

reasonable care seems to have been adhibited. The fact that they were equally negligent in the custody of the money in their own till, even if relevant in the case of a gratuitous depository (see *Doorman v. Jenkins*, 2 A. and E. 256), cannot excuse a bailee for reward.

I agree with the Lord Ordinary in his conclusion and his reasons.

Their Lordships refused the appeal.

Counsel for the Appellant (Pursuer, Respondent) — Danckwerts, K.C. — Robertson Christie. Agents — Gardiner & Macfie, S.S.C., Edinburgh — Christopher & Roney, London.

Counsel for the Respondents (Defenders, Reclaimers) — The Solicitor-General (Ure, K.C.) — Munro. Agents — Cuthbert & Marchbanks, S.S.C., Edinburgh — A. & W. Beveridge, Westminster.

## COURT OF SESSION.

Friday, June 5.

### FIRST DIVISION.

KENNEDY AND ANOTHER (OWNERS OF "WELSHMAN") v. CLYDE SHIPPING COMPANY, LIMITED (OWNERS OF "PORTLAND") AND OTHERS.

*Ship—Expenses—Limitation of Liability—Competitive Claims on Limited Fund—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 504.*

*Observed per Lord President* — "Where no question is raised as to the right of petitioners," under the Merchant Shipping Act 1894, "to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be strictly restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants."

*Process—Interlocutor—Alteration of Form of Interlocutor.*

"When an interlocutor is signed and given out to the parties, . . . if anything is to be said about altering the form of it, it must be said at once."

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sec. 504, provides—"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply . . . in Scotland to the Court of Session, . . . and that Court may determine the amount of the owner's

liability, and may distribute that amount rateably among the claimants, . . . and may proceed in such manner and subject to such regulations . . . as to payment of any costs as the Court thinks just."

David M'Allister Kennedy and John Kennedy, owners of the s.s. "Welshman," presented a petition under the Merchant Shipping Act 1894, section 504, for limitation of liability arising out of a collision in which the s.s. "Welshman" was in fault.

Claims were lodged by the Clyde Shipping Company, Limited, and others (the owners, officers, and crew of the s.s. "Portland," the injured vessel), N. Adshead & Son and others (cargo owners), Fletcher Son, & Fearnall, Limited, and others (cargo owners), James Sterling (cargo owner), and Arrols Bridge and Roof Company, Limited, and others (cargo owners).

The First Division on 12th April 1907 appointed consignation of £2500, 16s., with interest at 4 per cent. per annum from the date of the collision, being the whole sum for which on the tonnage of their ship the petitioners were liable. As the claims lodged exceeded the sum consigned, the Court remitted to Mr Richard Clancey to adjust and settle the claims and report thereon. After certain objections to Mr Clancey's report had been successfully maintained by certain of the claimants, the Court on 18th March 1908 pronounced an interlocutor, which after granting warrant to the Accountant of Court to deliver up the consignation receipt, and to the Commercial Bank of Scotland, Limited, to pay to the claimants or their agents the sums to which they had been respectively found entitled, proceeded as follows—"Find the petitioners liable in expenses to the respective claimants, including the expense of the remit to Mr Clancey and the procedure thereunder, and the objections to his report, and remit the accounts thereof to the Auditor to tax and to report."

The Auditor having lodged his reports, the petitioners objected to various items on the ground that only one set of cargo owners should get full expenses, and argued—Section 504 of The Merchant Shipping Act 1894 left the Court absolute discretion as to expenses, but the rule in *Burrell v. Simpson & Company*, July 19, 1877, 4 R. 1133, 14 S.L.R. 667, should be followed, and only one set of cargo owners should get full expenses, and the other cargo owners should only get the expenses of lodging their claims and of the appearance to take decree.

The Court continued the case in order to consult the Auditor.

At advising—

LORD PRESIDENT—I have looked into the case of *Burrell v. Simpson*, 4 R. 1133, and I draw attention to the fact that while the form of interlocutor here is "Find the petitioners liable in expenses to the respective claimants, including the expenses of the remit to Mr Clancey and the procedure thereunder, and the objections to his report," the interlocutor in *Burrell* was "Find the petitioner liable to the claimants in the

expenses of this process, except such expenses, if any, as have been solely occasioned by the discussion between the claimants." I do not lay stress on the fact that the word "respective" does not occur in the interlocutor in *Burrell* while it does in this, but the true difference lies in the express inclusion of the expenses of the remit and procedure thereunder.

If this matter had been raised when the decree was given I do not think that the interlocutor would have been pronounced in its present form. Where no question is raised as to the right of petitioners to have their liability limited, and where the ship, as it were, tables its stake, then such expenses as are given against the petitioners over and above the limited fund must be strictly restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants. Here the various accounts were given in, and I find from an examination of them that the way they were treated was this—most of them were passed, but some of them were docked, and one I notice was increased. Now, that seems to me to be clearly competition. But I want to say this, and I hope it will be noted and remembered by the profession—where a discussion has taken place and the Court pronounces an interlocutor following on the discussion, the Court is responsible for that interlocutor. But where there has been no discussion, although the Court is of course technically responsible for the interlocutor, in practice it signs whatever interlocutor is handed up to it. Now, of course, the time is long passed when insuperable difficulties would be raised to the alteration of an interlocutor that had once been signed. But when an interlocutor is signed and given out to the parties it must be noted by the profession that if anything is to be said about altering the form of it, it must be said at once. If this question as to the liability for expenses had been brought up at once, I do not think the Court would have allowed this interlocutor to remain in its present form. But it is far too late to raise the question now when the interlocutor has been allowed to stand and the whole matter has been before the Auditor. I am afraid, therefore, that we can do nothing to give the petitioners the relief they ask for.

LORD M'LAREN and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the petitioners' objections to the Auditor's reports on the claimants' accounts of expenses, repel the same, approve of said reports, of consent decern against the petitioners for payment to the various claimants for the taxed amounts of their respective accounts."

Counsel for the Petitioners—Dickson, K.C.—Spens. Agents—J. & J. Ross, W.S.

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Counsel for the Claimants (The Clyde Shipping Company, and for N. Adshead & Son and Others, cargo owners)—Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Claimant (James Stirling)—Dykes. Agent—Dunbar Pollock, Solicitor.

Counsel for the Claimants (Fletcher, Son, & Fearnall, Limited, and Others)—Murray—F. C. Thomson. Agents—Boyd, Jameson, & Young, W.S.

Saturday, June 6.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

HEMMING v. GALBRAITH.

*Bankruptcy—Termination of Bankruptcy by Payment of Composition—Action of Accounting at Instance of Bankrupt against Discharged Trustee—Competency—Averment—Relevancy—Bankruptcy Scotland Act 1856 (19 and 20 Vict. cap. 79), secs. 141, 142.*

A bankrupt who had been discharged on composition presented a petition, in terms of secs. 86 and 142 of the Bankruptcy (Scotland) Act 1856, against his former trustee, calling on him to account for his intromissions as trustee, and to pay certain sums. At the date of the action the sequestration was at an end and the trustee discharged.

Held that the action must be dismissed in respect (1) that, even assuming that a trustee who had been discharged could be called on to account at the instance of the bankrupt under sec. 142 it was incompetent, under that section, to bring a general accounting as to matters already adjudicated on; and (2) that as it was not averred that the particular items objected to had not been already investigated, the pursuer's averments were irrelevant.

Opinion (per Lord M'Laren and Lord Kinnear) that where a bankruptcy has been terminated by payment of a composition, a trustee who has been discharged cannot be called on to account at the instance of the bankrupt under section 142 of the Bankruptcy (Scotland) Act 1856, the meaning of that section being that the bankrupt is entitled to call on him to account before, but not after, his exoneration and discharge.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) enacts—section 141—*"Trustee's Accounts to be Audited before Composition be approved of.*—Before the Lord Ordinary or the Sheriff shall pronounce the deliverance approving of the composition, the commissioners shall audit the accounts of the trustee, and ascertain the balance due to or by him, and fix the remuneration for his trouble, subject to the review of the Lord Ordinary or the Sheriff,

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