shall proceed by arrestment, poinding and sale, and imprisonment where the sum is of sufficient amount as otherwise to make imprisonment competent. The express provisions in that Act appear to us to exclude the pursuer of such an action, or the holder of such a decree, from diligence against heritable estate. The jurisdiction was created by statute, and the manner in which it was to be exercised, and the whole effects, are expressly laid down.

In the Debts Recovery Act it is provided in three different sections—the 9th, 11th, and 12th—all of which relate to decrees under the Act, that the Sheriff may pronounce a judgment, and the decree shall be extracted, as nearly as may be "in the same mode, and shall have the same force and effect, and be followed by the like execution and diligence as a decree obtained under the 13th section of the Small Debt Act." Now that seems to us to fix conclusively that no diligence or execution can follow under the Debts Recovery Act that might not competently follow under the Small Debt Act. We shall therefore instruct the Lord Ordinary to refuse the bill.

The other Judges concurred.

Agent—James Somerville, S.S.C.

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*Thursday, December 5.*

## SECOND DIVISION.

### LINDSAY (LAURIE'S TRUSTEE) *v.* BEVERIDGE, ETC.

*Bankruptcy—Illegal Preference—Act* 1696, *c.* 5. A party purchased certain articles, and obtained delivery, but did not pay the price. The seller, some time after, and in the knowledge of the pursuer's insolvency, then presented a petition to the Sheriff praying for re-delivery of the articles. The buyer entered appearance, and then wrote a letter to the seller, within sixty days of bankruptcy, abandoning his defence, and saying that he might have the articles by sending for them. The Sheriff gave decree in terms of the prayer of the petition. *Held* that both the letter and the decree were illegal preferences, and reducible both under the Act 1696, c. 5, and at common law

The estates of William and Robert Laurie were sequestrated on 25th March 1865, and Mr Lindsay, the pursuer of this action, was appointed trustee. The bankrupts were tenants of the farm of Bellcoman, and also of Bankhead, to the latter of which they entered at Martinmas 1864. On the 28th of October 1864 the defender William Beveridge, acting on behalf of other parties, exposed for sale at Bankhead, by public roup, certain farm stock, &c. At this sale one of the bankrupts bought a horse, two cows, two rollers, and a boiler. The price of these together amounted to £43. He also bought a thrashing mill for £5 by private bargain. Delivery of the cattle was obtained at once, and of the thrashing mill at Martinmas, when the bankrupts entered on the farm. The bankrupts also purchased some manure for £20, which was left on the farm when they entered at Martinmas. No price was asked or paid for all these articles, notwithstanding a condition in the articles of roup that either money was to be paid, or a bill with a sufficient cautioner to be granted. On the 13th January 1865 petitions for sequestration for rent of the bankrupt's farms were presented to the Sheriff, and sequestration was granted. On the 5th of January Mr Beveridge had made the first application for payment of the cattle, &c., purchased from him. He then made an attempt to induce him to return the cattle, &c.; and, this demand not having been complied with, he presented a petition to the Sheriff, praying, *inter alia*, for restoration of the cattle, &c. The bankrupts entered appearance in this process. They were afterwards persuaded to sign a letter in the following terms:—"Bellyconan, by Dunfermline, 13th March 1865. Sir,—Referring to the petition at your instance against us for delivery of a horse and two cows, we beg to state that we have withdrawn our defence, and you may have the animals by sending for them.—Your obedient servants, (signed) Wm. and R. Laurie." The Sheriff, on 14th March, gave decree in terms of the prayer of the petition. Mr Beveridge sent and took away the cattle, &c. The present action concluded for reduction of the letter of 13th March, and of the decree of 14th March, and for delivery of the cattle, &c., or, in case of failure to do so, for their price.

The pursuer pleaded: The letter and decree foresaid having been granted and obtained in defraud of the bankrupt's creditors, and for the purpose of obtaining an illegal preference over the bankrupt's estate, confer no right on the defenders, and the pursuer is entitled to decree of reduction and declarator as concluded for. The said letter and decree being reducible, as preferences under the Act 1695, c. 5, the pursuer is entitled to decree of reduction as concluded for.

A proof was led before the Lord Ordinary (Barcaple), who found that the horse, cows, thrashing-mill, manure-rollers, and the boiler, mentioned in the conclusions of the summons, were, at the dates of the letter and decree sought to be reduced, the property of the bankrupts: that the said letter was granted by the said bankrupts within sixty days of their bankruptcy in favour of the defender William Beveridge, who was their creditor for the price of the horse, cows, and other articles in question, for satisfaction of his debt, in preference to their other creditors; that on 13th March 1865, when the said letter was subscribed by the bankrupts, they were, and were known by the defender to be, insolvent; that, for the purpose of carrying out and giving effect to the said letter and illegal preference, the said defender obtained the said decree; the bankrupts, in terms of the said letter, not insisting further in their defence against the application under which the same was produced: that the said letter was reducable under the Act 1696, c. 5, that the said decree having been obtained in the circumstances, and for the purposes foresaid, and contrary to the legal rights of parties in the property of the said horse, cows, and other articles, the same was reducible at Common Law; reduced, decerned, and declared in terms of the reductive and declaratory conclusions of the libel; and, in respect that the said horse, cows, and other articles had been sold by the defender, and could not be restored to the pursuer, decerned against the defender William Beveridge to make payment to the pursuer, as trustee on the sequestrated estate of the bankrupts, of the sum of £63, 15s. 5d., being the admitted price for which the same were sold. The Lord Ordinary, in his note, explained that the subjects were the property of the bankrupts, and, if so, he did not doubt that the letter was a document falling under the Act 1696, c. 5. He read it as an obliga-

tion by the bankrupts to deliver the animals, and not to insist further in their defence against the the petition—that is, to allow the defender to vindicate his demand for the whole subjects sold, to the prejudice of the other creditors (*Wilson* v. *Drummond* 16 D., 275). It appeared to the Lord Ordinary that the question as to reducing the decree was attended with more difficulty. He did not think the decree itself was a document to which the Act 1696 could be held to apply. If the letter was struck at by the Act the carrying out of the transaction by the bankrupts not resisting the petition, and the defender obtaining decree by default, seemed to be a proceeding for the purpose of giving effect to an illegal preference which the common law will set aside.

The defender reclaimed.

SHAND and HALL for him.

CLARK and LAMOND in answer.

At Advising—

LORD JUSTICE-CLERK—In this case the pursuer seeks to have a letter reduced, and a decree under which the Sheriff-substitute decerned against the pursuers, in terms of the prayer of a petition. Now, the first question we have to decide is, Whether the transaction in question is of such a nature as to pass the property of the subjects sold to the bankrupts. The sale took place on the day of a public auction, some of the things were sold by auction, and some of them by private bargain. Possession of some of these articles was actually taken, and possession of some of them was taken by the fact that the bankrupts came into possession of the farm. So far as the sale was concerned, there was a stipulation that the parties were to forfeit their purchases unless they paid for them or gave bills for three months with approved cautioners for the price. Now, so far as the cattle were concerned, the bankrupts got possession without granting a bill or being asked for the price—possession of the cattle was taken on the day of the sale, and continued till the 5th of January without any demand on the part of the exposers. Mr Beveridge was made aware of the fact that possession had been taken of the cattle about Martinmas, but he must have known it from the first, for he was the person who would have had to provide food for them if they had not been delivered. The first demand for payment was made by Mr Beveridge in a letter dated 5th January 1865, in which he says, "This should have been settled ere now, and I hope you will do so on Tuesday first." This letter is conclusive evidence that the transaction of sale was complete. He seeks payment without any allegation about any unwarrantable delay having taken place. Now that being the case, proceedings are afterwards instituted on the ground that there had been a violation of the articles of sale. The bankrupts have entered on possession of the farm. They actually use the thrashing-mill, and the manure is there for use. They get all the possession that was possible. Mr Beveridge thus becomes an ordinary creditor for the price, and the bankrupt's ordinary debtor. Then Mr Beveridge asks restitution extra-judicially. Mr Laurie refused to give up the articles, as he knew himself to be insolvent at the time, and I think he acted quite properly in doing do. After this, proceedings were instituted in the Sheriff-court, and the letter which is sought to be reduced was written by the bankrupt. Now there is evidence to connect the granting of this letter with the decree, for the letter is produced in the process. Decree might perhaps have been obtained without the letter, but I cannot but regard this letter as an attempt to obtain an undue preference, and it is certain that it was used with this effect. The statement in the letter is, "we have withdrawn our defence, and you may have the animals by sending for them," and the animals were immediately sent for. Under the circumstances, I think that this decree was an attempt by one of the creditors to obtain on undue preference over the other creditors, and I think that it, as well as the letter, is reducible both at common law and under the statute 1696.

The other judges concurred.

Agents for Pursuer—White-Millar & Robson, S.S.C.

Agents for Defender—Hill, Reid, & Drummond, W.S.

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*Friday, December* 6.

## FIRST DIVISION.

### CAMPBELL, PETITIONER.

(*Ante*, vol. iv., p. 84.)

*Proof—Commission—Haver—Search for Documents—Suspension and Interdict.*

Donald Campbell, designed as some time of 20 Devonshire Terrace, Hyde Park, in the county of Middlesex, late lieutenant in Her Majesty's 57th Regiment, and residing in Port-Glasgow, presented this petition to the Court, craving an order upon the trustees and law agents of the late Marquis of Breadalbane to search for and exhibit before Mr J. M. Duncan, advocate, examiner appointed by the Court of Chancery, a number of documents relating to the first Earl of Breadalbane and his family; and, if the Court should think it necessary, a diligence for recovery of the documents, and a warrant to cite the late Earl's trustees and law agents, as havers, to produce the same. The case has been already before the Court on several occasions. In May last the petitioner presented a petition to the Court in virtue of the Act 22 Vict., c. 20, and in pursuance of an order by the Court of Chancery, in a suit at the petitioner's instance for perpetuating testimony, craving an order upon the late Earl's trustees and law agents to appear before the examiner for the purpose of being examined as witnesses for the petitioner in the said suit, and of producing certain documents mentioned in the petition. The Court pronounced an interlocutor appointing the parties named to appear for examination as witnesses, and *quoad ultra* superseded consideration of the petition. In October last Lord Jerviswoode, one of the trustees, appeared for examination, and stated that he had none of the documents called for; and that the trustees would not search for or exhibit the documents called for without judicial authority. Mr Syme, one of the agents of the late Earl's trustees, stated that he had not searched for the documents, not being authorised to do so by the trustees, or ordered by the Court. Mr Cosmo Innes, one of the principal Clerks of Session, was also examined, and stated that he had been in the charter-room in Taymouth Castle, and that from the documents he saw there he considered it very probable that an account of the descendants of the first Earl down to the eighteenth century might be made out. This petition was then presented, and was partly heard on 27th ult., and continued