personal interest to oppose such a decree as the Lord Ordinary had pronounced; the trustee represented the creditors, who alone had an interest, and he declined to interfere—*Taylor* v. *Fairlie's Trustees*, *supra* (Lord Chancellor); Bell's Comm. 434.

The Court continued the case in order that the trustee might again consider the propriety of sisting himself.

At advising—

Lord President—This action is laid on a contract of sale, and the summons concludes for implement or damages. On the 3d December the Lord Ordinary "decerns against the defenders for implement in terms of the first conclusion of the summons, and *quoad ultra* continues the cause." Then on the 30th January it appears that the defender became bankrupt, and the Lord Ordinary appointed "intimation of the dependence of this process to be made to the trustee on his sequestrated estate, and ordains him to sist himself as a party thereto, if so advised, within the next eight days." On the 25th February, having again heard counsel, the Lord Ordinary "in respect the trustee on the sequestrated estate of the defender has not sisted himself as a party to the cause, ordains the defender to find caution for expenses within the next eight days," and then the Lord Ordinary pronounced the interlocutor of the 8th March which is now under review; and that interlocutor appears to me to be sound in law and perfectly well expressed, with the single exception of a slight verbal inaccuracy. It should have been the decrees of 3d December and 25th February 1879 instead of 30th January and 25th February.

Now, the effect of that decree is to enable the pursuer to rank on the bankrupt estate for damages and expenses, and it has no other effect whatever. The defender, who reclaims, is bankrupt, and we gave another opportunity to the trustee to sist himself, but he declines, and probably for good reasons. He may think that there is no answer to this demand, and that it would be throwing away the funds of the estate unnecessarily to attempt to meet it. It appears to me that the trustee as representing the creditors is the only person who has a direct and present interest in the matter. And although I am not prepared to go the length of saying that the Court will not permit the defender to continue to defend the action upon finding caution, still even in that case his title and interest would be very remote. But without caution it is, I am of opinion, altogether out of the question. In these circumstances, I am of opinion that we ought to adhere to the interlocutor of the Lord Ordinary with the exception of the small verbal inaccuracy.

Lord Deas and Lord Mure concurred.

Lord Shand—If it had been proposed to do diligence against the bankrupt, a different principle would have applied, and probably a different result would have been reached. But the bankrupt's interest here is of the most indefinable character, and if those who have the real interest do not appear, I think the bankrupt ought to be allowed to appear only on finding caution for expenses. The rule is very well expressed in Mr Bell's Commentaries, and I think we are only giving effect to the rule as there stated.

The Court adhered.

Counsel for Pursuers (Respondents)—Guthrie Smith—Lang. Agent—J. Smith Clark, S.S.C.

Counsel for Defender (Appellant)—Rhind. Agents—M'Caskie & Brown, S.S.C.

Wednesday, June 4. *

OUTER HOUSE.

[Lord Shand, Ordinary on the Bills.

BRUCE *v.* LORIMER AND M'GREGOR.

Bankrupt—Personal Protection—Bankruptcy (Scotland) Act 1856, *secs.* 45 *and* 77—*Power of the Sheriff to Grant Liberation after Trustee Appointed, and where Personal Protection Refused by Creditors.*

Section 45 of the Bankruptcy (Scotland) Act 1856 provides—"The Lord Ordinary or the Sheriff by whom sequestration was awarded may, on application made either in the petition for sequestration, or by a separate petition by the debtor, grant warrant for liberating the debtor if in prison, after such intimation to the incarcerating creditor or his known agent as the Lord Ordinary or the Sheriff may deem just, and after hearing any objection to the granting of such warrant; and if the application be refused, it shall be competent for the debtor to make a new application for liberation, with consent of the trustee and commissioners, and on the intimation and hearing objections as aforesaid, the Lord Ordinary or the Sheriff may grant warrant to liberate," &c. *Held* that the first part of that section applies only to the period prior to the appointment of a trustee, and that after that date the Lord Ordinary or the Sheriff has no power to grant an application for liberation unless it is based upon a resolution of the creditors agreeing to give the protection, or at least unless it be concurred in by the trustee and commissioners.

Doubt (*per* Lord Shand) as to the soundness of the judgment of Lord Kinloch in the case of *Summers* v. *Marianski*, Dec. 29, 1862, 1 Macph. 214, to the effect that an application under the second branch of section 45 of the Bankruptcy (Scotland) Act 1856 would be incompetent even if in the circumstances above stated the creditors should resolve to give personal protection.

The estates of Mr J. L. Bruce were sequestrated in the Sheriff Court of Lanarkshire, and by the interlocutor awarding sequestration personal protection was also awarded until the first meeting of creditors. At that first meeting the creditors refused to grant it any longer. The bankrupt then applied to the Sheriff for liberation from prison under the 45th section of the Bank-

* Decided September 20, 1878.

ruptcy (Scotland) Act 1856. This application was opposed by Messrs W. Lorimer and D. L. Stevenson, two of the creditors of the bankrupt, and on September 3d, 1878, the Sheriff-Substitute (SPENS) pronounced a deliverance refusing the application, on the ground that as personal protection after the first meeting of creditors was by the "Bankruptcy Act 1856" entrusted to the discretion of the creditors, and as the creditors had not granted personal protection, he was not entitled to interfere with their discretion. He further found, upon the authority of the case of *Summers* v. *Marianski*, that the application was incompetent. He added this note—

"*Note*—As I read the Bankruptcy Act of 1856, the matter of personal protection to bankrupts is intended to be left entirely in the discretion of the creditors. I see that the terms of the 45th section of the Act are perhaps in one sense not quite in strict accordance with this view, for it is there provided that if protection has been refused by the Lord Ordinary or Sheriff, that an application shall only be entertained if the trustee and commissioners consent thereto, but virtually the trustee and commissioners may be said to represent the body of creditors. While even assuming that such an application was made, I take it that the Sheriff's duty would be confined to ascertaining whether the requisite majority in number and value of the creditors consented to protection. Only to that extent I take it is the Sheriff entitled to make an inquiry. He cannot review the discretion of the creditors nor set up his discretion as against theirs. In the case of *Hodge*, December 4, 1856, 18 D. 135, Lord Ivory expressly states the view above set forth—"If the question had been whether the vote had been illegally or collusively obtained, then the Sheriff would have had right to inquire into it, but personal protection to a bankrupt is a matter left to the discretion of the creditors." In a note upon this case Mr Murdoch remarks, under the 169th section of the Act providing for appeals of resolutions of creditors—"It does not necessarily follow because an appeal is competent from the decisions of the creditors or trustee or commissioners that the Court can review the decision on the merits. On the contrary, it has been held in an appeal against a resolution of creditors to renew the bankrupt's protection that the Sheriff could only judge if there was a statutory majority. Mr Borland's argument, that if in the minute of meeting of creditors a refusal to grant protection had been formally recorded he would have been entitled to appeal that resolution to the Sheriff, is, I think, only sound to this extent, that if there is a question as to whether in point of fact there is the requisite majority in number and value the Sheriff can be appealed to to decide the question; but if that requisite majority has either granted or refused protection the Sheriff cannot interfere, or can only interfere to carry out the creditors' decision.

"In the case of *Summers* v. *Marianski*, Dec. 29, 1862, 35 Jur. 157, Lord Ardmillan held that it was incompetent to appeal to the Sheriff against a resolution of creditors dealing with the matter of personal protection. That case is on all fours with the present so far as I can see, with this exception, that it is not minuted admittedly that personal protection was refused to the bankrupt. I have come to be of opinion that this makes no difference. From the statements made I have no doubt that there was a discussion at the meeting as to whether personal protection should be granted or not, and that it was only because it was apparent that protection would not be granted that no reference is made to it in the minute. Mr Borland said that the minute must be looked at as the sole record of what took place, and I am inclined to concur in the view, but as I read the statute the power is conferred upon the creditors of granting personal protection, and if they do not grant it they must be held to have exercised their discretion in refusing to grant it. Of course if there was any reason to believe that the majority in number and value of the creditors were willing to grant protection, the bankrupt's friends should see that a division takes place. If there is reason to believe this in the present case I do not doubt that a meeting for considering the point can easily be arranged to be held, but I suspect there is no question that the majority of creditors in this case have definitely made up their mind to refuse protection."

The bankrupt appealed to the Lord Ordinary on the Bills, and his Lordship (LORD SHAND) on September 20, 1878, pronounced an interlocutor finding that the protection against diligence granted to the bankrupt when sequestration was awarded was not renewed by the creditors at the meeting for appointment of a trustee, and had not been renewed at any subsequent meeting of the creditors; and further, finding that in these circumstances, and in the absence of any consent to the present application by the trustee and commissioners, the provisions of the Bankrupt Statute founded on by the petitioner did not warrant his liberation, and therefore dismissing the appeal. His Lordship added this note:—

"*Note.*—The bankrupt remains liable to the diligence of his creditors except in so far as he is entitled to protection or liberation under the statute. The power of protection against diligence is given to the Judge, who awards sequestration only till the meeting for the election of trustee, and thereafter to the creditors, and to them only.

"It is said, however, that, although personal protection depends on the Judge in the first instance, and on the resolution of the creditors in the next, notwithstanding what the Judge or the creditors may have determined as to personal protection as soon as the bankrupt is incarcerated the Court has power under section 45 of the statute, on which the present application is founded, to grant liberation. I cannot so construe the statute. If the petitioner's view were correct, it would follow that even after the creditors had expressly declined to renew the protection, and incarceration had followed, the Court might immediately grant liberation, and repeat this in the case of successive creditors, who would of course each be entitled to incarcerate the bankrupt because of the absence of any personal protection. The practical result would be to render nugatory the provision of section 77 of the statute, which leaves it to the creditors to fix whether personal protection should be given, and to give that power or discretion to the Lord Ordinary or the Sheriff. It is, I think, obvious that this would be contrary to the policy and intention of the statute, and I think it would be contrary to its true meaning. The first part of

section 45 appears to me to apply to the time before the appointment of a trustee, and to that time only. Liberation granted under that part of the section, would, I think, be effectual only till the meeting for appointment of a trustee, and would, I think, only be given in circumstances in which a personal protection against diligence for civil debt generally would be granted. The second branch of section 45 refers to applications after the meeting of creditors for appointment of a trustee, for the consent of the trustee and commissioners is a condition of the application. As from the date of the trustee's appointment the creditors alone are vested with the power of giving protection against diligence, it seems to me that unless that power has been exercised by a resolution, and at least unless the trustee and commissioners concur in the application, the Lord Ordinary or the Sheriff has no power under section 45 to grant an application for liberation.

"The judgment of Lord Kinloch in the case of *Marianski*, 1 Macph. p. 214, seems to support the contention that even if the creditors should now resolve to give personal protection, an application under the second branch of section 45 of the statute could not competently be granted. That question does not arise here, but I think it right to say, with deference to the view expressed by Lord Kinloch, that if it should again occur, it appears to me to be worthy of reconsideration."

The appeal was therefore refused.

Agents—Macandrew & Wright, W.S.

Agents—J. L. Hill & Co.

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*Wednesday, June 4.**

OUTER HOUSE.

[Lord Shand, Ordinary on the Bills.

MACGREGOR *v.* ELSWORTH.

Bankrupt—Bankruptcy (Scotland) Act 1856, *secs.* 77 *and* 45 — *Warrant of Liberation — Where Diligence has been carried into Effect.*

Where diligence has been already carried into effect against a bankrupt, the Bankruptcy (Scotland) Act 1856 does not authorise the granting of a warrant of liberation under an application at his instance founded only on a resolution of the creditors to grant personal protection. In order to liberation he must proceed under the second branch of the 45th section of the statute, and after the resolution has been passed he must obtain the concurrence of the trustee and commissioners before presenting his application to the Sheriff or the Lord Ordinary on the Bills, and in dealing with this application the Judge is vested with discretionary powers.

Opinion (*per* Lord Shand) that under the Bankruptcy (Scotland) Act 1845 an advertisement in the *Edinburgh Gazette* eight days before the meeting was held was sufficient notice of a meeting of creditors of a bankrupt "to consider as to granting personal protection."

William Macgregor, whose estates had been sequestrated in the Sheriff Court of Stirling and Dumbarton on 8th November 1877, and a trustee appointed, presented this appeal against a deliverance of the Sheriff-Substitute of Stirling and Dumbartonshire (BUNTINE) refusing an application for liberation from prison, and a warrant of protection against future arrest or imprisonment. Minutes of a meeting of creditors were produced, which were signed by the preses W. N. Masterton as mandatory for James Baxter, a creditor. No proof was offered that the latter was entitled to vote, and he was not ranked as a creditor. The application was opposed by the incarcerating creditor, in the following circumstances, the narration of which is taken from the note to the interlocutor of the Lord Ordinary (SHAND)—"This application is expressly founded on the provisions of sections 45 and 47 of the Bankruptcy (Scotland) Act 1856, in virtue of which the petitioner asks a warrant of liberation from prison and a warrant of protection against future arrest or imprisonment until 26th March 1879.

"The petitioner's estates were sequestrated on 8th November 1877, and in the deliverance awarding sequestration it is understood personal protection against diligence was granted to the bankrupt until the meeting for the election of a trustee. That protection was not renewed by the creditors, and on 13th November 1878 the bankrupt was incarcerated in the prison of Edinburgh under diligence at the instance of the respondent Mr Elsworth for a debt of £76.

"The bankrupt applied for the benefit of *cessio bonorum* to the Sheriff of Mid-Lothian, but so recently as the 10th of March the application was refused. Having failed in this attempt to obtain liberation, the bankrupt, or one or more of his friends, caused the trustee to call a meeting of his creditors "to consider as to granting protection to the bankrupt," and at this meeting, held on 26th March, as appears from the minute of meeting, the creditors present resolved that a personal protection against arrest or imprisonment for debts due by the bankrupt at the date of the sequestration be granted for one year from the date of the meeting. The only persons present at this meeting in addition to the trustee W. B. Robertson, accountant, George IV. Bridge, Edinburgh, holding a mandate from one of the bankrupt's creditors, were William Nevay Masterton, solicitor, Edinburgh, as mandatory for James Baxter, a relative or connection of the bankrupt, who has recently purchased a number of claims against the bankrupt's estate from creditors who have assigned their claims to him on payment of a small composition, and Mr Robert Broatch, solicitor, Edinburgh, as mandatory for a creditor. Mr Broatch appears on 17th March to have granted an undertaking to relieve the trustee of the expense attending the meeting to consider whether personal protection should be granted to the bankrupt, and is agent for the bankrupt in this appeal."

The Sheriff-Substitute (BUNTINE) refused the prayer of the petition, adding this note to his deliverance—

* Decided April 12, 1879.