

the steed was stolen, issuing a proclamation warning parties meddling with the gate that they would be prosecuted criminally.

"May it therefore please your Lordships to cause an investigation to be made into the premises, so that my personal safety may not be further endangered by the misapplication of those justiciary powers conferred upon Sheriff Tait for the repression of crime, but which have been wrongously misapplied, with partial counsel, to screen a great malversation of public funds, or, at least, an exaction which can only be extorted by violence. Your doing so will remove a great scandal which has been thrown upon the administration of law in the county of Perth.—In respect whereof,—ALEX. ROBERTSON."

The complaint having been taken to avizandum, on a subsequent day—

The LORD JUSTICE-CLERK said—This complaint was made in open Court upon the Circuit at Perth, before my brother Lord Cowan and myself, last autumn. The complainer then read to us the petition which is now before your Lordships. It occurred to us at the time that the subject-matter of the petition was of so grave a nature, and involved reference to so many documents, that it would be desirable to have an opportunity of more deliberately considering them, and of having our opinion fortified or corrected by that of your Lordships. We accordingly certified the petition to the High Court, according to ordinary usage.

The question now is, how this petition is to be disposed of by your Lordships? And I am sure that all your Lordships will agree with me in the outset, when I say that it is the right of the subject to be protected against all malversation of justice. Such charges as are contained in this petition are, therefore, not to be lightly dealt with. But neither are they to be lightly made. Accordingly I have given to the petition and the documents produced my most deliberate attention, and I have come to the conclusion that there is not that *prima facie* case which the petitioner submits that he has made out for inquiry, and that he has set forth no relevant grounds for his complaint.

The petition divides itself naturally into four grounds of complaint; 1. That, with reference to the Dunkeld Bridge riot in 1868, the Sheriff had been guilty of oppression and misconduct of justice in precognosing witnesses against the petitioner, and not against other parties. 2. That the Sheriff's procedure with regard to a criminal information against his Substitute was contrary to justice. 3. That the Sheriff had neglected and refused to take certain proceedings against a certain party, and had quashed the same. 4. That the Sheriff had refused to permit a prosecution on the charge of assault committed by certain parties upon the petitioner and others.

Now, on these four points I have formed the following opinion:—That, as to the first, the length of time which has elapsed is a serious impediment in considering the question. In a matter of this point it is not right to let the complaint lie over from circuit to circuit. That is not the use to which the jurisdiction of that Court was intended to be put. It was meant to investigate complaints from circuit to circuit. I do not say that that would exclude the complaint altogether; but after such a lapse of time, the complainer must allege something very glaring and specific, which I consider he has not done. On the merits of this part of his complaint, the petitioner fails to make out any

case whatever. It is no offence that the Sheriff precognosed witnesses against the petitioner, unless an improper motive be alleged. And as to the Sheriff's demeanour at the trial, it would require much more specific allegations than we have here to establish any case for inquiry.

As to the second point, I am at a loss to understand the first objection, that the Sheriff adjudicated upon a complaint that was not before him. There is nothing in the proceedings which are before us to support this; and as to the Procurator-Fiscal refusing his concurrence, I consider he was right in doing so under the circumstances.

On the third head, the Sheriff was entitled to judge of the matter, and I see nothing to shew that he did not do so carefully and properly.

And, in the last head, I find that the Sheriff did make inquiry into the matter, and acted upon the judgment he formed accordingly, and there are no grounds for warranting the supposition that he did not proceed orderly and fairly.

Accordingly, upon these four matters I am of opinion that there are no *prima facie* grounds which would warrant us in ordering an investigation into these allegations. Had I had the whole information before me then that I have now, I would have been for dismissing the petition at once.

The other Judges concurred.

COURT OF SESSION.

Thursday, December 1.

SECOND DIVISION.

SPECIAL CASE—SLOANE AND OTHERS.

Trust Assignment—Insolvency—Prior Creditors—Act 1621, cap. 18, § 1. A trust assignment which had the effect of making the grantor insolvent, granted in favour of trustees for behoof of the grantor's wife and children, and in satisfaction of their claims of *jus relictæ* and *legitim*, held to be reducible at the instance of prior creditors of the grantor so far as to their prejudice.

Essential Error. Circumstances which held not to justify a plea of essential error.

This was a Special Case, in which the parties were Mr John Sloane, commission merchant, of the first part; certain trustees under a post-nuptial assignment for behoof of the first party's wife and children, of the second part; and certain creditors of the first party, of the third part. It was presented in the following circumstances:—On 22d May 1868 Mr Turner of Bothwell died leaving considerable estate, and under the provisions of his deed of settlement the first party, Sloane, succeeded to a share of that estate, uncertain in amount, but which was believed not to exceed £4000. Shortly thereafter Sloane, on the narrative that he had not made any provision for his wife and only child, voluntarily executed a trust assignment in favour of the parties of the second part, whereby he conveyed to them in trust for certain purposes (1) his share or interest in the succession of Mr Turner to the extent of £3000; (2) the balance of said share or interest over and above said sum of £3000, excepting to the extent of £1000. The first purpose was for payment of the expenses of the trust. The second purpose was thus expressed:—

"The said trustees may hold the residue of said funds first and second hereby assigned for behoof of my said wife, for her liferent alimentary use allenarly, during all the days of her life, and exclusive of my *jus mariti* and right of administration; and, after her death, for my liferent alimentary use allenarly, during all the days and years of my life thereafter; and I provide and declare that the said liferent in favour of the said Flora M'Lean or Sloane, and of myself, shall be strictly alimentary, not affectable by the debts or deeds of the liferenter, nor attachable by the diligence of creditors; (3) Upon the death of the survivor of my said wife and me, should we be survived by any lawful child or children of me, the said John Sloane, whether procreated of the present or any future marriage, or their issue, I direct the said trustees to hold the residue of said funds for behoof of my said children jointly with the issue of any predeceaser *per stirpes*, and upon their attaining the age of twenty-one years, in the case of males, and, in the case of females, upon their attaining that age or being married, whichever event shall first happen, to pay over to them their respective shares; (4) In the event of there being none of my children or their issue alive at the death of the first deceiver of me and my said wife, or of their all predeceasing the survivor of us, I direct my trustees to hold the said residue and remainder of said funds for behoof of any party or parties I may appoint, by any writing under my hand, whether *mortis causa* or otherwise; and failing such appointment, then for behoof of the survivor of me and the said Flora M'Lean or Sloane in fee." The trust assignment contained an express discharge of the truster's *jus mariti* and right of administration, and appointed the trustees tutors and curators to any of the beneficiaries under the trust who might be in pupilarity or minority. It also declared that the provision in favour of the truster's wife and children should be accepted by them in full of all claims, whether of *terce*, *jus relictae*, *legitim*, or otherwise competent to them by, at, or through his decease, in any manner of way. The only consideration for the said trust assignment was the foresaid exclusion, and the truster's natural obligation to provide for his wife and family. The deed contained no reserved power of revocation.

The trustees accepted the trust, and intimated the assignment to Mr Turner's trustees on 29th October 1868. They have received from these trustees £3000, and at the same time they have been informed that Mr Sloane's share in the succession will amount to about £5000, and this special case was presented in order that it might be ascertained whether those sums went to the trustees under the trust assignment to Mr Sloane or his creditors.

The effect of the assignment by Mr Sloane was to make him insolvent, and he has been so ever since.

Mr Sloane now maintained that he executed the trust assignment under essential error as to the amount of his share of Mr Turner's succession, and he claimed that the surplus over and above the £4000 should be paid to himself subject to the claims of his lawful creditors. All the parties to the special case admitted that he did not anticipate that any large surplus would revert to him over and above the £4000. It was also admitted that the error under which Mr Sloane laboured did not arise from neglect on his part to use the informa-

tion available to him as to the value of his interest in Mr Turner's succession; but from the intricacy of the calculation necessary to ascertain his interest, and the circumstances that there were pending questions involving an increase or diminution of his interest, and that the estate of Mr Turner had not been then realised, and its value could not be correctly ascertained.

The prior creditors of Sloane, on the other hand, maintained that the trust-assignment must be set aside so far as it affected them, until their debts were paid; both under the statute 1621, cap. 18, and at common law.

The following were the questions of law submitted for judgment:—“(1) Was the error under which the party of the first part admittedly laboured, at the time of granting the said voluntary trust-assignment, of such a nature as to entitle him to have that assignment set aside or restricted, in so far as it disposes of the truster's interest in Mr Turner's succession to any greater extent than the sum of £3000, and such further sum as may be required to defray the expenses of the trust; or is the said assignment now restrictable to any extent; and if so, to what extent? (2) Are the parties of the third part entitled to have the said trust-assignment set aside, in whole or in part, to the effect of obtaining payment of their claims, or part thereof, out of the fund thereby assigned, in preference to the claims of the beneficiaries under said trust-assignment; and if so, to what extent and effect.

M'LAREN for the party of the first part.

H. J. MONCRIEFF for the parties of the second part.

WATSON and MACKINTOSH for the parties of the third part.

At advising—

LORD JUSTICE-CLERK—The opinion I have formed is, that there are no relevant allegations of essential error as inducing the contract. The fact is, that at the time of the settlement the granter was aware of all the facts that could be known. He knew that the amount of the fund was uncertain. Even if it should turn out that the result is not what he expected, that constitutes merely an error of judgment. It is now conceded—as it could not but be—that this deed, having had the effect of making the granter insolvent, cannot have any force against prior creditors.

LORDS COWAN, BENHOLME, and NEAVES, concurred.

The Court found that there was no relevant statement of essential error, and therefore answered the first question in the negative; but, in regard to the second question, they held that the deed, being gratuitous, and granted with the result of making the granter insolvent, it could not be allowed to prejudice the prior creditors of the granter, and consequently answered the second question in the affirmative.

Agents—William Archibald, S.S.C.; J. & R. D. Ross, W.S.; J. & R. Macandrew, W.S.

Friday, December 2.

FIRST DIVISION.

MACANDREW (FRASER'S TRUSTEE) AND OTHERS *v.* JOHN AND DONALD FRASER.

Process—Interim Order—Ultra petita. Where, upon closing the records in conjoined actions