

been solvent, could have been compelled to grant it, for a deed may be voluntary in the sense of the Bankrupt Act though the bankrupt may be compelled to grant it. But although this is a voluntary deed, that is not enough to render it good. It must be either in satisfaction, or farther security, and in preference to other creditors. The next question therefore is, is this a deed in satisfaction or farther security? If a party in place of having one document of debt or more, gets a bond of this kind, it may be said that he takes it in satisfaction. It is difficult to say whether that is under the statute or not. I am disposed to think that satisfaction there has a different meaning. There is no great doubt that the deed is in farther security. It is not necessary that a special subject should be made over to the creditor. The meaning of the Act is not limited to that. But that is not enough, for the question remains, whether it must be said that this deed was in preference to other creditors? It is there that the question hinges, and there lies the strength of the view stated. I am rather disposed to think, looking to the words and the object of the statute, that this is, in the sense of the statute, a deed granted in preference to other creditors. The object of the statute was to fix a period within which things done, which otherwise would have been unchallengeable, should not be allowed to prejudice the right of creditors. It seems to be conceded that if any diligence had followed on this deed it would have been struck at by the statute. There is great difficulty in holding that, if diligence real or personal had followed on the bond, that diligence would have been struck at, and yet the bond stand. That is making the validity of the bond depend on the use made of it. I rather think the object of the statute was to prevent the granting of a deed which *might* be used for such purposes, without raising the question whether it was actually used. It would be an anomalous result that the deed should stand or not, according to the use made of it. It is said that the object of the statute was, not to prevent anything to induce equality, but only a preference of one creditor. I am not quite satisfied that if a party, having no document, gets a document like this, to enable him to rank with other creditors, that is not such a preference as is contemplated by the statute. It has the effect of diminishing the dividend they may receive. It ousts them to some effect from the position they would otherwise have. It may injure them as much as if it were a preference properly so called. There may be a great many more in the position of this lady, having no documents of debt, and I don't see how it can be said that if the bankrupt gives such documents of debt to one and not to all, he is not giving a preference. The fact that we don't hear of any others having such a claim, is of no moment. The question is, what may be expected to happen if there were other creditors in that position? There would be great power in the bankrupt to prefer one creditor to another, if he may give documents of debt to some of them. It is difficult to say that it is not a preference. But the words are not preference *over* other creditors, but *to* other creditors. Supposing there are other creditors not having such documents of debt, is it not a preference to give such a document? The deed accumulates interest with principal, making the whole payable on demand on a penalty, which penalty gives important advantages to the payee in many cases. The obligation to pay interest is either struck at by the statute, or it is good; and

when your Lordship holds that that is not to receive effect, it seems to me difficult to say that that is consistent with upholding the principal sum. But we are not in the position of construing the statute for the first time, for it has been enforced for centuries, and has been interpreted and acted on frequently. In so far as there seems to have been any interpretation of it by judges or institutioned writers, their opinions seem to me to countenance the view I suggest of the import of the statute. I cannot think that Mr Bell's doctrine is consistent with the judgment to be pronounced. It may be read in different ways, but I think it points in the direction I have stated. I don't mean to go over the cases, but I think they have been understood by the judges in the sense I have indicated. On the whole matter, I think the object of the statute was to fix a period within which things of this kind should have no effect at all, so as to save inquiry into individual cases, but make a general rule which should lead to a fair disposal of the estate of the bankrupt. This is a favourable case for taking an opposite view if the case admits of it. There were means here by following out which it might be found whether this was a just claim or not.

LORDS ARDMILLAN and CURRIEHILL concurred with the LORD PRESIDENT.

Agents for Trustee—G. & J. Binny, W.S.

Agents for Claimant—Hill, Reid, & Drummond, W.S.

Friday, June 28.

## SECOND DIVISION.

ADVOCATION—MORISON & FIELD *v.* JAMIESON & CO.

*Accounting—Interest—Commission—Exchange—Homologation—Acquiescence.* Circumstances in which held that a merchant who had made advances on security of goods consigned abroad, was entitled to charge a commission of 3 per cent. in addition to 5 per cent. interest on his cash advances, and was entitled to transfer to his own credit the sums received abroad as the price of goods, without holding them for the benefit of the consigner, to wait a fall in the rate of exchange.

This was an advocacy from the Sheriff-court of Lanarkshire of two conjoined actions. There were three points raised—(1) the rate of commission charged by the respondents, Jamieson & Co., in their accounts with the firm of Morison & Field, the advocators, on cash advances; (2) the amount of exchange on the remittance of a sum of 47,000 dollars from America; (3) a claim in respect of the non-recovery of certain bills of a person of the name of Robertson. Morison & Field, of whom the leading partner was a nephew of Mr Jamieson, the leading partner of Jamieson & Co., entered into the trade of forwarding goods to New York, induced by the hope of support from Jamieson & Co. The support was given by granting acceptances, and, ultimately, by money advances applied to the retirement of bills for their behoof. The case involves mainly mere questions of fact, which are fully explained in the annexed judgment of the Lord Justice-Clerk. The Sheriff-Substitute (BELL) and the Sheriff (ALISON) pronounced elaborate interlocutors containing a great number of particular findings

in fact. The Sheriff decided in favour of Jamieson & Co. Morison & Field advocated.

CLARK and WATSON for them.

GIFFORD and A. MONCRIEFF in answer.

At advising—

LORD JUSTICE-CLERK narrated the leading facts of the case, and proceeded:—

An explanation given by Mr Jamieson in his evidence in reference to the cash advances, which is supported by the accounts and other documents, is, that originally the only advances contemplated were to be of comparatively small amount, for which, when amounting to a sum considerable enough to be so dealt with, a bill was to be given. Interest only, and not commission, on such advances was to be asked. According to Mr Morison in his evidence, there was nothing where advances were to be made in the arrangement of the nature of an actual or implied limitation of their amount; and as to all such advances, interest only was to be charged.

Confessedly, as I read the evidence of both of these parties as to the accommodation to be given by way of bills, a commission was to be allowed at the rate of a quarter per cent. per month during the currency of these bills. The statement of Mr Morison is at page 92. He says [reads]. This I should certainly interpret as a current commission continuing during the currency of the bills, whether in their original form or in the form of renewals. That that was clearly the meaning of the parties is proved by an examination of the first five accounts, as to which there was no dispute between the parties. The amount of the commission charged in these accounts, and not objected to, is calculated at a quarter per cent. per month upon bills, according to their actual currency; and these accounts having been settled upon that footing, establishes the fact, as it appears to me, beyond dispute.

The contention of the advocators was, that one per cent. was chargeable upon the original transaction, and another on a retirement or renewal—a mode of dealing said to be in accordance with the practice of trade. The Sheriff-substitute, in a series of findings, disregarding, as it appears to me, both the parole and the documentary proof of the actual agreement and dealing of the parties, has apparently adopted some such principle as applicable to their dealings. The footing of the one per cent. on four months' bills, so far accords with the rate on the footing spoken to, but the bills embraced in the accounts are to a very great extent six months, the accounts do not at all concur with bills, and the one per cent. on retirements is one which is only, as it appears to me, to be found in an alleged admission at the debate, and to be founded in the alleged practice of trade, about which, moreover, there is conflicting evidence.

The question as to the commission on bills is important, not as directly affecting the state of the account, but with reference to the disputed items of commission to be charged on cash advanced to retire bills not paid by the advocators. So far as the actual commission on the bills is concerned, there is no attempt made to disturb the accounts. The actual question in dispute relates to the charge on cash advances to retire the bills. It appears to me clear on the evidence that, in the spring and summer of 1861, a pressure in the money market, and a distrust in transactions with America, occasioned a difficulty on the part of the banks in discounting bills of the advocators. It is certain

that the bank declined to discount bills tendered by the advocators with the respondents' acceptances, whereupon Jamieson & Co. proceeded to retire the acceptances when due. This condition of the fact is spoken to by Mr Bruce, p. 113, A, B, C; by Mr Jamieson, p. 107. On the 13th June of that year they wrote to Morison & Field the letter, pp. 54, 55.

The account had been previously commenced in draft, as appears from a letter of the day before (p. 51), written by the advocators, in which a proposed charge of commission on this very head is introduced. The letter of the 13th states an actual charge of commission on cash advanced, and notice is expressly given of the rate at which the dealings were to continue. It calls special attention to the fact of the charge, and states the rule of future dealings. It certainly appears reasonable that if, for the mere accommodation of their names, they should have paid to them a commission of a quarter per cent. per month, they should not be entitled to a less commission when, in lieu of their names to bills, they actually advanced the money represented in those bills; the original contemplation of small cash advances was altered; and if the commission of a quarter per cent. per month was, as it certainly appears to have been in the view of these parties, a reasonable remuneration for bill accommodation, it would not be less reasonable when money was actually advanced out of their pocket. But, as it appears to me, the necessity of considering the position of the parties generally as to the reasonableness of the charge, or its unreasonableness, is rendered as to this question unnecessary, having regard to the correspondence before us.

It is not, in point of fact, disputed, and it really does not admit of dispute, that the rule, as stated in this letter, must be applied to dealings posterior to the date of the letter. The argument is, that it could not be held to extend to any transactions in reference to advances to be made in the retirement of bills then in the circle, but only to any future transactions entered into with a view to new consignments. It seems to me that this view is not compatible with any reasonable view of the expressions in the letter, and is rendered plainly inadmissible from the evidence of the understanding of the advocators themselves as to its true construction, as disclosed in their contemporaneous writing. The advance of money to relieve current bills was, in every sense of the word, advance of money; and if the advocators did not desire that it should be advanced, their business was to find the money themselves. The advance to be made to withdraw current bills was cash advanced, for which it was said that the charge should be the same as for accepting. But it is plain that the advocators so understood it, for in their letter of the 12th June (p. 51), misdated 12th May, and in reference to the very account formally transmitted on the 13th, but evidently seen in draft before, they say "£60 is about the average, but you may charge £65 if you like." Now this was a charge for commission on the assumed average of cash advances during the currency of the account, which might be variously viewed as being £6000 or £6500; and, taking the one or other sum, the £60 or £65 comes out. Therefore they assent to a payment on cash advances made by the respondents in reference to the retirement of bills made during the currency of the past account without objection. Can they say that they did not under-

stand that the charge which they had assented to in reference to past advances should be exacted for the future? They could only read the intimation in one way, viz., as extending to future advances made in the same circumstances, whether in reference to the retirement of current bills or advances to be made without reference to them.

This seems to me conclusive, and it is very strongly confirmed by the fact, that when, in commissions made subsequently, in objecting to accounts in which this item was introduced, objections were made to the amount on which the commission was charged—implying a recognition of the principle of charge. The letters are quoted in the judgments of both Sheriffs; they seem to be capable of bearing out the meaning attached to them by the Sheriff-depute, whose reasoning on that point I adopt.

In my view the interlocutor of the Sheriff is correct on this point, and that of the Sheriff-substitute wrong.

On the second point, viz., the rate of exchange charged in reference to the remittance of 47,000 dollars from New York, the case stands thus:—

The New York house of the respondents, which traded under the firm of Babcock & Co., were, according to the course of dealing, to have power over the goods, and the produce of the consignments of goods, sent to New York by the advocates. In a letter of the 29th November 1861 (p. 55, Appx.), Morison & Field wrote as follows:—"The mode in which this was worked out was to have the produce realised by sales of goods paid to them." The 47,000 dollars in question were paid by Fanshaw & Fairchild as the produce of consignments realised by them. As the rate of exchange ruled extremely high, and was anticipated by the advocates to be likely to fall, they applied to Babcock & Co., once on the 27th September, and again on the 18th November 1862, to retain sums paid in by Fanshaw & Fairchild, expressing in one their wish, and stating in the other that they would be obliged if sums of about £2000 should be retained in their hands, to give the chance of a more favourable exchange. These requests were not complied with; but on the 21st February 1863, in reference to a payment of 25,000 dollars, there is the letter on which the contention of the advocates hinges. Jamieson & Co. intimate that they had advised Babcock Brothers & Co. that, holding the sum of 47,000 dollars, they sent a credit note—which is equivalent to an appropriation of the fund, and a fixing of the rate of exchange as of its date—without intimation, and without consent; that they were entitled to the benefit of a fall, which actually took place; and they gave an intimation (p. 15) on the 1st September 1863, when the rate was at 138 of exchange that they were ready to accept a credit note at that date, and so fixed the minimum of the rate chargeable at 138 per cent.

The respondents justify their proceeding to close the account upon the 26th June, denying that they were bound to continue the indulgence, as they view it, longer than they thought right; that, having these monies impressed in their hands, in order to indemnify themselves, they could not be held, in their instructions to their New York house, to have done more than give a fair opportunity for a reasonable time, which they say they did. They further state that they were justified by the fact that the advocates, contrary to their arrangement, got Fanshaw and Fairchild to remit to them a sum of £500 direct, which they should have paid in to

them, and that, the account being to that extent unsecured, they were justified in acting as they did without notice. I am disposed to think that the evidence supports the view of the respondents; that a sum of £500 was, without previous notice, got by the respondents from Fanshaw & Fairchild; and that this involved such a departure from the arrangements as to warrant the summary closing of a period of voluntary non-application of proceeds to purposes to which they were primarily destined. I find great difficulty in finding, in the indulgence granted by the respondents, any implied condition as to the giving of notice previous to the application of the proceeds, the more that any notice, to be available to the effect of enabling the advocates to take any advantage of it by finding funds to relieve Jamieson & Co. of their obligations, would have involved a very considerable time, and thus crippled the respondents in a way that could not have been contemplated. But it is unnecessary in my view to deal with this question on these grounds. There appears to me a ground which is conclusive against the plea of the advocates, and that is, that the advocates received, and failed *tempestive* to object to, the intimation given by the respondents of the appropriation of the money in their hands, and the rate of exchange as intimated.

The exchange was in a state of constant fluctuation—it was not proceeding uniformly in the direction of a lower rate—and was in June higher than in May. If, in such a condition of the market, the advocates were to repudiate the intimation, they were bound to have done so immediately. If there was no objection made on the intimation, the respondents were entitled, in their financial arrangements, to hold the matter ended. They could not hold that their application of outstanding obligations was to be kept open, and that for an indefinite period—giving the benefit of any fall to the advocates, but themselves fixed peremptorily to a minimum rate of 59 per cent. The first intimation of dissent was in the letter of 4th August (p. 14), sent to the New York house. I hold that, in this case, to have been too late; and, therefore, I think that the advocates have failed to show any ground for alteration of the judgment on these grounds.

As to Robertson's bills, there is a total deficiency of proof.

The case of the advocates rests upon the reception of these bills, and the alleged failure to recover their amount. The footing on which they were received, the nature of the undertaking in reference to the proposed dealing of the respondents with them, is left in obscurity. The particular neglect of which they are said to have been guilty, and the particular instructions given and not followed out, are scarcely hinted at. Whether invested with discretion as to the adoption of proceedings in regard to them, or under positive directions to proceed at all hazards, whether the institution of proceedings should promise to be of benefit or not, is left to conjecture; what indemnity, if any, was offered for the expenses to be incurred in proceedings against Robertson is not stated; and, above all, it is by no means made out that, Robertson, if sued in judicial proceedings, would have paid anything. The bills, when transmitted, were some of them over due—one had been protested—affording no very hopeful prospect of realizing judicial proceedings. It is certain that Robertson ceased to be in business for himself; and, though a witness is brought who was in New York (p. 99) in 1860, and who says he was not then insolvent, he admits that he knows nothing except from

his personal friends since 1860. There is therefore no ground for disturbing the judgment of the Sheriff on this matter; and, on the whole, my view is to remit *simpliciter* to the Sheriff.

The other Judges concurred.

The judgment of the Sheriff was accordingly adhered to.

Agents for Advocators—Jardine, Stodart & Fraser, W.S.

Agents for Respondents—Campbell & Smith, S.S.C.

Saturday, June 29.

## FIRST DIVISION.

YOUNG, APPELLANT.

*Bankruptcy—Recal of Sequestration—Liberation.*

Circumstances in which held that a bankrupt was entitled to liberation.

Thomas Mackenzie Young was imprisoned on the 7th of May 1867, in the prison of Forfar, under diligence at the instance of John Young, for a debt of £11, 18s. 4d. He petitioned for sequestration with concurrence of a creditor to the extent required by law, and on 11th May sequestration of his estates was awarded by the Sheriff-substitute. The bankrupt petitioned for liberation under section 45 of the Bankrupt Act, 1856. The Sheriff-substitute, after hearing the incarcerating creditor, who opposed the liberation, on 6th June granted warrant of liberation. On 18th June John Young, the incarcerating creditor, presented to the Court a note of appeal against this interlocutor; which note of appeal was sent to the summar roll. Thereafter, on 21st June, he presented a petition for recal of the sequestration.

SHAND was this day heard in support of this note of appeal against the interlocutor of 6th June. He contended that the I. O. U. founding the claim of the concurring creditor in the sequestration was signed as a mere fraudulent device to enable the bankrupt to get sequestration. A petition for recal of the sequestration had been presented. In the circumstances the liberation ought to have been refused.

MAIR, for the bankrupt, was not called on.

LORD PRESIDENT—The best ground for objecting to the liberation of a bankrupt under the 45th section of the statute is, that there is something fraudulent in his proceedings; and if there were anything of that here, apart from what is said to be the ground of presenting the petition for sequestration, there might be something to be said for the reclamer. But the only thing said is, that the bankrupt has presented this petition as a device to obtain liberation. If that be so on the one hand, it seems to me on the other that the proceedings of the reclamer are for the purpose of keeping the bankrupt in prison. It is just a case of diamond cut diamond. The sequestration here still subsists, and we must assume that it was properly awarded. If the reclamer had timeously presented his petition for recal, that would have been before us, and we would have considered its merits; but standing the sequestration, it would be inexpedient to interfere with the discretion which has been exercised by the Sheriff-substitute in this case.

LORD CURRIEHILL—This is an appeal against an interlocutor pronounced on 6th June, and the question is, Whether it should have been pronounced?

As matters then stood, it was properly pronounced. The ground on which the appeal is now presented is because of an *ex post facto* proceeding, viz., the presentation of an application for recal of the sequestration presented on 29th June, eleven days after this note of appeal against the Sheriff-substitute's interlocutor granting liberation was presented and appointed to be sent to the roll. I cannot hold that to be a good ground for recalling an interlocutor, which was well founded when it was pronounced.

LORD DEAS—I am of the same opinion. When the case came before the Sheriff-substitute, he pronounced an interlocutor on 6th June. There had been a sequestration awarded three weeks before, on 14th May. No objection was taken to that interlocutor at that time, in the only proper way, by applying for recal. But the objection pleaded to the Sheriff-substitute against the petition for liberation was, that the bankrupt had behaved in such a dishonest manner that he was not entitled to liberation; but the Sheriff-substitute thought that objection unfounded, and that is admitted now. The ground now taken by the reclamer is, that six weeks after the sequestration, and three weeks after the interlocutor under review was pronounced, he had applied for recal of the sequestration, and expects to succeed; and he asks us to delay this case till it appear if he can get it recalled or not. I think, if he manage adroitly, the case may not be decided until the Winter Session; and meanwhile, the bankrupt is to be kept in jail. We could only do that on some strong equitable ground, if the reclamer had been using all possible speed. But he has been going on as slowly as he could. The question itself, whether the sequestration ought to be recalled, is one with which we have nothing to do.

LORD ARDMILLAN concurred.

Agent for Appellant—Henry Buchan, S.S.C.

Agent for Respondent—William Officer, S.S.C.

Saturday, June 29.

## CUNNINGHAM, NOTE FOR POORS' ROLL.

*Poors' Roll.* Application for admission to the poors' roll refused.

Walter Cunningham, labourer, asked to be admitted to the benefit of the poors' roll, for the purpose of enabling him to raise an action of damages, for the death of his son, against the proprietors of a brickfield, in whose employment his son was working at the time of his death. The reporters on the *probabilis causa* reported in favour of the petitioner.

A. Nicolson, for the petitioner, grounded his application on poverty and ill-health. The petitioner was now earning 14s. a week; he had four children, two of whom, respectively nine and eleven years of age, were dependent on him for support. The petitioner's health was bad, and his income therefore precarious.

JOHN MARSHALL, for defenders, opposed.

The Court unanimously refused the application.

LORDS DEAS and ARDMILLAN were inclined to hold that where the action to be raised was an action of damages for loss of life by the fault of the defenders, a case which would be one of trouble and difficulty, the application could not be viewed in the same light as if the action were to be one in breach of contract, or one in which the pursuer sought to establish a valuable right of succession.