# CASES

## DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

## COURTS OF SCOTLAND,

## 1831.

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JOHN ROBERTSON, JOHN ROBERTSON, & JAMES ROBERTSON, Appellants.—*John Campbell—Crawfurd.*

No. 1.

EDWARD ALEXANDER and ALEXANDER SMITH, Respondents.—*Lushington—Sandford.*

*Bankrupt—Sequestration.*—Circumstances in which (affirming the judgment of the Court of Session) objections to an offer of composition were repelled.

*Delict.*—Two parties to a cause, having,—the one pending the cause and the other after he was cited as a haver,—destroyed documents, held (reversing the judgment of the Court of Session), that they were not entitled to the expenses of a petition and complaint presented against them in respect of these acts; and that the latter acted with indiscretion, and was liable in expenses.

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1ST DIVISION.
Inner House.

THE estates of the Stirling Banking Company, and the partners thereof, were sequestrated, under the bankrupt act, on the 14th of August 1826; and on the 5th of January 1830 a great majority of the creditors agreed to accept of a composition of 20*s.* in the pound, payable immediately on approval, under deduction of 12*s.* in the pound, which had been paid as dividends, and without interest on the debts from and after the date of the sequestration.*

A petition was in consequence presented to the Court of Session for approval, which was opposed by the respondents, John Robertson and his two sons John and James.

* A composition somewhat different in amount, but to the same effect, was offered by the partners to their private creditors, which was agreed to also by a majority, and petitions presented for approval. The present question, however, related exclusively to the composition offered by the banking company.

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It appeared, that in the month of February 1826 the Bank became embarrassed; and, having applied to the Bank of Scotland for assistance, they obtained an advance of £35,000, on depositing £70,000 of good bills, and they also sold Government stock to the amount of £18,000. On the 27th of March the respondent, Alexander, one of the leading partners, executed a disposition in favour of his wife of his house in Edinburgh, in liferent, and the furniture therein; and on the 30th Thomson (another partner) granted a bond of provision in favour of his children and his wife in liferent, in security of which he infeft them in certain heritable property. A demand was on the following day (the 31st) made by the Bank of Scotland for repayment of the balance of their advance; and on the 6th of April Alexander granted an heritable bond over his estate of Powis, in favour of his eldest son, for £10,000, and an heritable bond of annuity for £350 in favour of his wife in case she should survive him; on both of which infeftment was taken on the 21st.

The Bank continued to do business till the 12th of July, when they issued a notice that they were obliged to suspend payments; but, as a reversion was expected, the current notes would be retired by their agent, a banker in Edinburgh. Accordingly, about £40,000 of bank notes were taken out of circulation between that period and the 14th of August, when the estates of the company were sequestrated. A few days previous to the application for sequestration a meeting of the partners and of the leading creditors had been held, when it was resolved, that they should endeavour to have Alexander Smith elected trustee; and an advertisement was published by the Bank, requesting the support of the creditors in favour of Smith, who was accordingly elected and confirmed. At this time it was believed and held forth, that there would be a reversion after paying the creditors in full; and on this supposition the trustee consulted counsel as to the propriety of raising actions of reduction of the deeds executed by Alexander and Thomson in March and April. He was informed, that the bonds to the children were liable to be wholly set aside, and the postnuptial provisions to wives, in so far as they exceeded a reasonable and moderate fund of subsistence; but that, as a reversion was looked for, it was not expedient to involve the estate in litigation.

At a meeting held soon thereafter, the creditors instructed the trustee to bring the heritable properties to public sale; but this instruction was said to have reference to the alternative provision in the bankrupt act as to a public or private sale, and was not intended as a direction to sell. These estates were not sold; and in the month of August 1827 the trustee paid a dividend to the creditors of 10*s.* in the pound.

Early in the course of the following year Alexander and certain of the other partners attempted to make an arrangement with Kinnear, a banker in Edinburgh, so as to offer to the creditors a composition of 17*s.* per pound, under deduction of the dividend which had been paid. With this view Cleghorn, an accountant, was employed to investigate the affairs of the Bank, and the securities which would be afforded. The plan failed; and in August 1828 another dividend of 2*s.* in the pound was paid to the creditors.

Alexander having intimated his intention to offer a composition on the part of the Bank of 20*s.* per pound, a meeting of the creditors was held in October 1829, when, with reference to this offer, they ordered the trustee to prepare a state, "showing the "particulars of the funds yet in his hands and unrealized, with "the amount of the principal sum of the debts yet due, and the "balance remaining after the payment thereof; also a statement "of the interests due on the sums ranked up to the period of the "proposed payment of 20*s.* per pound, and the balance for or "against the estate in that event." On this occasion the thanks of the meeting were given to the trustee and commissioners, for their conduct in the management of the sequestrated estates. Another and a very numerous meeting was held on the 30th of November, when the offer of composition in question was made; and after considering the report by the trustee, (in which the deeds executed by Alexander and Thomson in favour of their families were brought under their notice,) they unanimously agreed to entertain the offer, and instructed the trustee to call another meeting for the purpose of disposing of it. Another was in consequence held on the 5th of January 1830, when, security being tendered, the creditors present unanimously accepted of the offer; and the statutory concurrence having been obtained, a petition for approval was thereupon presented. The total number of creditors ranked was about 2,500, whose claims amounted to about £183,000. From the report of the

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trustee, it appeared that the creditors in value who did not accede amounted to £13,398, and their number to 663. The only opposing creditors were the appellants, who were alleged to be acting under the influence of a cashier of the Bank, whose conduct had met with the disapprobation of the partners.

The chief grounds of objection were, that the offer was not reasonable, seeing that, under a proper administration of the estate, full payment, not only of the principal, but of the interest from the date of sequestration, would be obtained: That in 1828 the Bank was able to have paid 17*s.* per pound: That the estates of the private partners were adequate to supply any deficiency of the company's funds; that the partners had acted illegally in granting gratuitous deeds in favour of their families at a time when they must have known they were insolvent: That illegal preferences had been given to a great body of creditors, the holders of notes: And that the agreement to accept of the composition had been accomplished by means of a collusion between the bankrupts and the trustee, and by withholding proper information from the creditors. To this it was answered, that an immediate payment of a composition, which, with former dividends, would give the creditors 20*s.* in the pound, was infinitely preferable to the contingent and uncertain probability of realizing as much as would pay the interest; that accordingly the great majority of the creditors, after having a full state of the affairs under their consideration, were satisfied that this was reasonable; and on this question their opinion must be held conclusive, unless fraud or collusion could be established: That although allegations to that effect were made, they were not only not proved but were not true: That the deeds executed by the partners had been executed at a time when they were under the firm belief that there would be a reversion of the company's funds, and so their estates would not be liable to be attached; and that the payment of the notes was, under the circumstances, a highly expedient and proper measure, and done with no view to give a preference.

In the course of the preparation of the record, the appellants obtained a diligence from the Lord Ordinary for recovering certain writings, conform to a specification; and in consequence the following schedule was served upon Alexander, in reference to which he was cited to depone as a haver:

" 1. All letters received from Edward Alexander of Powis, or " others, connected, directly or indirectly, with the affairs of the

" Stirling Banking Company, or the private estates of the individual partners, between the 11th day of February 1826 and " 2d day of March 1830.

" 2. All memorials to and opinions from counsel, as well as " correspondence in relation to heritable securities granted by " Mr. Alexander in favour of his wife and children in March " and April 1826, and also as to the renunciation of these securities; likewise in relation to a composition of 17*s.* per pound, " proposed to be paid to the creditors of the Stirling Banking " Company in 1828, and embracing the correspondence had " with Mr. James Cleghorn, accountant, employed in preparing " the states, &c. connected with that offer.

" 3. All the memoranda, notes, letters, and correspondence, " drafts, jottings, missive letters, states, extracts and abstracts " of proposals, views or sketches of affairs, memorials and " opinions, circulars, minutes, and, in general, all the documents, " scrolls, and copies transmitted by Mr. Cleghorn, accountant, " to Mr. Alexander, in the month of December last.

" 4. All letters of renunciation, written or subscribed by " Mr. James Edward Alexander, renouncing or offering to " renounce his heritable security over Powis."

On being examined, he was interrogated, " Whether or not " he is in possession of the documents, scrolls, and copies " transmitted by Mr. Cleghorn, the accountant, to the deponent, " in the month of December last? Depones, That though it " appears to the deponent, that, under the diligence, the objectors " are not entitled to call for all the documents referred to in the " foregoing interrogatory, the deponent does not object to make " an answer thereto; and he accordingly depones, that all states " and documents regarding the negotiations with Mr. Thomas " Kinnear in 1828, when an attempt was made to induce " Mr. Kinnear to guarantee an offer of 17*s.* per pound to the " Bank creditors, and including the correspondence, jottings, and " calculations in Mr. Cleghorn's hands, were transmitted to the " deponent by Mr. Cleghorn, at his, the deponent's, request. " Depones, that the deponent destroyed the whole of the said " writings, with the exception of what are contained among the " writings already produced. Depones, that the deponent destroyed them at different times as useless, and after the foresaid " negotiation failed. Interrogated, Whether or not the deponent " destroyed any of the documents referred to within the last two

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"months? Depones, that he has no doubt that he destroyed "some of them within the aforesaid period. Interrogated, "Whether or not he destroyed any of these documents within "the last month? Depones, that he thinks he did. Interrogated, "Whether or not he destroyed any of these documents within "the last fourteen days? Depones, that he did not."

At the same time the following schedule was served on Smith, the trustee, in regard to which he was cited to depone as a haver:

"1. All letters received from Edward Alexander of Powis, or "others, connected, directly or indirectly, with the affairs of the "Stirling Banking Company, or the private estates of the "individual partners, between the 11th day of February 1826 "and 2d day of March 1830.

"2. All memorials to and opinions from counsel, as well as "correspondence in relation to certain heritable securities granted "by Mr. Alexander in favour of his wife and children in March "and April 1826, and also as to the renunciation of these secu- "rities, and particularly all private letters from Mr. Edward "Alexander, or from Mr. James Edward Alexander, or from "Mr. John Forman W. S., in reference to the renunciation of "the heritable securities, and specially in reference to Mr. James "Edward Alexander's letter of 9th May 1829."

After making several productions, and replying to many interrogatories, he was interrogated, "Whether or not the depo- "nent has put away or destroyed any of the writings called for? "Depones, that on Saturday last, after receiving his citation to "appear and be examined as a haver this day, on looking over "Mr. Alexander's letters to him, he found one entirely of a "private nature, and relating solely to his, Mr. Alexander's, "own private affairs: That the said letter appeared to have been "written under the influence of irritation, and as it did not refer "to the heritable securities, or to any intended offer of compo- "sition, and appeared to the deponent to be of no consequence "whatever, the deponent destroyed it."

In consequence of these depositions, and on certain other grounds unnecessary to be stated, the appellants presented a petition and complaint to the Court of Session, praying them "to find that the said Edward Alexander and Alexander Smith "did wrong in concealing, putting away, or cancelling the "documents before mentioned, and to inflict upon them such

"censure as your Lordships may think suitable; and farther, "on the various grounds before detailed, to remove the said "Alexander Smith from his office as trustee, and appoint the "said creditors to proceed in the election of a new trustee, in "terms of the statute; and farther, to find the said Edward "Alexander and Alexander Smith liable to the petitioners in "the expenses of this petition and consequent procedure, and "decern."

In defence against this complaint, Alexander stated, that he had considered the documents of no importance—had acted through ignorance, and expressed his regret. Smith stated, that the letter alluded to was one of somewhat an intemperate nature, addressed to him by Alexander, and, under the influence of temporary irritation, making certain unfounded charges; and that, being unwilling to have these exposed to the public eye, and not being aware that he might have had the protection of the commissioners, he had destroyed the letter, for which he also expressed contrition.

In reference to the petition for approval of the composition, the Court granted the prayer thereof on the 10th July 1830, and at the same time dismissed the petition and complaint, and found the respondents entitled to expenses.*

Robertsons appealed.

*Appellants.*—1. The grounds on which the appellants opposed the approval of the offer of composition were relevant, and more especially that which was rested on the averment, that full payment might be obtained; but the Court below refused to allow evidence to be taken in support of this allegation, and therefore a remit ought to be made to the effect of allowing such evidence. It is no answer to say, that a great majority of the creditors accepted of the composition; the appellants are creditors, and they are entitled, in terms of the statute, to be heard in opposition to it, and to have their averments duly inquired into; but there was, in point of fact, adduced such written evidence as established the averments, or, at all events, raised such a strong case as to entitle the appellants to a thorough investigation.

2. Although it is admitted by the respondents, that they

* 8 Shaw and Dunlop, No. 512.

Feb. 4, 1831. destroyed documents bearing on the present question after the discussion had commenced, and although the trustee admits that he did so after he was specially cited under the warrant of the Court, yet the prayer of the petition and complaint has not only been refused, but the Court below have actually approved of their conduct by finding them entitled to full expenses.

*Respondents.*—1. The question, whether an offer of composition is reasonable, is one peculiarly fitted for the consideration of the creditors; and the legislature has declared that this shall be ascertained by the votes of a certain majority. In the present case there is not only that majority, but almost all the creditors who have any real interest in the estate have concurred, and not a single one opposes the approval, except a father and two sons acting under a latent influence. In these circumstances it is necessary to show strong and manifest grounds for holding the composition unreasonable before any sanction can be given to such a proposition. No such evidence has either been produced or referred to; on the contrary, the statements of the appellants themselves show that the offer is highly advantageous to the creditors. It is said that there may be a reversion under proper management; this is quite true; and indeed, unless there had been such a prospect, no offer of composition would have been made, and no one would have interposed as cautioner. But, on the other hand, there may be a loss; and therefore it is infinitely better to accept of an immediate and certain payment of 20*s.* in the pound than to continue an expensive administration, at the risk of loss, for the purpose of realizing the interest.

2. The petition and complaint was not resorted to with any fair purpose, but merely to harrass the respondents, and prejudice the Court against them. The documents which were inadvertently destroyed were of no value; and copies of them, or at least of the greater part of them, were in existence, so that the appellants had no true interest to complain.

Lord Chancellor.—My Lords, This is certainly one of the most important cases, in point of amount, which has for many years come before your Lordships for judgment; and in reference to the large fund which the pendency of this appeal kept in suspense, and the interest of the creditors of the insolvent's estate, your Lordships were pleased, on the report of your Committee, to advance the appeal, and allow it to be brought on before others prior in point of date. The last of the interlocutors was pronounced in the month

of July 1830; and your Lordships are now, early in the following February, about to pronounce final judgment. I trust that this will soon be no longer reckoned an extraordinary dispatch, and that the same speed will be found in other cases to result from the regular course of proceeding.

My Lords, it is very much to be regretted that some provisions were not made in the statute of the 54 G. 3., the construction of which is, to a certain degree, now brought under consideration, with a view to giving that finality, if I may so speak, to proceedings in the Court below in matters arising out of bankruptcies, in Scotland, which, except in peculiar cases, is given in England to the proceedings in bankruptcy by the statute law of the land. It is known to your Lordships, that in England the great object of the Legislature being in this respect to promote dispatch, and to prevent the estates of bankrupts being torn to pieces by endless litigation, a deviation is made from the ordinary rule, which enables parties, where there have been interlocutory orders or final decrees in courts of equity, to appeal to your Lordships' House; for, in bankruptcy, no appeal is allowed, unless the Court, moved by the peculiar circumstances of the case—a thing of rare occurrence—gives leave to file a bill with the express view of enabling the party, against whom the decision is made, to appeal against it. Unfortunately this is not the law in Scotland; and although in the case of the Stirling Banking Company v. Stein*, which was an appeal from an order of the Court of Session discharging the bankrupt, which order was opposed by a small number of creditors, and that small number stated to have received very little countenance, Lord Eldon appears to have been at first inclined to doubt whether an appeal lay against an order of the Court of Session; yet, on looking into the acts of parliament, and referring to the common law jurisdiction of this House as a Court of Appeal in all cases where the right of appeal is not expressly taken away, his Lordship had no doubt ultimately that the appeal lay. No question has been raised in the present case as to the competency of this appeal, nor could it; for, after the consideration given by Lord Eldon to the matter, and the suggestion he expressly threw out, with a view to inducing the Legislature, when the bankrupt law of Scotland, namely, the act of the 33 G. 3., should be revised, to rectify this defect, and to render the law, in that respect, similar in the two parts of the kingdom, several acts passed, and among others the 48 G. 3. (not five years after Lord Eldon had thrown out that suggestion), enacted in part for the purpose of restricting the right of appeal, and taking it away in the case of

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* See 2 Bell, p. 447 and 453. The judgment of the Court of Session was affirmed 27th May 1803. Marshall et alii, Creditors of Stein, v. Stein.

Feb. 4, 1831. interlocutory orders, unless where the Court gave leave, or there was a difference of opinion on the Bench, yet the matter now under consideration was passed over entirely without observation, and no change made in the law previously existing. Then came the act on which this question arises, the 54 G. 3.; and I think there is nothing in that act to interfere with the appellate jurisdiction, either in a case of ordinary discharge, or in a case of discharge under the fifty-ninth section, a composition being sanctioned; nor do I understand that it is contended on the part of the Respondent that this appeal is not competent. We are therefore placed in the situation in which, with regard to the commissioners of bankrupt here, the Court of Chancery stands, a court of final resort; and without having access to more than that which appears upon the written documents before us, we are called upon to go through the whole mass of accounts for the purpose of ascertaining the question which was before the Court below, and was before the parties immediately interested; I mean the meeting of the creditors themselves. The Legislature has said, that if a composition shall be offered and accepted, at a meeting duly called, by nine-tenths in number and value of the creditors, unless that is objected to, it shall be deemed final, and shall entitle the Court to give the bankrupt his discharge, unless the Court, on objection made on behalf of any part of the creditors, shall be of opinion that it was not reasonable, or that the requisite of the statute had not been complied with; namely, the requisite of nine-tenths in number and value. The statute appears clearly, upon the sound construction of the fifty-ninth section, to have given a right to deliberate, first, upon the reasonableness, by which I understand the reasonableness of the offer at the time the creditors, nine-tenths in number and value, agreed to accept it; for I hold that to extend the time is a doctrine, ventilated by Mr. Bell, adverse to the policy of the bankrupt law—a doctrine without authority, and which would enable any creditor, by holding out and engaging in a protracted litigation, to bring the matter before the Court in circumstances altogether different from those wherein the creditors were called upon to exercise their discretion of accepting or refusing the composition. I say so with a reservation of any thing in the nature of surprise, or any new information, (*res noviter veniens ad notitiam*,) with respect to the nature of the funds at the time the composition was accepted by the creditors; but excluding any consideration of the increased value of the property between the date of the composition accepted and the period of the Court's coming to its decision. The Court is to see, first, that the composition was reasonable; and, secondly, that the statutory requisite had been complied with, by nine-tenths in number and value having accepted. Now, I take it to be clear, that though

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the question of reasonableness was here before the Court, it is the duty of the Court in all cases to lean much, I may almost say exclusively, towards that which the creditors themselves, by the large statutory majority in number and value, have thought fit to accept. They decide on the nearest view of the circumstances; and they, at all events, are the best judges of what is for their own interest. The very large proportion of those who are interested is required by the Legislature to concur, for the reason that so large a proportion gives a fair security, in ordinary cases, that that which has been so offered and so accepted is good for the whole as well as for the nine-tenths; and that the remaining tenth who do not accept are influenced by an unsound view of the state of the affairs of the bankrupt, or possibly by a less sound view of their own interest than that taken by the great majority which has accepted. This does obviously not exclude the jurisdiction of the Court, where, from the peculiarity of the circumstances, it is obvious that the creditors have done wrong; if it is quite plain that they have acted under a false impression of the nature of the funds or false views taken of their own interest, it is clear that, in such a case, the Court has a right to say they have accepted an unreasonable offer, although nine-tenths in number and value concurred; but in all cases the leaning ought to be strongly in favour of an offer so accepted, and in all cases the burden of the contrary proof ought to be held strictly to lie upon those who would bring the Court to that conclusion.

My Lords, with these views of the case I have looked into the evidence which was before the Court below, and which has been brought before your Lordships. We have now to judge of the same question, whether the creditors did well in accepting that offer; and I am called upon by the counsel for the appellants in this case to advise your Lordships, that nineteen hundred persons, (five or six hundred of whom were actually present at the meeting, and the rest of whom authorized those to act for them,) claiming an amount of debt so large as 169,000*l.*, were all so little aware of what it most imported them accurately to know, or were all so careless about their own interests, as, either from underrating the value of the estate, to have taken a composition less than it would have afforded, or, for reasons largely urged at the bar, (other than the mere amount of the sum offered,) to have agreed to that which, in those circumstances, and aware of the value of the estate, they ought not, upon a sound view of their own interests, to have done. Could I advise your Lordships lightly to come to the conclusion,—even if a smaller number had constituted the meeting,—that they had formed a wrong estimate either of the bankrupt's estate or their own interest, in preferring the security of a cautioner to the chance of a better dividend in case the land were brought to sale? If I could not,

Feb. 4, 1831. there ought indeed to be very strong circumstances to make me hold, that nineteen hundred out of little more than two thousand (and of those five or six hundred actually present) were to be considered, on the representation of a four-hundredth part of the whole, to have committed such a mistake, It appears to me, to say the least of it, the supposition of a bare but most remote possibility. My Lords, Courts of law cannot act on such suppositions. Courts cannot act upon a thing merely because it is not absolutely impossible that it should be true; they must act as dealing with the affairs of men upon the ordinary rules which guide persons of sound minds in the discharge of their duties to themselves. It is clear that an offer of 20*s.* in the pound, ready money, with the security of solvent bondsmen, though without interest, may be a much more advisable thing to accept than the chance of 20*s.*, plus one shilling in the pound of interest, without a bondsman, and contingent upon the sale of an estate in Scotland being so soon completed, and so successfully accomplished, as to produce that 21*s.* in the pound on the amount of their debts; especially as they are guaranteed against an event which at all times, and which, in 1827-8-9, of all years, was not surely a very remote possibility, namely, a fall in the value of land; and had the security of the bondsmen to stand against adverse circumstances of any nature whatever. The meeting took all this into consideration; and, upon the great numbers who concurred, it is impossible to suppose that any imposition can have been practised. My Lords, I have no doubt whatever that the Court of Session did come to a sound conclusion upon this subject; nevertheless, I cannot sanction, by passing it by unnoticed, the doubt expressed as to the relevancy of the evidence with respect to the amount of the estate. I think that doubt was not justified; for if it had been proved, that instead of being, according to the calculation, 38,000*l.*, the property, if rightly sold, would have produced, for instance, half a million, no one can deny, that this would go to show, that the great majority of creditors, though acting for their own interests, had accepted bad terms, and if it appeared, on the whole, clear that the proposition ought not to have been accepted, then the matter must have been re-opened. I shall humbly advise your Lordships to affirm the interlocutor appealed from in the first case, but without costs.

With respect to the second case, I certainly am under the necessity of recommending your Lordships to come to a different conclusion. Mr. Smith the trustee, not a man of business, but a country gentleman, acted as what we should in this country call the sole assignee of the estate and effects of the bankrupt. In the course of a controversy, which has brought the matter ultimately to this House, he was served with diligence, (a writ in the nature of a subpœna duces

tecum,) to bring all instruments in his possession before the Court, for the purposes of justice. After being served with this writ, of the exigency of which he ought to have been aware, he thinks fit to destroy a letter which, even by his own account of it upon his oath, when endeavouring to explain away this rash act of his, clearly appears to have come within the description in the writ. I say deliberately, that after having been served with that process, if he thought it as clear as noon-day that the letter did not come within exigency of the writ, he ought not to have destroyed it. But admitting, that it seemed to him to come within the exigency of the writ, he had no business to destroy it upon any fancied notion of its immateriality, or even to have exercised any discretion in considering whether it was material or not. It is needless to add, that there would be no security in the administration of justice—no security for parties whose dearest interests depend on the conservation of evidence—if such a rule should be established as that for which an opening is presented by what appears to have been said in the Court of Session when dealing with this evidence, that the gentleman seemed to have acted through inadvertence. I am satisfied he did not do it through inadvertence, though he may by no means have thought he was acting wrong; but no one shall be heard to say in a Court of law that he destroyed a paper through inadvertence at any time; least of all shall any man be heard to say that he destroyed a paper through inadvertence, when he tells you in the same breath that he destroyed it after being served with notice to produce it. That notice determines inadvertence; that notice puts all question of inadvertence out of Court; that notice makes him advertent whether he will or no. He is at his peril to be advertent; and he shall not be heard in any Court of law, either in Scotland or England, to say that, after the service of the writ, he destroyed that which the writ called upon him to produce, and to keep for the purpose of production. Even if he had thought that the paper was not aimed at by the writ, he had no business to destroy it then. There are times and seasons enough for destroying useless papers, other than those times and seasons, important in their nature, suspicious in their occurrence, which follow the service of a writ like this; and be it observed, too, when the party, in obedience to that writ, was called upon to produce it on an early day. He ought hardly at such a time to have destroyed a letter, even if he was aware, which he was not, that the letter was not one which the writ required him to keep and to produce. Nevertheless, the Court of Session have not only said that this gentleman was liable to no censure, but they have ordered the costs incurred by him to be paid by the party who made the application to the Court. I cannot understand the ground of that decision. I do not see that it is

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founded in reason; I am sure it is not founded in the usual practice of Courts of justice in any part of the world; and I take it to be inconsistent with the ordinary practice of the Court of Session itself; for in the case of M'Rae *v.* Mackenzie, a petition and complaint having been presented to the Court against a bankrupt, by his trustees and commissioners, for having written to them certain scurrilous letters, the Court dismissed the complaint on the ground, as I understand, that it was incompetent, by which I infer they meant that they had not jurisdiction to deal with it. That was a case for granting costs, against a party bringing another before the Court, to the party who was the object of the application, the question being one in which the Court had no jurisdiction; nevertheless, they refused to award the costs to the man not within their jurisdiction, and they refused to award them because of the impropriety of the expressions he had used in his letter. That is going on a principle different from the one on which they have determined this case; and that was a much weaker case for refusing costs to the person whose conduct was impeached than this is, for giving costs to the person charged with the indiscretion, unless it is meant to be said that it is a worse offence for a man to write an abusive letter, than for a trustee to destroy a paper, after being served with a subpœna duces tecum to keep and produce it. There is no comparison between the two cases; and the same principle which induced the Court to refuse the expenses in the former case ought, in my opinion, to have induced it to give the expenses in the latter to the party complaining. My Lords, I have said Mr. Smith is not a man of business, and that is a circumstance of great extenuation. If he had been a man of business, I should have recommended to your Lordships to remit the case, with direct words of censure; but he is not a professional man, and it is very possible he may have thought this an act of kindness towards Alexander, who had written what he calls a private letter in a moment of irritation. With respect to Alexander, I think he had better not, in the peculiarly delicate situation of the bankrupt, have destroyed any part of these papers; but he did so on a supposition very plausibly put forward, that they were the correspondence between himself and another person on the question of obtaining security, and that treaty having failed, he destroyed the letters; but there is a material circumstance, and which widely differs his case from Mr. Smith's; what he did was before he was served with the diligence of the Court, and therefore, though I am clear the Court ought not to have allowed him his expenses in this case, neither do I think the Court ought to have allowed expenses as against him, in favour of the petitioners; and I shall therefore move your Lordships that this case be sent back to the Court, with instructions, which I shall dictate, according to the

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tenor of the principles I have taken the liberty to lay down. My Lords, I hold this to be a case of importance; for it is highly necessary to guard against whatever would break in upon that most sacred rule, the preservation of evidence, in order to its being produced in our Courts of justice, and to repress any destruction of it by the hand of the keeper; and above all, after the Court has issued its process to bring the evidence into Court. In the second case, therefore, is it your Lordships' pleasure that the interlocutor appealed from be forthwith remitted, with instructions to the Court below to dismiss the complaint as against Alexander, but without expenses, and to find that Smith ought not to have destroyed the letter of Alexander to himself, after he had been served with diligence; thus taking upon himself to judge of its materiality, when he ought to have kept it ready to produce under the diligence, and find him liable in expenses in the matter of the petition?

The House of Lords ordered and adjudged, That the interlocutor complained of be reversed, and the cause remitted back to the Court of Session, with instructions to dismiss the petition and complaint as against the respondent Edward Alexander, without expenses, and to find the respondent Alexander Smith (the trustee) liable to the appellants in their costs and expenses of the said petition and complaint; and the Lords find, that the said respondent Alexander Smith acted with indiscretion, upon his own explanation, in destroying the letter referred to in his deposition, after he had been served with diligence (and thus took upon himself to judge of its materiality); whereas he ought to have kept it ready to produce with the diligence.

*Appellants' Authorities.*—2 Bell, 464; Kirkpatrick, July 5, 1827; (5 Shaw and Dunlop, 895;) 2 Bell, 469; 6 Vesey junior, 622; Tait on Evidence, 179; Campbell, Aug. 8, 1783, (3973).

A. Dobie—Richardson and Connell,—Solicitors.