

journey, but that was not at all his position. The damages here given must not be held as for the lost luggage—this £50 awarded by the Lord Ordinary is the consequence of gross misfeasance and mismanagement on the part of the shipowners, it is not for Lieutenant Stevenson's luggage that he was bound to take care of, but he was by the fault of the Steamboat Company placed in a position in which, for his own safety he was obliged to withdraw his care of the luggage, and for the loss caused by that fault he is entitled to claim compensation.

The Court adhered with additional expenses.

Counsel for Pursuers (Respondents)—Mackintosh and Watson. Agents—Dundas & Wilson, W.S.

Counsel for Defenders (Reclaimers)—Solicitor-General (Clark) Q.C. and Balfour. Agents—Macnochie & Hare, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Sheriff of Mid-Lothian.

APPEAL—ROBERT GIBSON NEILL, IN NEILL'S SEQUESTRATION.

Bankruptcy Act 1856, 19 and 20 Vict. cap. 79, § 146.

Circumstances in which a bankrupt applying for discharge in terms of the Bankruptcy Act 1856—held not entitled to discharge.

The estates of Mr Robert Gibson Neill, farmer, were sequestrated in February 1871, and a trustee was appointed. In July 1873, more than two years after the date of his sequestration, he presented a petition to the Sheriff for discharge without consent of his creditors.

The Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—

“*Edinburgh, 18th July 1873.*—The Sheriff-Substitute having resumed consideration of the foregoing petition, with the report by the trustee as to the petitioner's conduct, and other documents produced, and having heard counsel for the petitioner and the agent for the trustee—Refuses, *in hoc statu*, the prayer of the petition.

“*Note.*—When a bankrupt applies for his discharge after the lapse of two years from the date of sequestration, without the consent of creditors, it is essential that the trustee's report as to his conduct, which is held to come in the place of such consent, should be favourable, at least upon the main points specified in the 146th section of the statute.

“In the present case, while the application is presented in the circumstances referred to, the report of the trustee, so far from being favourable, is to the effect that the bankrupt ‘has not made a fair discovery and surrender of his estate; that he has attended the diets of examination, but has failed to make a proper disclosure of the state of his affairs; that he has been guilty of collusion and concealment of his estate; and that the bankruptcy has not arisen from innocent misfortunes or losses in business, sequestration having been awarded on the petition of the bankrupt when he had under his control funds sufficient to have settled with his creditors.’ It is impossible, in the face of such a report, to do otherwise than refuse the discharge.

“In supporting the application, counsel for the bankrupt relied mainly upon the fact that when tried before the High Court of Justiciary in February last upon a charge of fraudulently putting away or concealment of his effects, or fraudulent bankruptcy, the bankrupt was acquitted by the unanimous verdict of the jury. It does not seem to the Sheriff-Substitute that that fact has any real bearing upon the present question.

“At the most, it would suggest a doubt as to the accuracy of some of the statements contained in the trustee's report. The Sheriff-Substitute, however, is well acquainted with the circumstances of the sequestration, the lengthened public examination of the bankrupt having been taken before him, and he is satisfied that the trustee could not have reported otherwise than he has done.

“It appears that, notwithstanding that the bankrupt has thrown every obstacle in the way of the discovery and realisation of the estate, the trustee has succeeded in recovering sufficient funds not only to meet the expenses of the sequestration, but to yield a dividend of 18s. in the pound for the creditors.

“In these circumstances the bankrupt should have no difficulty in overcoming the opposition which the trustee has thought it right, in the interest of the creditors, to make to the present application.”

On August 1, 1873, the Lord Ordinary on the Bills remitted to the Accountant in Bankruptcy to report as to the matters contained in the trustee's report. The accountant concurred with the trustee in holding that the bankrupt's conduct had not been such as to entitle him to discharge.

The bankrupt appealed against the judgment of the Sheriff-Substitute.

At advising—

LORD PRESIDENT—This is an application for discharge by a bankrupt in terms of sec. 146 of the Bankruptcy Act of 1856. It is presented more than two years after the date of the sequestration, and so without the consent of the creditors, but it is indispensable to the granting of such an application that the trustee should report as to the bankrupt's conduct, and it is in the power of the Lord Ordinary, of the Sheriff, or of your Lordships, to discharge the bankrupt, to refuse the application, or to defer consideration of it. Now the points on which the trustee is directed to report are, first, how far the bankrupt has complied with the Act, and has made in particular “a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortunes, or losses in business, or from culpable or undue conduct.” Now the report of the trustee is to the following effect:—“(1) That the bankrupt Robert Gibson Neill has not made a fair discovery and surrender of his estate. (2) That he has attended the diets of examination, but has failed to make a proper disclosure of the state of his affairs. (3) That he has been guilty of collusion and concealment of his estate. (4) That the bankruptcy has not arisen from innocent misfortunes, or losses in business, sequestration having been awarded on the petition of the bankrupt when he had under his control funds sufficient to have settled with his creditors. The bankrupt has sustained losses through speculation in the shares of ‘bubble companies,’ but such losses, so far as disclosed, do not

exceed the funds and capital which he admittedly possessed." Now that is a very serious report; I think about the most unfavourable report I ever saw, and the great weight which must always be given to the trustee's report is in this case increased by the Sheriff-Substitute, for he says that he "is well acquainted with the circumstances of the sequestration, the lengthened public examination of the bankrupt having taken place before him, and he is satisfied that the trustee could not have reported otherwise than he has done." Besides this, we have had a full enquiry by the Accountant in Bankruptcy, and it is enough that in the main features of his report he concurs with the trustee. This, therefore, is a very unfavourable case for the bankrupt. The trustee seems to be of opinion that there never was any reason for a sequestration at all, and he has shown, I think clearly, that even if no more funds had been recovered, there were still assets enough to have paid the creditors in full. The effect of these proceedings in bankruptcy must have been to create a great deal of expense, and of this expense the bankrupt has complained. He has only himself to thank for it, but the effect of it has been to render the estate insolvent to a small extent. The trustee is still of opinion that more funds may be recovered, and I am not inclined to differ from him, nor to allow the bankrupt's interest to prevail as against his creditors. The case which was referred to, *Cooper v. Fraser*, decided in the Second Division, November 5, 1872, 11 Macph. 38, is at first sight rather startling, for in that case the bankrupt had been convicted on a criminal charge, but the circumstances in that case were very different, for the trustee's report was entirely in his favour. The bankrupt was convicted of breach of trust and embezzlement, and after he came out of prison applied for discharge, which was granted by the Second Division on appeal. If it were possible to conceive a case which is opposite to the present, that is the case—the sole objectors to his discharge being the beneficiaries under a trust in which he was trustee.

The Sheriff-Substitute has refused the petition "*in hoc statu*." I do not think it necessary to say that that is an incompetent form of interlocutor under sec. 146, but I am of opinion that it is not precisely in terms of the statute, nor expedient; the words, "*in hoc statu*," would not prevent the bankrupt from coming back with a fresh application a month hence. I think it is better to follow the Act strictly, and so we should not refuse the appeal absolutely, but defer it for a somewhat long period, say twelve months. I hope by that time, if the bankrupt renew his application, we shall have further materials for judgment.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"*Edinburgh, 26th November 1873.*—The Lords having heard counsel on the appeal and proceedings, Recall the deliverance complained of, and remit to the Sheriff with instructions to defer the consideration of the bankrupt's petition for discharge for a period of twelve months from this date."

Counsel for Appellant—Mair. Agent—Wm. Officer, S.S.C.

Counsel for Respondent—Asher. Agents—Millar, Allardice, & Robson, W.S.

M., Clerk.

Wednesday, November 28.

SECOND DIVISION.

CAMPBELL v. ORD AND MADDISON.

(See *ante*, p. 54.)

Expenses—Fees of Counsel—Auditor's Report.

Where a jury trial lasted one day only, a fee of twenty guineas to senior counsel, and fifteen guineas to junior counsel, allowed to be charged against the losing party.

This case, (reported *ante*, p. 54), in which the pursuer had been found entitled to expenses, came up upon two objections to the auditor's report. The account of expenses submitted by the pursuer's agent had amounted to £188, 9s. 8d., but the taxed amount came to £164, 5s. 5d. Objection was taken by the pursuer's agent to two items disallowed by the auditor—(1) A fee of one guinea and relative fees for the agent and clerk for moving the Lord Ordinary to fix a diet for trial; and (2) a sum of £11, 6s. in respect of deduction of five guineas each from the fees given to senior and junior counsel for the trial. The fee, as stated, given to senior counsel was twenty guineas, and to junior counsel fifteen guineas. As taxed, the fees allowed were fifteen guineas and ten guineas respectively. The trial lasted one day, during which eighteen witnesses were examined.

Cases cited—*Cooper*, 2 Macph. 346; *Hubbuck*, 2 Macph. 1291; *Duke of Buccleuch*, 5 Macph. 1054.

At advising,

LORD COWAN said—I am clear, on the first objection, that we ought not to interfere with the discretion of the auditor. The second objection involves delicate consideration. As a general rule the auditor ought not to interfere with the agent's discretion unless a clear and specific objection is stated, and if there is excessive exuberance of fees he should report the matter to the Court. In this case it does not appear he ought to have interfered. This was a case requiring great consideration, where important questions of law were involved, and I do not think that because it was finished in one day the fees should be cut down. The case of *Cowper* required great investigation, and the Court took into account the time the trial lasted, and the refreshers given to counsel. I cannot acquiesce in any general rule that no less a fee than twenty guineas to senior counsel and fifteen to junior should be given for a trial lasting one day only. The auditor must exercise his discretion in each case.

LORD BENHOLME—I agree very much. Where a case lasts only one day we cannot argue from a case lasting more than one day.

LORD NEAVES—I concur. This was not a simple assessment of damages, but various intricate facts had to be cleared up in order to bring out the point of law.

LORD JUSTICE-CLERK—I am prepared to acquiesce, although my first impression had been not to interfere with the auditor; but I think it of great importance to keep in mind that the trial lasted only one day, and cannot acquiesce in the principle that each day after the first is to count as a separate