

v. *Rodger*, June 26, 1834, 12 S. 802; *M'Cowan v. Wright*, June 21, 1852, 14 D. 901; *Ehrenbacher & Company v. Kennedy*, July 10, 1874, 1 R. 1131.

At advising—

LORD JUSTICE-CLERK—In order to come to a satisfactory opinion on this case it is necessary that we should look at the substance of the transaction, and see whether what was done was in the ordinary course of trade. It seems to me that it was not. Campbell, the debtor, had been for some time in pecuniary difficulties—that is quite evident, because the creditor M'Intyre had given him a charge on a protested bill. In that state of matters M'Intyre and Campbell came to an agreement by which Campbell put in a third party to sell some of his surplus stock, and to keep the price realised for M'Intyre and another creditor. That does not recommend itself to me as a usual act of ordinary administration, and seems to have been invented to secure payment of Campbell's debts to M'Intyre and the liquidators.

The purchasers at this sale gave bills for the stock bought by them, and of these bills some were handed to M'Intyre's agent and discounted by him, and the cash so received applied in partial extinction of the debt due to M'Intyre.

In these circumstances I am quite satisfied with the judgment of the Sheriff-Principal.

LORD YOUNG—I concur, and I think, now that we have heard the facts of the case, that any difficulty which seemed originally to attach to it has disappeared.

The case clearly falls under the Act 1696, c. 5, but is not to be regarded as one involving fraud in any sense.

The statute has for its object to preserve as far as possible equality among creditors by restoring to the estate for the benefit of all interested any asset which by being alienated within sixty days of insolvency might have or has disturbed the state of the insolvent's affairs. It is not necessary for the purposes of that statute that there should be any want of *bona fides* in the alienation struck at. The statute is held to affect anything which the law can lay hold of whereby the equality of distribution of the insolvent's estate might be disturbed. It has accordingly been held to strike at bills of exchange granted by the bankrupt within the restricted period, although these cannot be held to be alienations of his existing estate. In short, it may be safely stated as law that under that statute any act whatever affecting the bankrupt's estate whereby the equality of distribution may be disturbed will be set aside. The only exception—although it even is not absolute—is in the case of cash payments. But cash payments are exceptional not only in this branch of the law, but in all others. If a creditor gets payment of his debt in cash it is no matter to him where the cash comes from. In fact it makes no difference that the debtor may have stolen the cash, because this is the only, or at all events the most conspicuous, exception to the rule that your author cannot give you a better title than he himself has. The thief of money can always do so. The object of this exception is to protect transactions in the ordinary course of business. If the debtor here had paid the whole of M'Intyre's claim in cash, as it seems he did to the extent of £10, there would have been no question about it. But instead of

this, three bills in favour of the bankrupt were handed to M'Intyre's agent along with the £10 to make up the balance of the debt. M'Intyre's agent happened also to be the agent of the branch of the Commercial Bank at Oban, and he had selected these bills as bills which could be easily turned into cash, and he as agent of the bank did cash them, and by his doing so in that capacity the proceeds of these bills can be reached under the Statute 1696, and the transaction can be set aside and equality be restored in the distribution of the bankrupt's estate. Had it been otherwise—that is, had it been the true state of the case that the bankrupt had himself raised the money by personally discounting these bills, and had then paid the debt in cash—then the transaction would have been protected. But that is not the state of the case, and we can set aside the transaction as falling under the Statute 1696. In that view I concur, but without any imputation of dishonesty.

LORD CRAIGHILL—I also concur, and agreeing as I do with your Lordship in the chair and Lord Young, I do not consider it necessary to add much to what has been already said.

On looking at the proof I have no difficulty in coming to the conclusion that the Sheriff has read it aright, and that in point of fact the balance of this debt was not paid in cash.

As M'Arthur received these bills as agent for the creditor M'Intyre, that puts them in the same position as if they had been received by the creditor himself. That being so, the payment was in bills, and not in cash, and so falls to be set aside under the Statute 1696, cap. 5.

LORD RUTHERFURD CLERK—I am of the same opinion. The bills here were endorsed to the bankrupt, and I think that it is the fact that they were thereafter handed over to M'Arthur as agent for M'Intyre. This, in my opinion, was a contravention of the Act 1696. It is of no consequence that the bills were afterwards cashed or discounted by M'Arthur as agent for the Commercial Bank without being endorsed by M'Intyre. This was a matter of their own concern, and it is obvious that M'Intyre did not endorse them, nor was ever asked to do so, because it was hoped that by abstaining he would be able to avoid the Act.

The Lords dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for Appellant—Shaw. Agent—John Gill, S.S.C.

Counsel for Respondent—Dickson. Agent—Robert Emslie, S.S.C.

Thursday, July 13.

FIRST DIVISION.

[Lord Lee, Ordinary.

THOMPSON v. NORTH BRITISH RAILWAY.

Reparation—Issue—Relevancy—Pursuer engaged in Unlawful Act—Duty of Railway Servant where Passenger in Breach of Law.

The pursuer of an action of damages for bodily injury against a railway company,

averred that having failed to find room in the carriages of a train which was about to start, he was in the act of entering the guard's van, in which he observed a number of other passengers who were there with the guard's knowledge and consent, when he was violently pushed back by the guard, with the result that he fell between the train, which was then beginning to move, and the platform, and received severe injuries. *Held* that as the pursuer did not allege that he had any authority from the guard to enter the van, and must be therefore assumed to have had none, the guard was justified in preventing him from entering a part of the train where he had no right to be, and that his statements were therefore irrelevant, as not disclosing any case of fault on the part of the railway company or their servants.

Process—Poor Roll—Caution for Expenses—Probabilis causa litigandi.

Held (per Lord Lee) that it is not a ground for obliging a pursuer to find caution for expenses that the reporters on the *probabilis causa litigandi* of applicants for the poor roll have reported that he has no *probabilis causa*.

This was an action at the instance of George Thompson, mason in Edinburgh, against the North British Railway Company. The pursuer concluded for £2500 damages for injuries sustained by him on 8th October 1880 through the fault, as he alleged, of the defenders. He averred that on 8th October 1880 he was at the Musselburgh Autumn Race Meeting, and had a return ticket by the defenders' line, and (Cond. 5) that on entering their station at Musselburgh in the afternoon he found a train nearly ready to start. "A number of the doors of the carriages were open, as if for the purpose of passengers entering. There were no officials present on the platform of the station or in the train except the guard, who was at his van, and to whom the pursuer spoke, asking if the train was full. The guard replied it was not, and the pursuer proceeded forward to look for room in the carriages. He was unable to find accommodation, and returned to the guard, requesting to be allowed to travel in the van, in which there were a number of passengers, who in the knowledge and with the consent of the guard were about to travel in the van. While in the act of entering the van, the train being then at a standstill, the guard, without warning or remark of any kind, pushed him back with his hand on the pursuer's breast, so violently that he stumbled, and to prevent himself from falling clutched hold of the handle of the carriage-door. The train at the same moment was, without any notice or warning, started, and dragged the pursuer backwards for some yards along the platform, and he being unable to regain his feet was thrown down between the carriages and the platform. The guard's van passed over his right arm and leg." He averred that in consequence of the accident he had his right leg and arm amputated shortly after the accident, and that he was therefore unable to work for the maintenance of his family and himself. In Cond. 7 he made the following averments:—"On the occasion referred to there were no officials of the company on the platform or in the station to see that passengers

were duly accommodated, and to warn them that the train was about to start, other than the guard before referred to. It was the duty of the defenders to provide suitable travelling accommodation to their passengers, to provide suitable officials to guard against accidents, and to see the trains duly and carefully despatched after due notice and warning. The defenders failed to discharge said duties, having no proper officials in charge, no suitable accommodation, and no warning having been given of the starting of the train; and by their failure in these respects they were guilty of gross and culpable recklessness and negligence, and of want of due and reasonable care."

The defenders denied that the pursuer's injuries arose from any fault for which they were responsible. They stated that the pursuer had applied for, and was refused, admission to the poor roll of the Court, and that the reporters had reported that he had not in their opinion a *probabilis causa litigandi*.

They pleaded, *inter alia*—" (1) The pursuer having made application for admission to the poor roll, to enable him to carry on this action, and having been refused, on the ground that he had no *probabilis causa litigandi*, is bound to find caution for expenses. (2) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons."

The Lord Ordinary (LEE) repelled the first plea-in-law for the defenders, and adjusted issues, granting leave to reclaim. He appended this note to his interlocutor:—"In the case of *Hunter v. Clarke* (1 R. 1154) the pursuer was a pauper in actual receipt of parochial relief. I think that such a case is plainly distinguishable from that of a pursuer against whom all that can be said is that he is in poverty, and has failed to obtain a favourable report from the reporters on *probabilis causa litigandi*."

The defenders reclaimed, and argued that the pursuer's statements were irrelevant, since it appeared from them that his case was that the defenders' servant had in the discharge of his duty prevented him from entering the van in which he had no right to travel, and that his injuries had resulted from a fall sustained when he was being so prevented. In any event, the pursuer ought to be made to find caution for expenses. The reporters on the *probabilis causa* of litigants were a protection to a defender from a litigation with one with whom it was a hardship even to litigate successfully, for he could never pay a penny of expenses.—*Mackdonald v. Simpson*, March 7, 1882, 19 Scot. Law Rep. 571.

At advising—

LOED PRESIDENT—We have heard argument on the first two pleas-in-law for the defenders in this case, which are—[*His Lordship read the pleas, quoted supra*]. Now, if the pursuer's averments are not relevant it is unnecessary to go further, and therefore the plea as to relevancy may be taken first. The whole question depends on the averments in the fifth article of the pursuer's condensation. The pursuer having stated that he was at Musselburgh Race Meeting in October 1880, and came to the station in the afternoon for the purpose of travelling home to Edinburgh, avers that he found that a train was nearly ready to start, and that he asked the guard whether the train was full. The guard replied

that it was not, and the pursuer proceeded forward to look for room but could not find it. That was all natural enough, for a train fills up rapidly on such an occasion. The pursuer then goes on to say that he "returned to the guard, requesting to be allowed to travel in the van, in which there were a number of passengers who, in the knowledge and with the consent of the guard, were about to travel in the van. While in the act of entering the van, the train being then at a standstill, the guard, without warning or remark of any kind, pushed him back with his hand on the pursuer's breast, so violently that he stumbled, and to prevent himself from falling clutched hold of the handle of the carriage-door. The train at the same moment was, without any notice or warning, started, and dragged the pursuer backwards for some yards along the platform, and he being unable to regain his feet was thrown down between the carriages and the platform. The guard's van passed over his right arm and leg."

The train, it appears, got into motion just at the moment that a push was given by the guard to the pursuer. Now, it is to be observed that though it is averred by the pursuer that he requested to be allowed to travel in the guard's van, he does not say that his request was granted, or that any answer was made to it at all, nor does he even say that the guard remained silent. In short, there is nothing to show that he had any sanction whatever for trying to get into the van, and it must therefore be assumed that he attempted to enter the van without it. Now, that was illegal, since passengers are not entitled to enter the van but by permission of the persons in charge of the train. If, then, the pursuer, in entering the van as he did, was pushed back by the guard, it is impossible to say that the guard was not thereby doing his duty. The guard pushed him back to prevent him from entering the van, and also, probably, to prevent him from being injured by the train which was just starting at the time. The pursuer being thus pushed back, caught hold of and held on to the handle of the van. That was a most imprudent thing. If he had not held on as he did to this handle the accident would plainly not have happened. I am of opinion therefore that the pursuer's statements are irrelevant.

LORD DEAS concurred.

LORD MURE—The point is not free from difficulty, but I do not see my way to differ from your Lordships. I go chiefly on the fact that the attempt of the pursuer to get into the van without permission was a step which a railway passenger is not entitled to take.

LORD SHAND—I am entirely of the same opinion, and I give my opinion not on mere pleading, but because I believe that the substance of the case is fairly stated. I think that in the record a case is set forth in which no fault is stated against the defenders, and without fault there is no claim against the defenders. The pursuer summarises his case in Article 7—[*His Lordship here read Article 7, quoted supra*]. These words must of course be read with reference to the statements made in the previous articles. Now, so far as the want of accommodation goes, I think that a passenger in such circumstances as the pursuer

was here placed in must remain behind. We all know that on such an occasion a train is rapidly filled up, and that it is often necessary for a passenger in the pursuer's position to wait till another train is made up and sent off. Therefore as far as want of accommodation goes, that did not conduce to the accident. The same thing must be said of want of sufficient number of officials, and of want of sufficient warning that the train was about to start. The statement of the pursuer is that he endeavoured to enter the van when the train was just starting, and that the guard pushed him back when unhappily this accident occurred. I think the statement is irrelevant.

The Lords recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer—J. C. Smith—J. A. Reid. Agent—D. H. Wilson, S.S.C.

Counsel for Defenders—J. P. B. Robertson—MacWatt. Agents—Millar, Robson, & Innes, S.S.C.

Friday, July 14.

FIRST DIVISION.

[Sheriff of Midlothian.

NEWLANDS v. MILLER.

Husband and Wife—Marriage-Contract—Bankruptcy—Lapsed Trust—Right of New Trustee to Claim in Husband's Sequestration.

A trust created by an antenuptial contract of marriage had lapsed by the death and resignation of the original trustees, and was revived by the spouses appointing a new trustee, subsequent, however, to the husband's sequestration; by the terms of the trust the wife's estate, *acquisitum et acquirendum*, was conveyed to the trustees for payment of the proceeds thereof to the husband so long as the marriage subsisted, and the fee to the wife or her heirs on its dissolution; the Lords thought that the trustee had been competently appointed by the spouses, but held he was not entitled to claim in the husband's sequestration for money to which the wife had succeeded during the subsistence of the marriage, and for which a discharge had been granted by the spouses, who had uplifted it, valid by the terms of the deed through which the money had come.

By antenuptial contract of marriage Thomas Laidlaw, sometime builder in Innerleithen, and subsequently hotel-keeper in Stirling, assigned and conveyed to certain persons mentioned in the deed, and to such others as might be assumed under the powers contained in it, the subjects and sums of money therein specified, but always in trust for the ends and uses mentioned therein. On the other part, Catherine Stewart or Laidlaw, with the consent of the said Thomas Laidlaw, assigned and conveyed to trustees her whole means and estate, both what then belonged to her or which might pertain to her during the subsistence of the marriage, exclusive of the *jus mariti* and right of administration of her said in-