section 45 appears to me to apply to the time before the appointment of a trustee, and to that time only. Liberation granted under that part of the section, would, I think, be effectual only till the meeting for appointment of a trustee, and would, I think, only be given in circumstances in which a personal protection against diligence for civil debt generally would be granted. The second branch of section 45 refers to applications after the meeting of creditors for appointment of a trustee, for the consent of the trustee and commissioners is a condition of the application. As from the date of the trustee's appointment the creditors alone are vested with the power of giving protection against diligence, it seems to me that unless that power has been exercised by a resolution, and at least unless the trustee and commissioners concur in the application, the Lord Ordinary or the Sheriff has no power under section 45 to grant an application for liberation.

"The judgment of Lord Kinloch in the case of *Marianski*, 1 Macph. p. 214, seems to support the contention that even if the creditors should now resolve to give personal protection, an application under the second branch of section 45 of the statute could not competently be granted. That question does not arise here, but I think it right to say, with deference to the view expressed by Lord Kinloch, that if it should again occur, it appears to me to be worthy of reconsideration."

The appeal was therefore refused.

Agents—Macandrew & Wright, W.S.

Agents—J. L. Hill & Co.

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*Wednesday, June 4.**

OUTER HOUSE.

[Lord Shand, Ordinary on the Bills.

MACGREGOR *v.* ELSWORTH.

Bankrupt—Bankruptcy (Scotland) Act 1856, *secs.* 77 *and* 45 — *Warrant of Liberation — Where Diligence has been carried into Effect.*

Where diligence has been already carried into effect against a bankrupt, the Bankruptcy (Scotland) Act 1856 does not authorise the granting of a warrant of liberation under an application at his instance founded only on a resolution of the creditors to grant personal protection. In order to liberation he must proceed under the second branch of the 45th section of the statute, and after the resolution has been passed he must obtain the concurrence of the trustee and commissioners before presenting his application to the Sheriff or the Lord Ordinary on the Bills, and in dealing with this application the Judge is vested with discretionary powers.

Opinion (*per* Lord Shand) that under the Bankruptcy (Scotland) Act 1845 an advertisement in the *Edinburgh Gazette* eight days before the meeting was held was sufficient notice of a meeting of creditors of a bankrupt "to consider as to granting personal protection."

William Macgregor, whose estates had been sequestrated in the Sheriff Court of Stirling and Dumbarton on 8th November 1877, and a trustee appointed, presented this appeal against a deliverance of the Sheriff-Substitute of Stirling and Dumbartonshire (BUNTINE) refusing an application for liberation from prison, and a warrant of protection against future arrest or imprisonment. Minutes of a meeting of creditors were produced, which were signed by the preses W. N. Masterton as mandatory for James Baxter, a creditor. No proof was offered that the latter was entitled to vote, and he was not ranked as a creditor. The application was opposed by the incarcerating creditor, in the following circumstances, the narration of which is taken from the note to the interlocutor of the Lord Ordinary (SHAND)—"This application is expressly founded on the provisions of sections 45 and 47 of the Bankruptcy (Scotland) Act 1856, in virtue of which the petitioner asks a warrant of liberation from prison and a warrant of protection against future arrest or imprisonment until 26th March 1879.

"The petitioner's estates were sequestrated on 8th November 1877, and in the deliverance awarding sequestration it is understood personal protection against diligence was granted to the bankrupt until the meeting for the election of a trustee. That protection was not renewed by the creditors, and on 13th November 1878 the bankrupt was incarcerated in the prison of Edinburgh under diligence at the instance of the respondent Mr Elsworth for a debt of £76.

"The bankrupt applied for the benefit of *cessio bonorum* to the Sheriff of Mid-Lothian, but so recently as the 10th of March the application was refused. Having failed in this attempt to obtain liberation, the bankrupt, or one or more of his friends, caused the trustee to call a meeting of his creditors "to consider as to granting protection to the bankrupt," and at this meeting, held on 26th March, as appears from the minute of meeting, the creditors present resolved that a personal protection against arrest or imprisonment for debts due by the bankrupt at the date of the sequestration be granted for one year from the date of the meeting. The only persons present at this meeting in addition to the trustee W. B. Robertson, accountant, George IV. Bridge, Edinburgh, holding a mandate from one of the bankrupt's creditors, were William Nevay Masterton, solicitor, Edinburgh, as mandatory for James Baxter, a relative or connection of the bankrupt, who has recently purchased a number of claims against the bankrupt's estate from creditors who have assigned their claims to him on payment of a small composition, and Mr Robert Broatch, solicitor, Edinburgh, as mandatory for a creditor. Mr Broatch appears on 17th March to have granted an undertaking to relieve the trustee of the expense attending the meeting to consider whether personal protection should be granted to the bankrupt, and is agent for the bankrupt in this appeal."

The Sheriff-Substitute (BUNTINE) refused the prayer of the petition, adding this note to his deliverance—

* Decided April 12, 1879.

"*Note.*—The bankrupt who now petitions for liberation is not entitled to much consideration or indulgence. He is also petitioner in a process for the benefit of *cessio bonorum* pending in the Sheriff Court of Mid-Lothian. The Sheriff-Substitute has refused him the benefit of *cessio bonorum* in that process so lately as the 10th of last month. The present Sheriff-Substitute is entitled to assume therefore that the conduct of the bankrupt has caused reasonable suspicion of fraud or improper dealings, and that is a good and valid ground for refusing liberation—*Muir*, Nov. 30, 1839, 2 D. 166, and other cases quoted by Mr Kinnear in his work on Bankruptcy, p. 64. The Sheriff-Substitute would have been much influenced by the opinion of the majority of the creditors in number and value assembled in meeting to consider whether they wished to grant protection to the bankrupt. But the minutes of the meeting produced are not altogether satisfactory. They are signed by the preses William Nevay Masterton, who is designed as mandatory for James Baxter. But there is no proof offered that James Baxter is a creditor entitled to vote. He is not ranked as a creditor, but is stated to be assignee of a number of creditors who have been duly ranked on the bankrupt's estate. There is no evidence produced that Mr Masterton was entitled to vote as a creditor, under the provisions of sections 63 and 64 of the statute. The assignations are not produced, and it is not stated that they were intimated to the trustee—*Walker*, Feb. 7, 1835, 13 S. 428. Mr Masterton may have been entitled to vote, but until the Sheriff-Substitute has proofs of his right he is unable to give effect to any minutes signed by him as preses. The Sheriff-Substitute thinks that the meeting was properly called in terms of sect. 99, and that the incarcerating creditor was not entitled to written notice.

"On the whole question the Sheriff-Substitute has come to the conclusion that it will be more prudent to refuse the prayer of the petition. The commissioners would appear from the minutes to have voted for the resolution that the bankrupt should be granted personal protection through their assignee, and the trustee also voted as mandatory for a creditor. No doubt, therefore, these gentlemen will consent to a new application for liberation under sect. 45, which will receive the most favourable consideration."

The bankrupt appealed, and the Lord Ordinary on the Bills (SHAND) on 12th April 1879 refused the appeal, finding that the provisions of the Bankrupt Statute 1856, founded on by the petitioner, did not warrant any order or decree of liberation under the present application. He added this note, which, after stating the facts *ut supra*, proceeded—

"*Note.*—The only notice given of the meeting of creditors was an advertisement in the *Edinburgh Gazette* eight days before the meeting was held. The respondent states that he never heard of it, and that although his law-agent had an interview with Mr Robertson, the trustee, the day before the meeting took place, the fact that such a meeting was to be held was not communicated to him. The notice given by advertisement appears to me to be a sufficient compliance with the provisions of the bankrupt statute. It is, I think, unfortunate that the Legislature has not required special notice to be given to each of the creditors where a meeting is called for the special purpose of considering the propriety of granting personal protection to the bankrupt. I do not doubt that in the present instance the intention of the bankrupt or his friends was to obtain from the creditors or a section of them a protection from diligence which would entitle the bankrupt to liberation without the respondent being made aware that proceedings for that purpose were being carried out.

"The Sheriff-Substitute has refused the application on the ground mainly that the right of Mr Baxter as a creditor entitled to vote at the meeting had not been established. I am not satisfied with this ground of judgment, for it appears from the assignations in process, and which are referred to in the minute of meeting, that the claims of a number of the creditors ranked had been duly assigned to him.

"But I think the petition must be refused, because the bankrupt statute does not authorise a warrant of liberation being granted under an application by the bankrupt founded only on a resolution of the creditors to grant him personal protection. There is a clear distinction between a warrant of protection against future arrest and imprisonment, and a warrant of liberation from prison under diligence already duly carried into effect at a time when the bankrupt had no protection. The creditors under section 77 of the statute can resolve to give or to renew protection from future diligence, and the Court will give effect to this on the application of the trustee by granting the necessary warrant of protection against future arrest and imprisonment, but the creditors cannot in effect grant a liberation from the existing diligence of a creditor. This point was settled in the cases cited by Professor Bell in his Commentaries (5th ed., vol. ii. p. 439), under a former bankrupt statute. The learned author suggested that the law in this respect should be altered, but the provisions of the existing Act, and particularly sections 44 to 47 and section 77, clearly maintain the distinction, and this view was acted on in the case of *Summers* v. *Marianski*, December 29, 1862, 1 Macph. 214. I entirely concur in the opinion of Lord Kinloch there expressed that a resolution to give protection against arrest and imprisonment does not give the bankrupt a right to liberation under diligence already carried into effect.

"If the bankrupt has any means of liberation beyond the ordinary process of *cessio*, this must be under the second branch of section 45 of the statute, which provides that even after a previous refusal by the Lord Ordinary or the Sheriff to grant liberation "it shall be competent for the debtor to make a new application for liberation with consent of the trustee and commissioners, and on intimation and hearing objections as aforesaid, the Lord Ordinary or the Sheriff may grant warrant to liberate, and in any case, the Lord Ordinary or the Sheriff may annex such conditions of caution or otherwise to such warrant as he may judge proper." In the case of *Summers* Lord Kinloch expressed an opinion that "incarceration by an individual creditor taking place after and under warrant of a resolution of creditors refusing protection cannot competently be interfered with by the Lord Ordinary or the Sheriff under the provisions of section 45." In the case of *Bruce*, decided by me on 20th September

1878 (*ante*, p 593) I held, for the reasons fully stated in my judgment, that a bankrupt could take no benefit from the second part of section 45 where the creditors had declined to grant him personal protection, and accordingly I refused an application for liberation made in these circumstances. In that case, however, I ventured to express a doubt as to the soundness of the view stated by Lord Kinloch in the passage above quoted, and which was necessary to the judgment. My further consideration of the point has confirmed that doubt. It appears to me, for the reasons stated in the case of *Bruce*, that unless the creditors have resolved to grant personal protection against diligence, the bankrupt can obtain no benefit under the second branch of section 45 of the statute, but, on the other hand, I am of opinion that if such a resolution has been passed an application by the bankrupt, with consent of the trustee and commissioners, for liberation may competently be presented and entertained by the Sheriff or the Lord Ordinary on the Bills.

"Accordingly, if this had been an application by the bankrupt with consent of the trustee and commissioners under section 45 of the statute, I would have held it competent in the circumstances. But in that case it would be entirely a matter in the discretion of the judge to give or withhold the warrant of liberation asked. The fact that the creditors had resolved to give a personal protection would be a circumstance material, and indeed in my view indispensable, in support of the application, but the success of such an application would to some extent depend on the conduct of the bankrupt towards his creditors generally, and towards the incarcerating creditor, and the liberation might be granted under such conditions as to caution or otherwise as the judge might think fit to annex.

"As the Sheriff-Substitute remarks, the bankrupt may yet present such an application if he can obtain the consent of the trustee and commissioners. But he will do well to consider whether he can possibly succeed in such an application in the face of the decision against him in the process of *cessio* founded on his own misconduct, and if it be the fact that the trustee intentionally refrained from informing the agent of the incarcerating creditor of the meeting of creditors about to be held to consider the propriety of giving the bankrupt personal protection, as the respondent alleges, his concurrence in the application should have very little weight."

The appeal was therefore refused.

Counsel for Appellant — Nevay. Agent — Robert Broatch, L.A.

Thursday, June 5.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

TRUSTEES OF THE KELVINSIDE ESTATE COMPANY *v.* THE TRUSTEES OF THE GREAT WESTERN ROAD, GLASGOW, AND DONALDSON'S TRUSTEES.

Property—Conveyance of Heritage—Reserving Personal Right to Compensation for Part previously Disposed of—Act 1 and 2 Will. IV. cap. 43 (General Turnpike Act)—Act 6 and 7 Will. IV. cap. 135 (Special Act)—Act 2 and 3 Vict. cap. 82 (Supplementary Act).

Certain road trustees obtained a Special Act empowering them, after having resolved to take possession of any lands, "to stake out, take, and acquire" such lands on "making satisfaction to the proprietors. . . for the value thereof . . . as shall be agreed on." The General Act authorised the acquisition of and provided for the lands becoming the property of the trustees. These road trustees in 1838 came to an arrangement with the proprietor of certain lands, and they took possession of a portion thereof extending to four acres, payment of the price being postponed until such time as the road should pay. Subsequently the lands, including the four acres, were sold to an estate company, without any reservation of the ground occupied by the road, or any assignation of the rights of the original proprietor to the price. *Held* in these circumstances that the price of the ground acquired by the road trustees formed a portion of the estate of the representatives of the original proprietor, as a debt due to him personally, and did not pass with the rest of the lands when they were conveyed to the estate company.

This was an action of declarator raised by Eleanor Montgomerie and others, as trustees of the Kelvinside Estate Company, against Dr Richardson and others, trustees of the Great Western Road, Glasgow, and against the trustees of the late Mr Donaldson of Gartnavel.

The following narrative of the circumstances of the case is taken from the note appended to the interlocutor of the Lord Ordinary (CURRIEHILL):—"In this action the trustees of the Kelvinside Estate Company seek to have it found and declared that under and by virtue of their titles to the lands of Gartnavel, part of the estate of Kelvinside, they are in right of, and have a valid and sufficient title to sue for and discharge, the sum due by the trustees of the Great Western Road, Glasgow, as the price or value of a piece of ground of about three or four acres in extent, forming part of the said lands of Gartnavel, which piece of ground is occupied and possessed by the said Road Trustees, and now forms part of the said Great Western Road, together with all interest due upon the said price or value from and since 1st August 1838. The parties called as defenders are the trustees of the deceased James Donaldson of Thornwood, who in 1838 was proprietor of the lands of Gartnavel. These trustees, after his death in 1844,