

of the expense of three fowl-houses which he had agreed should be erected at the joint-expense of himself and the defender, and that this sum must in any event be deducted from the sum sued for.

Proof was led, and on 17th May 1893 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—"Finds in fact that the defender has been tenant of the subjects in question since Whitsunday 1892, at a rent of £35 per annum: Finds that only after proceedings for recovery of the rent sued for had been threatened was any complaint made as to the state of the dwelling-house which forms part of the subjects, or that the pursuer had not fulfilled the obligations undertaken by him in connection with the defender's lease of the subjects: And finds it not proved that the pursuer undertook as part of his bargain with the defender to provide a washing-house with fixed tubs and other appliances, to erect a glass-house in the garden, and to remove a wall there: Finds in law that the defender is liable in payment of the rent sued for: Repels the defences and decerns against the defender in terms of the conclusions of the libel."

Against this interlocutor the defender appealed to the Court of Session.

The pursuer took objection to the competency of the appeal, and argued—The conclusions of the action showed that the value of the cause did not exceed £25. The Court could only look at the conclusions of the action; the appeal was therefore incompetent—*Dixon v. Bryson*, May 14, 1889, 16 R. 673; *North British Railway Company v. M'Arthur*, November 5, 1889, 17 R. 30. The case of *Bayden v. Macfarlane*, November 2, 1867, 3 Macph. 7, did not apply, as in that case the defender's liability under an I O U brought the sum sued for above the £25 limit. And in the case of *Thomson v. Barclay*, February 27, 1883, 10 R. 694, there were conclusions to the action other than monetary, so this case also was inapplicable.

Argued for the defender and appellant—The appeal was competent. The action was brought really to decide whether there was any lease between the parties or not, and, besides, the condescence showed that the sum involved was £35, viz., the whole year's rent, although only half a year's rent was sued for—*Cunningham v. Black*, January 9, 1883, 10 R. 441; *Drummond v. Hunter*, January 12, 1869, 7 Macph. 347.

At advising—

LORD JUSTICE-CLERK—In my opinion this action is incompetent. The sum dealt with in this action is less than £25, and there is a statutory rule that no appeal is to be allowed where the sum sued for is less than that sum. I see nothing in this case making it so special as to furnish a reason for not applying the statutory rule.

LORD RUTHERFURD CLARK—I have had some difficulty as to this case and still have. But as your Lordships are agreed I do not dissent. I think you are applying a most wholesome rule.

LORD TRAYNER—I think this action is on the face of it for a sum below £25, and that it is therefore incompetent.

LORD YOUNG was absent.

The Court adhered.

Counsel for Defender and Appellant—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Pursuer and Respondent—Young—A. S. D. Thomson. Agents—Welsh & Forbes, S.S.C.

Thursday, July 20.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'CARTER v. AIKMAN.

Bankrupt—Sequestration—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 146—Petition for Discharge Refused because Trustee's Expenses Unpaid.

A person having got into difficulties, petitions for his sequestration were taken out both by himself and a creditor. The sequestration was ultimately carried out, and a trustee appointed on the latter's petition. The only asset of the bankrupt was a heritable property burdened to the amount of its value at the date of the sequestration. The general creditors therefore got no dividend from the estate. Two years thereafter a petition was presented by the bankrupt for his discharge. The trustee objected, as the expenses of the sequestration, including the law account and his own fee, were unprovided for.

Held (diss. Lord Young) that before getting his discharge the bankrupt must pay the expenses of the sequestration to the trustee, or make arrangements with him regarding them.

In March 1891 John M'Carter, whose estates had been sequestrated on 21st February 1889, presented a petition to the Sheriff of Lanarkshire for his discharge in terms of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 146.

Patrick Hamilton Aikman, the bankrupt's trustee, opposed the petition, on the ground that the law account incurred by him in the sequestration proceedings and his own fee had not been paid.

The facts of the case are detailed at length in the interlocutors and notes of the Sheriff-Substitute.

On 4th June 1891 the Sheriff-Substitute (ERSKINE MURRAY) pronounced the following interlocutor:—"Finds (1) that the bankrupt J. M'Carter, a rag and metal merchant, Glasgow, acquired a number of years ago a property for £900, on which he expended about £330 in improvements and in the purchase of a right-of-way which had interfered with its value: Finds (2) that recently, he getting into difficulties, peti-

tions for his sequestration were taken out both by himself and by the objecting creditor, but the sequestration was ultimately carried out on the latter's petition, and the property in question, which had fallen to the value of £1000, was taken over by the principal creditor, who held an absolute disposition over it for advances made and to be made: Finds (3) that 5s. in the pound has not been paid, but that had it not been for the fall of £250 in the value of the property this could have been done: Finds (4) that the trustee appearing at the last minute objects to the discharge, as the expenses of the sequestration for the law account in which he is liable are unprovided for: Finds, on the whole, that before getting his discharge the bankrupt must pay to or arrange with the trustee for these expenses to the extent of, say £20: Finds that the failure of the bankrupt to pay a dividend of 5s. in the pound has arisen from circumstances for which he cannot justly be held responsible: In respect of the objections taken by the trustee, defers further consideration of the petition till future orders of Court.

“*Note.*—The law account, untaxed but restricted to £20, and the trustee's fee, £5, 5s., amount together to £25, 5s. But it must be remembered that originally the bankrupt had a concurrent petition for sequestration, which was rendered useless by the present being adopted. It seems hard to say therefore that the bankrupt is taking advantage of these expenses up to the date of the meeting of creditors, though he clearly must be held to have done so for the subsequent period. Further, the trustee is only personally liable for the expenses incurred from the date of his appointment. It seems therefore that in considering the amount of the bankrupt's liability the antecedent expenses should be deducted. These amount to between £13 and £14, and deducting them from the original total, and adding on the trustee's fee of £5, 5s., and deducting £1 or so for taxation, the £20 is brought up. Of this no doubt the bankrupt in getting his discharge will have got the advantage, and he should pay it or arrange for it with the trustee. Nor can he say that sequestration was unnecessary, as his own petition showed that he considered it proper and advisable. On the other hand, the objecting creditor cannot successfully object to the bankrupt's discharge in respect of the portion of the expenses antecedent to the trustee's appointment, as the proceedings under the bankrupt's own petition would have been equally available for the purpose.”

On 17th June 1893 the bankrupt presented to the Court the following minute—“In respect (1) that the bankrupt is unable from circumstances over which he has no control to pay or arrange with the trustee for the payment of the expenses as stated in the said interlocutor; (2) that it is usual in mercantile sequestrations for the expenses of the sequestration to be paid out of the bankrupt estates, and that the trustee in this sequestration took up the trusteeship

on these terms; and (3) that the bankrupt is sixty-eight years of age, and can only earn his livelihood by dealing in his own particular line of business, and as he cannot get goods on credit so long as he remains an undischarged bankrupt, he is thus, while his discharge is withheld, prevented from earning a livelihood; the bankrupt respectfully craves the Court to grant him a hearing on his said petition, and thereafter to resume consideration of the same, and to grant him his discharge.”

On 29th June 1893 the Sheriff-Substitute pronounced the following interlocutor:—“Refuses *in hoc statu* the bankrupt's petition for discharge, deferring further consideration of the petition till future orders of Court.

“*Note.*—There is no change in the circumstances since the case was up two years ago. No attempt appears to have been made to arrange with the trustee for the expenses of sequestration, and the trustee still opposes. The bankrupt says he cannot pay them. But why should he get the benefit of sequestration if he cannot pay the expenses of it? The case of *Napier*, 13 D. 222, is clear on the point, and is backed up by the opinion of all the Judges in the more recent case of *Mather*, 8 R. 952. No doubt in these cases the sequestration was one at the bankrupt's own instance. Here the petition on which sequestration proceeded was at the instance of creditors. But, as the Sheriff-Substitute has previously pointed out, the bankrupt by himself also presenting a petition showed that sequestration was necessary or desirable. No serious distinction can therefore be drawn between the present case and those of *Napier* and *Mather*.

“It seems to the Sheriff-Substitute that the bankrupt's friends should rather direct their attention to making some arrangement with the trustee by which his opposition could be withdrawn.”

The bankrupt appealed to the Court of Session, and argued—In view of the special circumstances set forth in his minute, he was entitled to his discharge. The case of *Napier v. Paterson*, December 3, 1850, 13 D. 222, did not apply, as in that case the trustee was appointed on the bankrupt's own petition.

Argued for the trustee—Non-payment of the trustee's account was sufficient ground for refusing the bankrupt's discharge—*Mather v. M'Kettrick*, July 14, 1881, 8 R. 952. In the present case the bankrupt himself had petitioned for his discharge, which showed that in his opinion sequestration proceedings were necessary, and he alone had derived any benefit from these proceedings. It was in the discretion of the Sheriff to refuse or grant a discharge—*Buchanan v. Wallace*, February 3, 1882, 9 R. 621.

At advising—

LORD JUSTICE-CLERK—There is no doubt that in this case the bankrupt is free from all tinge of blame. He seems to have been perfectly honest, and has done all the duty required of him in giving up everything to

the trustee in his sequestration. It has turned out that the whole of the assets consist of a heritable property burdened to the amount of its value and the heritable creditor has therefore taken everything, and nothing has been left out of which to pay any dividend to the remaining creditors. No question arises except as to the conditions on which the bankrupt is to be discharged. Sequestration of the estate having been taken out, a sum of money was necessarily spent in carrying on the proceedings, and the trustee is liable therefor to the agent in the sequestration. The trustee has no claim against the bankrupt for that money. This sole claim is from the assets of the estate for the remuneration fixed by law. In this case the assets for division among the general creditors have turned out to be *nil*, and no one will take any benefit by the sequestration except the bankrupt, who will take some benefit if he gets his discharge. The question therefore comes to be, whether the bankrupt is to get that benefit without meeting to some extent the expenses incurred by the trustee? It is no doubt a question of equity, and it has to be kept in view that the bankrupt has nothing from which to pay the trustee's expenses, and will have to get these expenses paid by his friends or remain a bankrupt. Having considered the judgments in prior cases, I think that the true course is that taken by the Sheriff-Substitute, and that it is not equitable that the bankrupt should take any benefit from the sequestration until the expenses necessarily incurred by the trustee during the sequestration are paid.

LORD YOUNG—I am very unwilling to interfere with the discretion exercised by the Sheriff in such a case as this. But I must say that the facts of this case are in my opinion unfavourable to the demand made by the trustee that the bankrupt, or rather the friends of the bankrupt, should pay an account which he has no means of paying. I have no sympathy with a bankrupt's trustee who incurs debt either on account of himself or his agent without having any creditor who will take responsibility for his account, or having property in his own hands from which it can be paid. We are informed that this rag merchant had no other property than the heritable property burdened to the full amount of its value. There is no suggestion that he represented that he had any other property. Under the sequestration the heritable property and that alone passed into the hands of the trustee. Why then did he incur the account?

The case of *Napier* is different from the present. In that case a debtor who had nothing and knew that he had nothing applied for sequestration and appointment of a trustee and then refused to pay the expenses of the trustee. In these circumstances the Court thought that it was equitable that the bankrupt should pay the expenses incurred by the trustee whom he had himself petitioned for before he got his

discharge. With hesitation, therefore—because I dislike to interfere with the Sheriff-Substitute in such a case as this—I think we should recal his judgment and discharge the bankrupt.

LORD TRAYNER—I think it is a well-established rule in our bankruptcy law that the bankrupt is not to be discharged without paying the expenses incurred by the trustee in the sequestration. There may be exceptions to this rule, but I do not think this is one. It is immaterial in the present case that the application for sequestration was made by a creditor of the bankrupt, because at the same time an application was also made by the bankrupt, and it was by mere accident or arrangement between the parties that the sequestration proceeded on the former application. The bankrupt ought to have known that he had no estate to yield anything to the general creditors. The circumstances of the present case are therefore not distinguishable from that of *Napier*, and even less distinguishable from that of *Mather*.

It is said that the rule should give way to equitable considerations. What are the considerations alleged? Only this, that unless the bankrupt is assisted by his friends, he has no funds out of which to pay the trustee, and will therefore remain undischarged. I sympathise with the position of the bankrupt, but I cannot disregard rights of other parties on account of my sympathies.

The only person who takes a benefit by the bankruptcy is the bankrupt himself, and in getting that benefit I think it is equitable he should relieve the trustee of expenses incurred in carrying through the sequestration.

I am therefore of opinion that it is my duty to adhere to the judgment of the Sheriff-Substitute.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Appellant—Hunter. Agents—Henry Robertson, S.S.C.

Counsel for the Respondent—M'Clure. Agents—W. & J. Burness, W.S.