

trustees will abuse their trust by a misapplication of the fund; if they do they are responsible, and any party interested may, by representation to us, prevent the evil. We have no such case raised on record or any matter before us other than the power of redressing the error by making the money a *surrogatum*, or the alternative of paying over the money to the executrix, a result which, I think, would be unjust and inconsistent with the truster's wishes.

LORD COWAN and LORD BENHOLME concurred with Lord Justice-Clerk.

LORD NEAVES dissented, holding that there was no direction to entail any lands but those mentioned in the deed, and also holding that the trustees were now *functi* in this matter, in respect of certain proceedings in an action brought in 1845, under which they were deemed to denude of the trust-estate.

Agent for Reclaimer—John Gillespie, W.S.

Agents for Stainton's Trustees—Tawse & Bonar, W.S.

Agents for Heirs of Entail—Tawse & Bonar, W.S.

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Tuesday, January 14.

FIRST DIVISION.

SHAW AND MANDATORY, PETITIONERS.

Bankruptcy—Bankruptcy Act (England) 1861—Bankruptcy (Scotland) Act 1856—Bankruptcy and Real Securities (Scotland) Act 1857—Mandate—Foreign. Petition for sequestration of estates of foreign bankrupt, under sect. 218 of English Bankruptcy Act 1861, 24 and 25 Vict., cap. 134, presented by official assignee of bankrupt and his mandatory, *refused*, on the ground that the mandatory had no authority to present the petition. *Opinion*, that the Court are not bound under section 218 of 24 and 25 Vict., c. 134, to award sequestration without inquiry and exercise of discretion.

This was a petition for sequestration of the estates of George Millar, sometime of Collingwood, and afterwards of Castlemaine, in the colony of Victoria, Australia, presented by Henry Steel Shaw, of Melbourne, official assignee of Millar's estate, and by Andrew Hendry, solicitor in Dundee, factor, commissioner, and attorney of the said Henry Steel Shaw, conform to factory, commission, and power of attorney dated 25th April 1865.

It appeared from the petition that, on 10th June 1864, the Insolvency Court of the colony of Victoria "ordered, adjudged, and finally declared that the estate of the said George Millar be sequestrated for the benefit of his creditors, according to law," conform to certified copy of the orders, adjudication, and deliverances produced. The petition then sets forth that by sect. 218 of the English Bankruptcy Act, 24 and 25 Victoria, cap. 134, entitled, *The Bankruptcy Act 1861*, it is enacted that, "if any person who shall have been adjudged or declared bankrupt or insolvent in India, or any of the foreign dominions, plantations, or colonies of her Majesty, shall be resident or shall be possessed of property in England, Ireland, or Scotland, or in any colony, plantation, or foreign possession of the Crown, it shall be lawful for the official assignee, trustee, or other representative of the creditors of such bank-

rupt or insolvent to apply for and obtain an adjudication of bankruptcy, sequestration, or insolvency against such person in the Court of Bankruptcy in England, and in the proper Court in Scotland, Ireland, and such colony, plantation, or foreign possession of the Crown respectively; and by virtue thereof of the same order and disposition shall be had and taken with respect to the person and property of the bankrupt or insolvent as would have been if he had been originally adjudged bankrupt or insolvent by the Court or tribunal so applied to;" and that "upon such application, it shall not be necessary for the assignee, trustee, or other representative of the creditors of the person so declared bankrupt or insolvent as aforesaid, to give proof of any act of bankruptcy, or petitioning creditors' debt, or to produce any other evidence than a duly certified copy under the seal of the Court of the order or adjudication by which such person was found or adjudged bankrupt or insolvent."

The petitioners then stated that Millar had lately succeeded to a sum of £300, which now belonged to his creditors, and craved the Court to award sequestration of Millar's estates, heritable and moveable, situated in Scotland, in conformity with the provisions of the Bankruptcy (Scotland) Act 1856, and the Bankruptcy and Real Securities (Scotland) Act 1857.

LORD MURE reported the case.

MATR for petitioners.

LORD DEAS indicated an opinion that the terms of the mandate did not authorise the present application.

LORD PRESIDENT—I am for refusing this petition on the ground suggested by Lord Deas, that the attorney in this country has no authority to present it. But I take leave to say, at the same time, that the remedy asked in it is of so peculiar a kind that it would require a very special case to entitle any one to apply for it, particularly in such circumstances as the present. What is asked is, that sequestration should be awarded of the estates of a person domiciled in Australia, and who, for anything we know, has been there all his life, and the whole object is to recover certain debts said to be due to him in this country. The object is quite incommensurate with the magnitude of the machinery sought to be put in motion. The object of a sequestration, with all the statutory forms, is to produce a *concursum* of creditors in the country where the estates of the bankrupt are mostly situated. In some cases such an application may be expedient; but I should be sorry to think that we were under any obligation, without leave to exercise our discretion or to inquire into the circumstances, to award sequestration under that section whenever any one came from a colony and demanded it. That would be too strict a construction of the statute. But I merely say that for the purpose of strengthening the ground of judgment, that the petitioner has no authority for taking the present step.

LORD CURRIEHILL—I concur. If the authority had been explicit, it would have given rise to important questions, such as arose in the case of *Stein*, but these questions cannot arise under the present application.

LORD DEAS—I agree that if this could be held to be a petition by the official assignee, important

questions might arise. But I agree also that there is no authority here given by the official assignee for presenting this petition. That authority might not require to be in express terms, but it would require to be in such terms as to comprehend this power, and I think this power of attorney does not, and was not intended to comprehend it.

LORD ARDMILLAN—I think the party presenting this petition has authority to sue an action, but he has plainly no authority under this power of attorney to take his present step.

Agent—J. M. Macqueen, S.S.C.

Tuesday, January 14.

PETERSEN AND MANDATORY v. M'LEAN & HOPE AND HERTZ.

Reparation—Ship—Arrestment of Ship—Damage to Ship by Unskilful Management—Issues. Issues adjusted to try questions of wrongful invasion and removal of vessel, malicious arrestment of vessel, and unskilful management, causing damage to vessel.

The pursuer of this action, Niels Christian Petersen, is master and part-owner of the vessel "Nayaden." The defenders, M'Lean & Hope, are merchants in Leith, and the other defender is a merchant in Glasgow.

The "Nayaden" had been employed in bringing over a cargo of bones from Barcelona to Leith, deliverable to Hertz or his order. By 9th May 1867 the cargo was delivered at Leith to M'Lean & Hope, holders of the bill of lading. On 15th May, the vessel was taken to the roadstead of St Davids, in the Firth of Forth, to load a cargo of coals for Flensburg. The pursuer alleged that the vessel, on account of her tonnage, build, and other circumstances, could not safely be taken into or allowed to remain in a tidal harbour, where she was liable to be left aground for a length of time on the receding of each tide. "Accordingly, the pursuer intended to load in the said roadstead, and had made arrangements for going into the harbour and taking part of the cargo on board when the tide was in, and thereafter going out again to the roadstead, bringing the cargo from St Davids in lighters or small vessels, and putting it on board in the roadstead. About nine o'clock at night on 16th May 1867, while the said vessel was lying safely at anchor in said roadstead, a number of men, acting on the orders of the defenders, or for whom the defenders are responsible, came on board and illegally took possession of her, hove up the anchor, loosened the top-sails, and carried her into the harbour of Inverkeithing, to the danger of the lives of all on board, the vessel having no ballast. No arrestment was used or executed, or at least no arrestment was regularly and validly used or executed at this time. If any arrestment was used, it was illegal, oppressive, malicious, and without probable cause. The harbour of Inverkeithing is not a place to which such a vessel should have been taken, or in which she could remain in safety, and this was, or ought to have been, well known to the defenders, and to said parties. Further, the pursuer specially remonstrated against the said vessel being taken into the harbour of Inverkeithing, and pointed out to the said parties who came on board as aforesaid

that injury and damage would necessarily arise to the vessel from her being taken into said harbour, or into a tidal harbour; but, notwithstanding of said remonstrances, they persisted in their said illegal proceedings. In entering the said harbour, the said parties who had taken possession of the vessel, by unskilful and reckless management, ran her up against the quay, and against a coal spout on said quay, to her injury and damage. The collision caused the vessel to lurch to starboard, and she afterwards again struck against the quay, thereby suffering additional damage. When said vessel was brought into the harbour, a pretended arrestment was executed by one of said parties, who stated that he was John Thomson, messenger-at-arms, and was acting under the defenders' instructions. The said arrestment was used on a summons at the instance of the defenders M'Lean & Hope, with consent and concurrence of the other defender, Theodor Hertz, against the pursuer as master and part owner, and for himself and as representing the other owners of the vessel, for payment of £297, 6s. 4d., for alleged short delivery of the foresaid cargo of bones. The said claim against the pursuer was entirely without foundation, the pursuer having delivered the whole cargo of bones put into his vessel at Barcelona. In said action the defenders altogether disregarded the qualification contained in the said bills of lading, and also calculated the tonelada as equivalent to the English ton. Before using said arrestment, the defenders made no inquiry whatever as to the quantity contained in the Spanish tonelada. The said arrestment was illegal and oppressive, and was used maliciously and without probable cause, or at least recklessly and without due caution or inquiry. The said John Thomson, under colour of the said pretended warrant of arrestment, caused the said vessel to be laid alongside the quay-wall of said harbour, where, at every fall of the tide, she received additional damage by falling over and lying on the wall or quay, which slopes outwards. In consequence of this and other improper and reckless usage by said parties, as also from being moored in said harbour and allowed to take the ground, the vessel received great damage and injury in her hull and timbers, and the copper was torn off her in several places. She was also considerably strained, and at each tide made a deal of water. In consequence of said injuries caused by the proceedings of the defenders, the said vessel was so damaged that she was not in a condition to take in cargo or proceed to sea, and required to be placed in a dry dock and repaired."

The pursuer sought damages, and proposed four issues, which, as finally adjusted, stood as follows:—

- (1) "Whether, on or about 16th May 1867, and in or near the roadstead of St Davids, in the Firth of Forth, the defenders, or others acting by their orders, wrongfully, and without legal warrant, invaded and took possession of the said vessel, and brought her to the harbour of Inverkeithing, to the loss, injury, and damage of the pursuer?"
- (2) "Whether, on or about the said 16th day of May 1867, the said defenders maliciously, and without probable cause, arrested the said vessel on the dependence of said action, and caused her to be detained, first in the harbour of Inverkeithing, and thereafter in the harbour of Leith, from said date till 22d June 1867, to the loss, injury, and damage of the pursuer?"
- (3) "Whether, on or about said 16th May 1867, the