

his personal friends since 1860. There is therefore no ground for disturbing the judgment of the Sheriff on this matter; and, on the whole, my view is to remit *simpliciter* to the Sheriff.

The other Judges concurred.

The judgment of the Sheriff was accordingly adhered to.

Agents for Advocators—Jardine, Stodart & Fraser, W.S.

Agents for Respondents—Campbell & Smith, S.S.C.

Saturday, June 29.

FIRST DIVISION.

YOUNG, APPELLANT.

Bankruptcy—Recal of Sequestration—Liberation.

Circumstances in which held that a bankrupt was entitled to liberation.

Thomas Mackenzie Young was imprisoned on the 7th of May 1867, in the prison of Forfar, under diligence at the instance of John Young, for a debt of £11, 18s. 4d. He petitioned for sequestration with concurrence of a creditor to the extent required by law, and on 11th May sequestration of his estates was awarded by the Sheriff-substitute. The bankrupt petitioned for liberation under section 45 of the Bankrupt Act, 1856. The Sheriff-substitute, after hearing the incarcerating creditor, who opposed the liberation, on 6th June granted warrant of liberation. On 18th June John Young, the incarcerating creditor, presented to the Court a note of appeal against this interlocutor; which note of appeal was sent to the summar roll. Thereafter, on 21st June, he presented a petition for recal of the sequestration.

SHAND was this day heard in support of this note of appeal against the interlocutor of 6th June. He contended that the I. O. U. founding the claim of the concurring creditor in the sequestration was signed as a mere fraudulent device to enable the bankrupt to get sequestration. A petition for recal of the sequestration had been presented. In the circumstances the liberation ought to have been refused.

MAIR, for the bankrupt, was not called on.

LORD PRESIDENT—The best ground for objecting to the liberation of a bankrupt under the 45th section of the statute is, that there is something fraudulent in his proceedings; and if there were anything of that here, apart from what is said to be the ground of presenting the petition for sequestration, there might be something to be said for the reclamer. But the only thing said is, that the bankrupt has presented this petition as a device to obtain liberation. If that be so on the one hand, it seems to me on the other that the proceedings of the reclamer are for the purpose of keeping the bankrupt in prison. It is just a case of diamond cut diamond. The sequestration here still subsists, and we must assume that it was properly awarded. If the reclamer had timeously presented his petition for recal, that would have been before us, and we would have considered its merits; but standing the sequestration, it would be inexpedient to interfere with the discretion which has been exercised by the Sheriff-substitute in this case.

LORD CURRIEHILL—This is an appeal against an interlocutor pronounced on 6th June, and the question is, Whether it should have been pronounced?

As matters then stood, it was properly pronounced. The ground on which the appeal is now presented is because of an *ex post facto* proceeding, viz., the presentation of an application for recal of the sequestration presented on 29th June, eleven days after this note of appeal against the Sheriff-substitute's interlocutor granting liberation was presented and appointed to be sent to the roll. I cannot hold that to be a good ground for recalling an interlocutor, which was well founded when it was pronounced.

LORD DEAS—I am of the same opinion. When the case came before the Sheriff-substitute, he pronounced an interlocutor on 6th June. There had been a sequestration awarded three weeks before, on 14th May. No objection was taken to that interlocutor at that time, in the only proper way, by applying for recal. But the objection pleaded to the Sheriff-substitute against the petition for liberation was, that the bankrupt had behaved in such a dishonest manner that he was not entitled to liberation; but the Sheriff-substitute thought that objection unfounded, and that is admitted now. The ground now taken by the reclamer is, that six weeks after the sequestration, and three weeks after the interlocutor under review was pronounced, he had applied for recal of the sequestration, and expects to succeed; and he asks us to delay this case till it appear if he can get it recalled or not. I think, if he manage adroitly, the case may not be decided until the Winter Session; and meanwhile, the bankrupt is to be kept in jail. We could only do that on some strong equitable ground, if the reclamer had been using all possible speed. But he has been going on as slowly as he could. The question itself, whether the sequestration ought to be recalled, is one with which we have nothing to do.

LORD ARDMILLAN concurred.

Agent for Appellant—Henry Buchan, S.S.C.

Agent for Respondent—William Officer, S.S.C.

Saturday, June 29.

CUNNINGHAM, NOTE FOR POORS' ROLL.

Poors' Roll. Application for admission to the poors' roll refused.

Walter Cunningham, labourer, asked to be admitted to the benefit of the poors' roll, for the purpose of enabling him to raise an action of damages, for the death of his son, against the proprietors of a brickfield, in whose employment his son was working at the time of his death. The reporters on the *probabilis causa* reported in favour of the petitioner.

A. Nicolson, for the petitioner, grounded his application on poverty and ill-health. The petitioner was now earning 14s. a week; he had four children, two of whom, respectively nine and eleven years of age, were dependent on him for support. The petitioner's health was bad, and his income therefore precarious.

JOHN MARSHALL, for defenders, opposed.

The Court unanimously refused the application.

LORDS DEAS and ARDMILLAN were inclined to hold that where the action to be raised was an action of damages for loss of life by the fault of the defenders, a case which would be one of trouble and difficulty, the application could not be viewed in the same light as if the action were to be one in breach of contract, or one in which the pursuer sought to establish a valuable right of succession.

The LORD PRESIDENT grounded his opinion on this, that the applicant was an able-bodied man in full employment, earning as much money as most labourers in this country.

Friday, June 29.

ADAMSON, HOWE, & CO. v. GUILD AND OTHERS.

Issues—Bankruptcy—Fraud—1696, c. 5—Stoppage in transitu—Sale—Bill of Lading—Indorsation.

A purchased and paid for a cargo of sugar for B, to whom he shipped the cargo and sent the bill of lading. B accepted bills of exchange for the price, but failed to retire them; he became bankrupt, having previously indorsed the bill of lading to C, who indorsed it to D, who again indorsed it to E. In a reduction of these indorsations at the instance of A, as being fraudulent at common law, and in violation of the Act 1696, c. 5, held, (1) that to entitle the seller to succeed in a reduction on either ground, to the effect of recovering the sugar itself or its value as a *surrogatum*, he must prove that he had stopped the sugar *in transitu*, before delivery thereof to the purchaser or any one in his right; and (2) that, as a bill of lading is a negotiable document, the seller, in order to succeed in the reduction as fraudulent at common law, must prove fraud on the part of the indorsee as well as on the part of the indorser.

This was an action of reduction, declarator, and payment at the instance of Adamson, Howie, & Company, merchants at Pernambuco, and James Pender Logan and William Reid, sole partners of the firm, against James Wyllie Guild, accountant in Glasgow, trustee on the sequestrated estate of Stirling, Gordon, & Company, merchants in Glasgow; Andrew M'Ewan, accountant in Glasgow, trustee on the sequestrated estates of John Reid junior & Company, merchants in Glasgow; Walter Grieve, merchant in Greenock; Paul, Sword, & Company, sugar refiners in Glasgow; and Barrie & Johnstone, merchants and store-keepers in Greenock.

It appeared that in November 1864 the pursuers, on the order of Stirling, Gordon, & Company, and on their account, purchased a quantity of sugar which had been shipped on board the "Dante," then lying at Pernambuco and about to sail for Greenock, by Johnston, Pater, & Company merchants in Pernambuco, on account of Barrie & Johnstone, who were owners of the "Dante." The pursuers paid for the sugar and invoiced it to Stirling, Gordon, and Company at the price of £4114, 5s. 8d., which included their commission on the purchase. On 9th. November the pursuers advised the purchase to Stirling, Gordon, & Company, inclosing the invoice and the bill of lading. Stirling, Gordon, & Company received this letter and inclosures on 5th December. They did not pay the price of the sugar, but granted their acceptances therefor, payable 3 months after sight. These acceptances they did not retire. On 10th December Stirling, Gordon, & Company declared their insolvency, and on 17th December their estates were sequestrated, they having previously blankindorsed the bill of lading to John Reid junior & Company. John Reid junior & Company declared themselves insolvent on 24th December, and on 30th December their estates were sequestrated. They had pre-

viously, on 13th December, indorsed and delivered the bill of lading to the defender, Walter Grieve. The pursuers, on 14th December, four days after Stirling, Gordon, & Company declared themselves insolvent, had applied for interdict against these defenders and John Reid junior & Company, using or transferring the bill of lading, and taking possession of the cargo of the "Dante," and had obtained interim interdict. On 22d December Walter Grieve sold the sugar to the defenders Paul, Sword, & Company, and granted them a delivery order. On the 30th December the pursuers applied to the Sheriff of Renfrewshire for an interdict against Bain & Johnstone, in whose stores and name the sugar had been stored on its arrival at Greenock, and against the defenders Grieve and Paul, Sword, & Company, giving or taking delivery of the sugar, or using or transferring the bill of lading. Interim interdict was granted, but eventually, on 10th February 1865, the petition of the pursuers was dismissed. The Sheriff's judgment, however, was advocated, and the advocacy is still in dependence. The sugar was thereafter taken possession of by Paul, Sword, & Company, and manufactured and sold by them.

The pursuers now brought an action against the defenders, concluding for reduction of the indorsations and transferences of the bill of lading, and for payment by the defenders, conjunctly and severally, of the price of the sugar. They pleaded—

1. The pursuers are entitled to decree against the defenders for the value of the foresaid sugars, in respect that the said sugars were stopped *in transitu*, and in respect that the defenders never required any valid or legal right to the said sugars, or to the said bill of lading, or any right which could prejudice or affect the right of the pursuer.

2. The pursuers are entitled to decree against the defenders for the value of the foresaid sugars, in respect that the right thereto was never legally or validly transferred to the defenders, or to any of them.

3. The firm of Stirling, Gordon, & Company, and the firm of John Reid junior & Company were not entitled to take delivery of the said sugar, and could not legally transfer or give any right to the said bill of lading, in respect that they were, to their own knowledge, irretrievably insolvent, and knew that they could not pay for such sugar.

4. The defenders cannot found on the indorsations of the bill of lading, or on any alleged sale of said sugar, and the same ought to be reduced, in respect—1st, That the same were contrary to the Act 1696, c. 5; 2d, That they were fraudulent at common law; and 3d, That they were made and granted, as aforesaid, in execution of a fraudulent device, to benefit the defenders at the cost of the pursuers.

5. The defenders, Paul, Sword, & Company, are not entitled to found on the indorsation, or delivery order, or sale note, in their favour, and the same ought to be reduced, in respect that they obtained the said indorsation, delivery order, or sale note, in their favour, and the possession of the said sugar, in the knowledge of the fraud by which their authors had obtained the said bill of lading, and indorsation thereof.

On 10th July 1866, Peter White was sisted as a defender in the action, as trustee on the estates of John Reid junior & Co., in room of Andrew M'Ewan deceased. The defenders pleaded that the action was irrelevant and that the pursuers were not entitled to issues. The case came before this Court on the adjustment of issues.