your Lordships, and especially of his having to be satisfied with such a title as the trustee might be able to give him. It might even happen that the heritable securities might be greater than the value of the subjects, but that is one of the risks he runs in making these advances. The clauses of the statute to which so much reference has been made were clearly intended, I think, for the protection of the purchaser, and did not compel him to keep back the purchase price until the Court ordered payment.

They were intended to meet cases in which the trustee could not, from some cause or other, give a clear title, when matters had, in consequence of a sequestration or otherwise, become complicated, and delay was likely to occur. In such cases the purchaser withholds payment until he sees to whom he ought to pay, but it was never intended that he should be kept from a settlement until such time as a scheme of ranking and division was made up.

On the question as to the amount of the incumbrance upon the subjects here, there can be no possible doubt that it is only the amount which was due on the cash-credit bond at the date of the sequestration, and that alone, that can be charged against the purchaser.

The Court appointed the trustee to amend the scheme of ranking and division in terms of the foregoing judgment.

The trustee subsequently put in an amended scheme of ranking and division, giving Goldie credit for the sums he had paid to Ferrier, and showing credit to the company only for the amount (with interest) which they had advanced prior to sequestration.

The Court approved of the scheme as amended and granted warrant for payment.

Counsel for the Trustee (Petitioner)—A. S. D. Thomson. Agent—Marcus J. Brown, L.A.

Counsel for the Respondent Goldie—W. C. Smith. Agent—J. Stewart Gellatly, S.S.C.

Counsel for Standard Property Investment Company—Lorimer. Agents—Duncan Smith & M'Laren, S.S.C.

Friday, June 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

ALLAN AND OTHERS (HARVIE'S TRUSTEES) *v.* GUILD (KETTLE'S TRUSTEE).

Bankruptcy — Sequestration — Cautioner — Constructive Letter of Guarantee—Indefinite Payment—Ranking.

A bank, in security of cash advances to A, a customer, received a letter of guarantee