Tuesday, June 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MARR & SONS *v.* LINDSAY.

(*Ante*, June 4, p. 535.)

Bankruptcy—Sequestration — Where Petitioning Creditor Charges on Bills as being for Value Received, and no Value has been Received.

L. granted four bills to M. & S. for £50 each, payable at different dates, as part of a transaction by which L. was to retire the bills on receiving £75 worth of goods for each bill—M. & S. having previously given L. goods to the value of £300 in return for £400 worth of shares. Two of the bills as they fell due were not retired owing to a dispute between the parties as to the conditions of the transaction. M. & S. thereupon charged upon the bills without tendering the goods, and then petitioned for L.'s sequestration. *Held* that M. & S. were not thus entitled to make use of the process of sequestration in order to compel implement of a contract.

John S. Marr & Sons, wholesale stationers, Glasgow, presented a petition for the sequestration of the estates of Robert Lindsay, bookseller there. In their petition they stated—"That the petitioners are creditors of the said Robert Lindsay to the extent of £100, 6s. 6d., contained in two bills for £50 each, dated 20th November 1880, and payable three and four months after date respectively, with interest thereon at the rate of five per cent. to date of oath. That the bill which fell due on 23d February 1881 was protested by the petitioners on said date, and the protest thereof was recorded in the Sheriff Court books of Lanarkshire at Glasgow 12th March 1881. On said last-mentioned date a charge was given under said protest which has since expired. The bill payable four months after date was protested on 23d March 1881, and the protest thereof was recorded in the Sheriff Court books of Lanarkshire at Glasgow 28th March 1881. Both debts are still unpaid." In their affidavit Marr & Sons deponed—"That no part of said sum has been paid or compensated, and that the said John S. Marr & Sons hold no other person than the said Robert Lindsay bound for the debt, and no security for the same." And they further deponed—"That the goods for the price of which said two bills were granted are still undelivered, and the said John S. Marr & Sons claim a right of retention over the same." The bills bore to be for value received.

The respondent denied "that the petitioners are creditors of the respondent to the extent required by statute, or to any extent. In a balancing of accounts between them as in a bankruptcy it will be found that instead of the petitioners being creditors of the respondent, they are his debtors to a considerable amount. They gave no value for the said two bills until about three months after they received them, and they hold securities over the respondent's estate, or otherwise are due to him sums of money, or value in goods which exceed the amount of the said bills. The statement in their affidavit that they hold no security over the respondent's estate is false. They denied his other statements, and explained as follows:—"In November 1880 the petitioners entered into a contract with the respondent, whereby they purchased from him fifty shares of the Kilmalcolm Hydropathic Company (Limited), at the price of £8 per share, making £400 for the fifty shares. The respondent agreed to take payment of the said price of £400 in books, to be purchased from the petitioners in the following manner, viz.:—He was to receive delivery of £300 worth of books on transferring the shares and granting four bills to the petitioners for £50 each, all dated 20th November 1880, and payable at two, three, four, and five months respectively after date, and on retiring each of those bills he was to receive delivery from the petitioners of £75 worth of goods, to be selected by him, and thus obtain full payment of the price of the said fifty shares. . . . . The respondent, in implement of his part of the contract, accepted the four bills for £50 each, and transferred the said fifty shares to the petitioners in November 1880. The petitioners failed timeously to implement their part of the contract. Instead of delivering the £300 worth of books specified in their letter of 20th November 1880, they delivered only two lots thereof, of the value in all of £12, 10s. The remainder they refused to deliver, on the ground that the said fifty shares were not fully paid up, the last call of £2 per share, amounting in all to £100 on the fifty shares, not having been paid. The respondent had claims against the said company which he was entitled to place against the said call, and which he considered were sufficient to meet it. On or about the 9th January 1881 those claims were admitted by the company to the extent of £80, and were placed against the call on said fifty shares, and for the balance of £20 which the petitioners advanced to meet the call the respondent granted in their favour a bill for £20, 1s. 11d., payable one month after date, and the respondent retired the said bill when it fell due on 12th February. The petitioners did not deliver the remainder of the £300 worth of goods till 14th February 1881. The respondent declined to accept some of the books then sent as not having been selected or ordered by him, and he returned a parcel of the value of £5, 8s. 4d. Although the petitioners did not deliver until 14th February 1881 the £300 worth of books which they ought to have delivered immediately after 20th November 1880, they wrongfully and illegally protested on 23d January 1881 the first of the said four bills for £50, and illegally and wrongfully recorded the protest in the Sheriff Court books of Lanarkshire on 3d February 1881, and of same date caused a charge of payment thereon to be given to the respondent. The respondent brought a suspension of the said charge in the Court of Session, which has been passed in the Bill Chamber and is now in dependence. The petitioners have also wrongfully and illegally protested the second and third of the said four bills, and in consequence of their said illegal and wrongful proceedings in protesting the said bills and recording the protests thereon, and thereby seriously injuring the respondent's credit, the respondent brought an action of damages against them in the Court of Session, which was called in Court on 7th April current.

"It was not intended by the parties in entering

into the foresaid contract that the petitioners should do summary diligence upon any of the said bills, but simply that the respondent should not obtain the additional books to which he is entitled in payment of the balance of the price of the said fifty shares until he should retire the bills, and that on retiring each bill he should receive £75 worth of books. In any view, it was not intended that the bills should mature until two, three, four, and five months after delivery of the £300 worth of books, and that is the fair construction of the contract. Those periods will not expire till 17th April, 17th May, 17th June, and 17th July 1881. Moreover, any failure on the respondent's part to retire any of the bills at maturity would merely amount to a breach of contract on his part, and might infer some claim of damages against him, but would not entitle the petitioners to enforce payment of the bill either by way of action or by summary diligence, when they are bound, *simul ac semel* with payment of each bill for £50, to deliver to him books of the net value of £75, the obligation on their part exceeding that on his part by £25 on each bill. At the present moment the petitioners in a balancing of accounts between them and the respondent are debtors to the respondent for the balance of the price of the said fifty shares. That price was £400, and to account thereof the respondent has received books to the value of £300, 2s. 6d., less £5, 8s. 4d. returned. There is also an open account for books due by the respondent to the petitioners, the period of credit for which has not yet expired, amounting to £53 or thereby. At the present moment, therefore, there is a balance of upwards of £50 of said sum of £400 due by the petitioners to the respondent, or to put it in another way, they are more than fully secured for the said bills by what they owe to the respondent, and they are therefore not qualified to be petitioning or concurring creditors in an application for sequestration of his estates.

"The respondent is not insolvent, and is not notour bankrupt. The present application by the petitioners is not a legitimate mode or lawful means of seeking to enforce implement before the proper time of the respondent's part of the said contract. It is quite unnecessary and uncalled for. The petitioners in presenting it have acted maliciously and most injuriously towards the respondent, and he holds them liable in damages for the consequences."

The Sheriff-Substitute (SPENS) dismissed the petition, adding this note—"I was at first inclined to believe that the petitioners were entitled to claim sequestration upon their affidavit, because they swore there that no security was held, and believing that no inquiry could be made into the truth of that statement I further thought that as the fact whether security is held or not does not prevent a creditor applying for sequestration, it was not of essential importance to specify in the oath the fact of security being held *quoad* a petitioning creditor. A more attentive consideration of the statute of 1856, however, has induced me to be of opinion that it is absolutely essential that a petitioning creditor should specify if he holds any security that he does hold such security, and that if a respondent in these circumstances is alike instantly to verify the fact that the petitioning creditor holds a security which he has not specified, the basis upon which the petition rests is cut down in respect that a statutory requisite has not been complied with, and accordingly the petition itself falls to be dismissed—see sec. 21 of Bankruptcy Act 1856. It may be that another creditor might take it up, but there is no proposal of that kind made here. Now, I am of opinion that the respondent has shown that Marr & Sons hold a security which has not been specified. The words of the 22d section of the 1856 Act contain, *inter alia*, this provision—'The creditor shall specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified, and where he holds no other person than the bankrupt so bound and no security he shall depone to that effect.' The oath on which the petition is founded, *inter alia*, contains the statement that the 'petitioners hold no other person than the said Robert Lindsay bound for the debt, and no security for the same.' Now, by the letter of the petitioners, of date 20th November 1880, which is admitted to be their letter, the following agreement or offer was made: — 'We now give you offer in writing. You transfer fifty shares Kilmalcolm Hydropathic Establishment, being fully paid ten-pound shares, for eight pounds per share, and accept the enclosed four bills of fifty pounds each. In return we deliver to you three hundred pounds' worth of goods to you whenever shares are transferred, and as each bill is due and paid we will deliver other seventy-five pounds' worth of goods.' It is not disputed that the shares in question, in implement of the agreement come to, were handed over to the petitioners or their nominees—two of the partners of the firm. Something is said about the shares not having been fully paid-up shares as represented, but be that as it may, it seems perfectly clear that the shares in question were handed over to the petitioners in security of the bills—four in number—specified in the letter, on two of which bills this petition for sequestration is admittedly presented. I asked the agent for the petitioners how it was they contended they had no security against the bills; his statement was that they did not hold the bills in security but goods. I understood this statement to have reference to the words in the letter—'And as each bill is due and paid we will deliver other seventy-five pounds' worth of goods.' I can hardly follow this argument, looked at in any point of view I can see. These shares are held as security against the bills, in part at all events; and I really do not think it is open to argument that if these shares were handed over by the respondent on the faith of the letter referred to, which does not seem to me to admit of dispute, he did so in the belief that he was handing them over to the petitioners in part security at least of the bills. I am therefore of opinion that the affidavit has been cut down, and giving effect to the views previously indicated, the necessary result is the dismissal of the petition. I may, however, add here, with reference to this matter, that it is not difficult to see there are good grounds for insisting that the security held by a creditor petitioning for sequestration shall be specified. By the 30th section of the 1856 Act sequestration may be elided by the instant payment or satisfaction of the 'debt or debts due to the petitioner, or to any other creditor appearing and concurring in the

petition.' If the petitioning creditor has a debt, say of one hundred pounds, but holds an ascertained security of ninety pounds, payment of ten pounds would be satisfaction of the debt, or if payment of the debt in full were insisted on the security would fall to be given up.

"Passing, however, from this point, it appears that a tender was made to the petitioners through their agent of the money value of the bills in question, and this was declined; thereafter consignation was made. The petitioners' agent argued to me that consignation was not payment. It may not be payment, but it surely is satisfaction of the debt if it be authorised to be handed over to the petitioning creditors by the Court, and if I had taken a different view of the first point I have dealt with I would not have awarded sequestration, but would have authorised the Clerk of Court to pay over the consigned money to the petitioners in extinction of their claim."

Authorities—*Knowles* v. *Crooks & Balgarnie*, Feb. 1, 1865, 3 M. 457; *Dyce* v. *Paterson*, March 11, 1847, 9 D. 993; *Gibson & Stewart* v. *Brown & Co.*, Jan. 13, 1876, 3 R. 328.

The petitioners appealed.

At advising—

Lord President—There are two bills here for £50 each which are drawn by the petitioner and accepted by the pursuer, and bear to be for value received. *Ex facie* of these bills, therefore, the respondent is undoubtedly owing the petitioners £100; but the presumption arising from the words "for value received" is in this case taken off by the production of the contract in execution of which the bills were granted, which shows that the bills were not given for value received. On the contrary, it is distinctly proved that no value was received when they were granted. The contract provided for the transfer to the petitioner by the respondent of shares in the Kilmalcolm Hydropathic Company of a total value of £400. In return the respondent agreed to take delivery of books from the petitioners to the value of £300. But this was merely to be an interim arrangement, because in the end he was to receive goods to the total value of £400. For it was also a condition of the contract that the respondent was to grant four bills for £50 each, payable at different times, and the provision was that the respondent "on retiring each of those bills was to receive delivery from the petitioners of £75 worth of goods to be selected by him, and thus obtain full payment of the price of the said fifty shares"—the result in the end thus being, that when all the bills were paid the respondent would have received goods to the value of £300, which, with the £300 worth formerly received, makes £600, and this exactly corresponds with what was received by the petitioner, namely, £400 worth of shares and the bills.

Now, it is said that the respondent was under an obligation to pay each of these bills as soon as it became due—that payment of the money was to precede delivery of the goods, not that the two acts were to take place *simul et semel*. I do not think so. This contract is just like any other contract of sale—payment and delivery are to be simultaneous acts. In practice delivery often takes place before payment, and in other cases payment precedes delivery, as when you buy in a shop and pay for what you buy, telling the shopkeeper to send the goods purchased to your house. But the right of parties in either case is to have the goods delivered and the money paid simultaneously—that is to say, if the transaction is a ready-money one. Now, when these bills fell due they were not paid, and undoubtedly when they fell due the holders had a good action to compel implement, but such an action must have been accompanied by a tender of the goods. To compel payment of the money without a tender of the goods would have been to stand on the words "value received," when these words are proved to be inconsistent with the facts. Now, that being so, is the holder entitled to charge on the bills and to do ultimate diligence without a tender of the goods? I think not. He is precluded from so doing by the terms of the contract. It is a debt which has taken the form of a bill; but it is just an ordinary contract debt. Therefore to proceed by diligence, which until the recent Act would have included imprisonment, would be an illegal proceeding.

Now, what is it that the petitioner proposes to do? He proposes to sequestrate the debtor's effects because the bill has not been paid. But he does not tender the goods. On the contrary, his affidavit expressly bears "that the goods for the price of which the said two bills were granted are still undelivered, and the said John S. Marr & Sons claim a right of retention over the same." He claims that sequestration shall be awarded as for a debt past due, and that the goods for the delivery of which the debt was contracted should be retained until payment of the debt. It seems to me that this is an entire abuse of the process of sequestration. This claim on the part of Marr & Sons is one which they are entitled to enforce by action, but not in this manner. They are resorting to sequestration for the mere purpose of obtaining implement of a contract. I am therefore for adhering to the judgment of the Sheriff-Substitute; but I must add that I do not concur in all the grounds of his judgment. I think that he is under a mistake when he says—"These shares are held as security against the bills—in part at all events; and I really do not think it is open to argument that if these shares were handed over by the respondent on the faith of the letter referred to, which does not seem to me to admit of dispute, he did so in the belief that he was handing them over to the petitioners in part security at least of the bills."

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Appellants — Asher — Jameson. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent — Guthrie Smith—M'Kechnie. Agent—John Gill, S.S.C.