have acted with extreme rashness if they had done otherwise. But to refuse to do that is said to be wrong. If it was not wrong, then the Sheriff has acted rightly in dismissing the petition.

LORD CRAIGHILL—I also am of opinion that the application should be dismissed, and I have only to add that were we called on to decide purely the question argued to us by Mr Trayner I should, as at present advised, be inclined to adopt the views of the Sheriff-Principal.

I concur with your Lordships in thinking that when the petition was presented the Caledonian Railway Company were entitled to refuse the demand for delivery.

LORD RUTHERFURD CLARK—These cattle were attached by arrestment *fundandæ jurisdictionis*, and that being done the consigner raises this petition against the Caledonian Railway Company for immediate delivery. He does not call the arresting creditor, but seeks to obtain warrant for delivery without calling him, and he repeats his demand by taking this appeal, for that arresting creditor has not yet been called.

I am of opinion that he is not entitled to any such warrant in the absence of the arresting creditor, and that the petition should be dismissed. I might suggest that even now the arresting creditor might be made a party to the process, but I think it is unnecessary now that the cattle have been sold.

The Court dismissed the petition.

Counsel for Pursuers (Appellants)—Trayner—Dickson. Agent—Donald Mackenzie, W.S.

Counsel for Defenders (Respondents) — R. Johnstone — Graham Murray. Agents — Hope, Mann, & Kirk, W.S.

Friday, May 30.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

ADAM & WINCHESTER *v.* WALKER (WHITE'S TRUSTEE).

Bankruptcy—Trustee—Agent and Client—Law-Agent's Hypothec—Personal Action against Trustee—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79).

A trustee in bankruptcy obtained from the bankrupt's law-agent, for use in an action to reduce an illegal preference which the bankrupt had granted, a number of documents belonging to the bankrupt, and over which the agent claimed a right of hypothec. The trustee on obtaining them granted a receipt reserving the agent's claim of hypothec, if any. The documents were used in the action, which was successful, and thereafter the agent, alleging that the trustee had recovered funds sufficient to pay his account, sued the trustee, *qua* trustee, and also as an individual, for his business account, on the ground that he had by the manner in which he had obtained the documents made himself liable for it, at least to the extent to which he had recovered funds by means of the action of reduction. *Held* that the action as against the trustee as an individual was irrelevant, and that the agent's claim against the estate must be made by claiming in the sequestration.

John White, builder, 18 Melville Terrace, Edinburgh, was sequestrated in January 1883, the first deliverance being on the 10th of that month, and John Walker, chartered accountant, Edinburgh, was appointed trustee upon the sequestrated estate.

The present action was raised in the Sheriff Court of the Lothians and Peebles at Edinburgh by Messrs Adam & Winchester, S.S.C., Edinburgh, against Mr Walker as White's trustee, and as an individual, and it concluded for the payment of a sum of £125.

The pursuer averred that from 12th July 1881 down to the date of the sequestration they had acted as law-agents for the bankrupt, and that he was due to them a sum of £196, 18s. 6d. for professional services and disbursements in connection with various actions and other business in which they had been employed by him.

They further alleged that in the way of business and in the course of their agency for the bankrupt they came into possession in November 1882 of the following documents:—(1) A bill for £94, 4s. 2d., drawn by William White, wood merchant, Edinburgh, on the bankrupt, and endorsed by Francis Allan, cab proprietor, Edinburgh, dated 4th August 1882, at 3 m/d., which the bankrupt had paid; (2) receipt and acknowledgment granted by the said William White to the bankrupt dated 13th November 1882, of the latter having placed with the former a horse, lorry, and harness, in security of the sum then due under said bill; (3) letter from James Drummond, W.S., on behalf of the said William White to the bankrupt anent said bill and security given, dated 15th November 1882; and (4) three letters from Mr Drummond to pursuers on same subject, dated 21st and 22d November 1883. These documents the pursuers averred to be the property of the bankrupt, and they also alleged that they remained in their hands from November 1882 to 5th June 1883; that they were thus in their hands at the date of the sequestration, and so became subject to their right of lien or hypothec in respect of their account for £196, 18s. 6d., or at least of the restricted sum of £125 sued for.

It was admitted that the pursuers on 5th June 1883 handed to the defender the documents above described, to be used by him as trustee in an action which he had raised against William White, on the ground that the manner in which he had received payment of the said bill through the pledging and sale of the said horse, lorry, and harness, amounted, in respect of the subsequent sequestration of the bankrupt within sixty days thereof, to an illegal preference by John White in favour of William White, under the Act 1696, cap. 5. The defender had desired to use them *in modum probationis* in the action against William White.

The following receipt was granted by the defender's agent to the pursuers at the time when he as trustee recovered the documents from them:—

"*Edinburgh*, 5*th June* 1883.

"Received by me on behalf of the trustee in John White's sequestration, the documents, of which the above is an inventory [being those above detailed], subject to and under reservation of the claim of hypothec of Messrs Adam & Winchester, S.S.C., if any, and to the trustee's defences thereto.

"KNIGHT WATSON."

In that action the trustee (the present defender) obtained decree for £40 with expenses.

The pursuers alleged that the amount of benefit derived by the defender from the documents obtained from them for use in the action was £125—the total of the sum recovered (£40) together with the expenses of both sides—and for this amount they concluded in the prayer of the petition, they being willing to restrict their account thereto. They averred that the documents were essential for that case, or at least the defender had deemed them so, and that he had recovered from the estate of the bankrupt funds sufficient to pay their business account, in security for which the documents obtained from them had been hypothecated; and further, that if he had failed to recover from the bankrupt's estate a sum sufficient to meet their lien, then he was liable to them as an individual with a right of relief against the estate, but had refused to make any payment to them either as trustee or as an individual, had denied their right of hypothec, and insisted on their proceeding by lodging a claim in the sequestration, to be adjudicated on by him in the statutory manner.

The defender admitted that he had found it to be his duty as trustee, to challenge the transaction between the bankrupt and William White, had used the documents in question, and had been successful in getting the transaction cut down by the Lord Ordinary as an illegal preference.

He averred that the documents came into the pursuers' possession after the time of the illegal transaction, and that none of them were received by the pursuers as security for their accounts, and that they were not capable of affording any such security; and he further alleged that he was quite willing that the pursuers should resume possession of them.

He averred further that he had not even sufficient funds to meet the preferable claims.

The pursuers pleaded, *inter alia*—"(2) The documents in question having come into pursuers' possession in the course of their law-agency for the said John White, in the manner condescended on, were, as at the date of his sequestration as well as at the delivery thereof to the defender, subject to the pursuers' claim or right of retention, lien, or hypothec, as against the said John White and the defender, his trustee, in respect of the pursuers' said business accounts against the said John White, incurred and due by him to them as condescended on. (9) In any event, whether there be sequestration funds or no, the pursuers are entitled to hold the defender personally liable in respect (1) of the nature of their lien, and (2) of the contract which subsequent to said sequestration defender personally entered into with them for delivery of the said documents on the terms condescended on."

The defender pleaded—(1) The action is irrelevant. They also pleaded that the documents in question were received by the pursuers within sixty days of John White's sequestration, and when he was bankrupt, and that they could not plead their right of retention so as to give them a preference over White's other creditors.

On 28th January 1884 the Sheriff-Substitute (RUTHERFURD) pronounced an interlocutor sustaining the defender's first plea-in-law, and dismissing the action as irrelevant.

"*Note*.—It is not matter of dispute that the documents in question came into the pursuers' possession subsequent to the bankruptcy of their client, and the Sheriff-Substitute is therefore of opinion that they have no lien over them (Bell's Comm. 7th edition, vol. ii. p. 89).

"But even if this were otherwise, the pursuers were bound to deliver the documents to the trustee, under reservation of the effect of their hypothec as conferring a preferable claim in the sequestration. The action of the trustee has proved beneficial to the estate on which the pursuers are creditors, and so far they have no ground of complaint. If they have a preferable claim it must receive effect in the ranking. It cannot be given effect to in the present action."

The pursuers appealed to the Court of Session, and argued—(1) On the question whether any lien had been created over documents coming into the hands of pursuers as the bankrupts' agents in November, being within sixty days of his client's bankruptcy—that the account in respect of which a lien was claimed over the deeds in question was made up of disbursements and business charges, and not of cash advances; that the pursuers had a proper lien over these documents, because although they came into their hands within sixty days of White's bankruptcy, yet that bankruptcy was not notour bankruptcy such as Professor Bell evidently referred to in his Commentaries, at the passage cited by the Sheriff-Substitute, but only insolvency — see *Menzies* v. *Murdoch*, Dec. 15, 1841, 4 D. 257. In order effectually to reduce a transaction completed within sixty days of bankruptcy it was necessary either to prove fraud at common law or to bring the act done within the statute, otherwise the deed stood. In the present case, as the bankrupt had not been divested of his estate at the time when the documents were handed over to the trustee, the transaction stood good, and effect must be given to the appellants' lien. (2) As to the class of documents over which an agent's lien extended:—With regard to the defender's pleas that the documents in question were not of a nature to be the subject of lien, the authorities went to this length, that any document falling lawfully into his agent's hands founded a lien against the client—2 Bell's Comm. p. 111; *Finlay* v. *Sime*, 1773, M. 6250; Bankton, i. 17, 15; Ersk. iii. 4, 21; Bell's Prins. 1428; Stair, vol. i. p. 85. There was no attempt in this case to give a preference to the appellants by handing them their documents; on the contrary, the documents came into their hands in the ordinary course of business the transaction, therefore, was not of the kind contemplated by the Act of 1696. The documents though other than title-deeds, were such documents as may form the subject of special lien

—*Renny & Webster* v. *Myles & Murray*, Feb. 8, 1847, 9 D. 628; *Meikle & Wilson* v. *Pollard*, Nov. 6, 1880, 8 R. 69. This was a case of special lien; here the papers recovered by the trustee became the means of increasing the value of the bankrupt's estate. As the trustee had paid himself to a certain extent by means of these documents, he became thereby personally liable to the appellants, in respect of the receipt which he granted when the documents were handed over to him alternatively. The present action might be taken as one of constitution of debt, and the appellants were willing to take a decree against the estate.

Authorities—*Renny* v. *Kemp*, July 1, 1841, 3 D. 1134; Companies Act 1862, sec. 115; *Skinner* v. *Henderson*, June 2, 1865, 3 Macph. 867; *Ferguson* v. *Grant*, Feb. 8, 1856, 18 D. 536.

Argued for the respondent—(1) The transaction was within sixty days of White's bankruptcy, and so fell to be reduced, and the Sheriff's decision in the matter was right. The tenor of recent decisions was, that in the opinion of the Court writers' hypothec had been carried too far. (2) The action was irrelevant, so far at least as it was directed against the trustee as an individual, and the appellants could claim in the sequestration for any preference which they might think that they had over the estate. In so far as directed against the trustee as trustee, the action of the appellants was simply an attempt to oust the jurisdiction created in him by the Bankruptcy Act, and as such it fell to be dismissed as irrelevant. The present case differed materially from that of *Webster & Renny*, in so far as there the trustee had granted an obligation *qua* trustee. The documents were only required *in modum probationis* by the trustee, and could now be handed back to the appellants.

Authorities—2 Bell's Comm. p. 89, 7th ed.; 2 Bell's Comm. p. 214, 5th ed.; *M'Intosh* v. *Chalmers*, Oct. 17, 1883, *ante*, p. 7, and 11 R. 8.

At advising—

LORD PRESIDENT—The defender Mr Walker, as trustee upon the sequestrated estate of the bankrupt John White, found it necessary to recover certain documents which were in the possession of the bankrupt's law-agents, in order to enable him to challenge and reduce an alleged illegal preference by the bankrupt in favour of a creditor. I think that the trustee had a right to recover and use the documents in question under the 80th section of the Bankruptcy Act. The 80th section provides as follows—"The trustee shall, as soon as may be after his appointment, take possession of the bankrupt's estate and effects, and of his title-deeds, books, bills, and vouchers, and other papers and documents, and also make up an inventory of such estate and effects." Now, it appears to me that the provisions of this section not only entitle the trustee to recover such documents as we are here dealing with, but puts the recovery of them upon him as a matter of duty. It may no doubt be said that the documents which under this section the trustee is bound to recover are only such as are necessary for the purposes of the sequestration, or for the reduction of an irregular preference such as was the case in the present instance. But the agent holding these documents would not have been prejudiced by being compelled to hand them over to the trustee, because the estate of the bankrupt is, under the 102d section of the Act, vested in the trustee, subject to such preferable securities as might have existed over it at the date of the sequestration, and have not since been reduced. This alleged preference existed at the date of the sequestration, and how far it may now be prejudiced it is not under the 80th section necessary to inquire.

What has taken place in the present case is that the trustee has under the provisions of section 80 recovered certain documents from the bankrupt's law-agents, and in the receipt for the documents he has given, what was perhaps not necessary, a reservation of any right of preference which the pursuers as law-agents for the bankrupt might have had over these documents at the date of the sequestration. The trustee undertook no personal obligation. He merely reserved whatever claim the agents might have to the documents in question. He used the documents which he had recovered, *in modum probationis*, for the reduction of an illegal preference, in which he was ultimately successful, and got decree for a sum of £40.

It is in these circumstances that the present action is brought against the trustee, both in his capacity as trustee and also as an individual, and it is brought for the purpose of enforcing personal liability against him. I do not think it can have been brought for any other purpose. The Sheriff has held the action to be irrelevant, and I am very clear that in coming to this decision, as far as the question of personal liability is concerned, he was quite right. From beginning to end of this record I can see nothing in it to suggest a ground for personal responsibility upon the part of the trustee. And any reservation which may have existed at the date of the sequestration may be founded on by the agents of the bankrupt in making their claim in the sequestration. The allegations on which the plea of personal liability is based are, I may say, the most unintelligible I ever read. If, then, no case of personal responsibility can be made out, why was the action brought? It is unnecessary. But more, it is an inversion of the order of proceedings in the ranking of creditors in a sequestration. No doubt an action may be brought by a creditor against a bankrupt or his trustee as representing him, where the interests involved are beyond those which may be claimed and brought into the sequestration. It may be necessary sometimes to constitute a debt in order to give effect to a collateral security. If there is no such cause, it is an unnecessary and improper proceeding. The plain and simple course is that all creditors shall come into the sequestration where a *concursus creditorum* has taken place, and claim in it according to their respective rights and preferences. I think, therefore, that the present action should be dismissed, and taking that view of the case I think it unnecessary to discuss any of the arguments which were submitted to us upon the merits.

LORD MURE—I agree with your Lordship in thinking that this action should be dismissed as irrelevant, and therefore consider that I am not called upon to deal with the rather delicate question raised in the first paragraph of the note of the Sheriff-Substitute. In reading the pleadings

it appears that the action is sought to be brought against the trustee not only in his capacity as trustee but also as an individual, but I can see no ground whatever in anything stated on record for personal liability, and upon that ground I think the action falls to be dismissed. The agent can claim in the sequestration and get his preference given effect to, if he has any.

LORD ADAM—This action is laid against the defender both as trustee and as an individual. A trustee may no doubt grant an obligation which he may be compelled to fulfil by an action at common law, but in the present case I cannot see anything indicating a shred of obligation undertaken by him as trustee. The receipt founded on was merely an expression of the legal rights of parties, as these rights are fixed by the Sequestration Statutes. It neither enlarged nor modified the rights either of the trustee or of the parties. So far as directed against the defender as an individual, this action is irrelevant. So far as directed against him as a trustee the ordinary and proper way was to claim in the sequestration. It is really a claim upon the trust funds, and the proper way to make such a claim effectual is to make it in the sequestration, where due effect will be given to any existing preference, and I see no reason why that course should not be followed here. There are special cases where different proceedings may be necessary, but we have no such case here. If the pursuers have a preference over the claims they will have the benefit given by the statute, but I agree with your Lordships in thinking that no sufficient reason has been stated why the present action was raised.

LORD DEAS and LORD SHAND were absent.

The Court refused the appeal.

Counsel for Pursuers (Appellants) — Young — Orr. Agents—W. Adam & Winchester, S.S.C.

Counsel for Defender (Respondent)—J. Burnet —M'Neill. Agent—Knight Watson, Solicitor.

Friday, May 30.

SECOND DIVISION.

MACFARLANE, PETITIONER.

Process—Poor's Roll—Application for Admission to Benefit of Roll—Remit to Reporters.

Circumstances in which, in an application for admission to the benefit of the poor's roll, the Court remitted to the reporters *probabilis causa,* and instructed them to inquire and report their opinion as to whether the case of poverty had been substantiated.

David Macfarlane applied for a remit to the reporters, with the view of obtaining the benefit of the poor's roll. The application was made with a view of enabling him to bring an appeal from an interlocutor of the Sheriff of Forfarshire in an action of damages for injury to the person raised at his instance against William Thomson.

Thomson opposed the application, and stated that during the proof in the Sheriff Court, Macfarlane had stated that he earned thirty-seven shillings a week, and that he could earn twice that sum when on piece-work. Since his recovery from the accident Macfarlane had been earning thirty-five shillings a week, and a certificate from his employers to the effect that he had been earning thirty-five shillings a week up to the date of the appeal was produced. In these circumstances, and on the authority of the case of *Snaddon,* June 9, 1883, 20 S. L. R. 648, the respondent maintained that Macfarlane was not a person entitled to the benefits of the poor's roll. Macfarlane replied that although it was true that he was earning thirty-five shillings a week, all the balance above £1 had been arrested at the instance (1) of the agents of Thomson for payment of their expenses, and (2) by his own agents for payment of their account, for which they held a decree. The poor's agent in Dundee was now acting on his behalf. On these facts Macfarlane argued that Thomson was not entitled to oppose the application, as they had themselves been the cause of his poverty.

The Court pronounced this interlocutor :—

"Remit to the reporters, and instruct them to inquire and report their opinion as to whether the case of poverty has been substantiated."

Counsel for Appellant — Gardner. Agent— J. A. T. Sturrock, S.S.C.

Counsel for Respondent—Law. Agent—

Friday, May 30.

SECOND DIVISION.

PATERSON *v.* WILSON.

Bankruptcy — Cessio—*Process — Sheriff—Appeal —Debtors Act* 1880 (43 *and* 44 *Vict. c.* 34), *secs.* 8 *and* 9.

In a petition at the instance of a creditor to have his debtor ordained to execute a disposition *omnium bonorum,* the Sheriff pronounced an interlocutor dismissing the action. The pursuer appealed to the Court of Session. The appeal was signed by the agents of certain other creditors, who had not appeared in the Sheriff-Court, but who lodged minutes in the Inner House craving to be sisted as appellants in the action. *Held* that, not having entered appearance before the Sheriff's interlocutor dismissing the action was pronounced, they were not now entitled to do so.

Charles E. Paterson presented a petition in the Sheriff Court at Edinburgh against David Hay Wilson, S.S.C., for decree ordaining him to execute a disposition *omnium bonorum* for behoof of his creditors, and for the appointment of a trustee on his estate. He averred that the defender was notour bankrupt within the meaning of the Bankruptcy Act 1856 or the Debtors Act 1880, and was unable to pay his debts; that certain of his effects had been sold by the Sheriff's warrant, under decree of sequestration for rent; and that he was a creditor of the defender to the extent of £9, 13s. 4d., which sum was composed of the amount of two debts both con-