

and others against the interlocutor of Lord Fraser of 14th March and 14th May last, and considered the cause, Recal the interlocutors reclaimed against, and find that no part of the improvement expenditure bond entered in the amended objections for the pursuer at the sum of £5670, 12s. 2½d. falls to be computed in the legitim fund: Find the total charge against the defender, the Countess-Dowager of Kintore, to be £115,346, 15s. 9d., and the total discharge to be £66,130, 15s. 10d., thus leaving of free personal estate £49,215, 19s. 11d., one-half of which is legitim, but these findings are made subject to the deductions from the one-half forming legitim of the sums after mentioned." . . .

Counsel for Pursuer (Respondent)—J. P. B. Robertson—Darling. Agents—Murray, Beith, & Murray, W.S.

Counsel for Defenders (Reclaimers)—Pearson—Guthrie. Agents—Morton, Neilson, & Smart, W.S.

Saturday, June 20.

SECOND DIVISION.

[Sheriff-Substitute of Renfrew and Bute.

BOYLE, PETITIONER.

Bankruptcy—Sequestration—Discharge—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 146—Bankruptcy and Cessio (Scotland) Act 1881, sec. 6—“Circumstances for which Bankrupt cannot justly be held Responsible.”

A bankrupt whose estate had failed to yield a dividend of five shillings in the pound, presented a petition for discharge at the end of two years after the decree awarding sequestration. The trustee in the sequestration and the Accountant in Bankruptcy both reported in favour of the bankrupt's discharge. The Sheriff, on the ground that the deficiency arose from a balance against the bankrupt of £800 on certain bill transactions with another person in the same line of trade, which though originally ordinary trade bills had become accommodation bills, and but for which the estate would have realised five shillings in the pound, refused discharge. *Held* that discharge should be granted.

In February 1883 the estates of Boyle & Tonner, contractors, Johnstone, and of Francis Boyle and John Tonner, the individual partners of that firm, were sequestered under the Bankruptcy Acts by the Sheriff of Renfrew and Bute. Andrew Gibson, accountant in Glasgow, was appointed trustee.

The bankrupt estate on being realised failed to yield a dividend of five shillings in the pound.

In March 1885, being more than two years after the award of sequestration, Francis Boyle presented a petition to the Sheriff praying for discharge. The trustee reported that the bankrupt had not, so far as known to him, been guilty of any

collusion; that he believed that the bankrupt had made a fair discovery and surrender of his estate, and that his bankruptcy had arisen from misfortune in business, and not from culpable or undue conduct. The Sheriff-Substitute having ordered intimation of the petition to creditors, and appointed a copy thereof and the trustee's report to be transmitted to the Accountant in Bankruptcy to report whether the bankrupt had fraudulently concealed any part of his estate, or whether he had wilfully failed to comply with any of the provisions of the Bankruptcy Act, allowed to him a proof that his inability to pay five shillings in the pound had arisen from innocent misfortunes for which he could not justly be held responsible. No creditor appeared to object.

The trustee deponed—He had made an inventory of the valuation of the estate of the firm, which showed the claims of trade creditors to amount to £1035, 16s. 10d., there being other liabilities made up of contingent claims on bills on which the bankrupts are obligants. The assets were £345, 18s. 3½d. ‘‘Had it not been for the contingent claims referred to, and the loss that was sustained in realising the stock, and wages incurred in the partial completion of contracts, the estate showed more than 5s. per £1. The bills in connection with M'Lay (another contractor) appear to me to have arisen originally through work being done by the one party for the other. The bankrupts did work for M'Lay and drew on M'Lay, and M'Lay did work for the bankrupts and drew on the bankrupts. My investigation into the matter led me to the belief that if M'Lay had retired the bills when they ought to have been met, the estate would have paid more than 5s. per £1. *To the Court*:—Interrogated—Were these in any sense accommodation bills? Depones—It is somewhat difficult to say either yes or no to that; to some extent they were. The bills arose through work actually done by each of the parties for the other. Interrogated—How did they come to be accommodation bills in a sense? Depones—Because when the bill which ought to have been paid by M'Lay fell due, M'Lay was unable to retire it, and they got the bankrupts to retire it on the promise that when the bankrupts' bill became due they, M'Lay's people, would retire it, but this M'Lay failed to do. The bills that were in that position amounted altogether to about £800. *Examination resumed*—That is fully more than one-third of the whole liabilities. It was that that brought about the suspension.”

One of the commissioners gave similar evidence. He attributed the losses of the bankrupts to some of their contracts having been taken at too low a price, in one instance to the severity of the weather. From the statement submitted by the bankrupts he was quite satisfied that the estate showed 5s. in the pound if M'Lay's bills had been arranged. He understood that these bills took their rise out of *bona fide* transactions. M'Lay did work for Boyle & Tonner for which he drew upon them, then Boyle & Tonner did work for M'Lay for which they drew upon him, and he did not pay his bills, which came back on Boyle & Tonner as the drawers. Witness did not consider any of these bills to have been accommodation bills.

James Rankin, cement merchant, a creditor,

stated that he had supplied the bankrupts with cement, which on one occasion was injured by a severe frost, causing the work to be done over again. On the assumption that M'Lay's bills were arranged, it was his opinion that the estate could have paid 10s. in the pound.

The petitioner himself being interrogated, "Were these" (M'Lay's) "bills in the ordinary course of business, or were they accommodation bills?" deponed—"They were commenced just in the ordinary course of business. M'Lay's firm were working to us and we to them, and there was an accounting in respect of that work, settled by the bills first, and they were renewed from time to time till they became accommodation bills. We paid one of these bills of M'Lay on the understanding that they were to meet ours a fortnight afterwards. They failed to do that, and that was the cause of our having to take out sequestration." Assuming M'Lay's bills out of the way they would have been able to pay nearly 10s. in the pound. He attributed the losses of the firm principally to bad weather, very severe frost having occurred during the currency of heavy contracts, and on one occasion to a flood when executing a contract to lay pipes across a stream, and on another to the absconding of a person for whom they had done work. In other cases they had taken the contracts too cheap.

The report of the Accountant in Bankruptcy was to the same effect as that of the trustee.

The Sheriff-Substitute (Cowan) pronounced this interlocutor:—"Refuses the prayer of the petition, because the petitioner has not paid the sum of 5s. per pound sterling to his creditors, and because it is not proved that his failure to do so has arisen from causes for which the petitioner cannot justly be held responsible, and decerns.

"*Note.*—The petitioner's failure to pay 5s. per pound is plainly attributable to his liability for the bills amounting to £800, to which he put his name for Messrs M'Lay. However these bills may originally have been *bona fide* bills, they latterly and for a long period had become pure accommodation bills. And it is the belief of the trustee that had the *bona fide* bills been retired at the time they became due instead of being converted into accommodation bills the estate would have paid 5s. per pound. In these circumstances the Sheriff-Substitute holds that the petitioner is responsible for the loss thus resulting to the creditors through his improper trading."

The petitioner appealed to the Court of Session, and argued—There was nothing in the evidence to show that the failure to pay 5s. was due to other than innocent misfortune in trade. The bills in question were not accommodation bills, but *bona fide* renewals of current bills, and even if they were that was not of itself a circumstance disentitling a bankrupt to his discharge.

At advising—

LORD JUSTICE-CLERK—I think the reports of the trustee and the Accountant in Bankruptcy are enough to warrant us in giving discharge.

LORD YOUNG—That is quite my opinion, more especially where no creditor is interposing to object to the discharge being granted or com-

plaining of the debts on these bills, and when there is not even a suggestion of impropriety in the conduct of the bankrupt. I think it is natural that two contractors who are doing work for each other should grant and accept each other's bills, and that that should degenerate into a system of accommodation, and that the result should be a balance against one of them of £800, is not unlikely. But I cannot see anything improper in that. I think the reports of the trustee and the Accountant in Bankruptcy are in accordance with the circumstances, and as the evidence shows that the inability, apart from these bills, to pay five shillings in the pound arose from innocent misfortune, without hesitation I think that discharge should be granted.

LORD RUTHERFURD CLARK—I agree. I think the reports of the trustee and the Accountant in Bankruptcy are strong circumstances in the bankrupt's favour, though I do not much like the origin of some of these debts.

LORD CRAIGHILL was absent.

The Court recalled the Sheriff-Substitute's interlocutor and granted discharge.

Counsel for Petitioner—Salvesen. Agent—J. A. Trevelyan Sturrock, S.S.C.

Monday, June 22.

TEIND COURT.

(Before the Lord President, Lords Shand, Rutherford Clark, Adam, and Kinnear.)

SMOLLETT v. SIMPSON.

Teinds—Sub-Valuation—Approbation—Dereliction.

In an action brought by a heritor in the Teind Court in 1884 for approbation of a report of the sub-commissioners in 1630 valuing the teinds of certain lands, the minister lodged defences, in which he stated that though the victual teind was calculated according to standard measure, yet stipend had for more than a hundred years been paid according to the county measure, which exceeded the former. He also stated that a small payment had been made to the minister of an adjoining parish out of the lands valued. He pleaded that the pursuer and his predecessors had derelinqushed the sub-valuation sought to be approved. *Held* that there was no evidence of an intention on the part of the heritor to abandon the sub-valuation, and defences therefore *repelled*.

This was an action brought in the Teind Court by Patrick Boyle Smollett of Bonhill against the Duke of Montrose, as titular of the teinds of the parish of Bonhill, and the Reverend William Simpson, minister of the parish, for approbation of a sub-valuation of the teinds of the pursuer's lands of Bonhill dated 16th March 1630.

By this sub-valuation the teinds of the eight