

C. L. Cham.]

McINNES v. DAVIDSON.

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such an obligation, it was absolutely beyond his power to comply with it, having not a dollar of his own, nor any means of defraying the expenses thereof, the assignee having received all his property and assets; but having been gratuitously provided by some relatives with the means of going to Bruce Mines, no part of which was furnished either by his creditors or by the assignee, he conveyed the said books and papers to Montreal, and left them at the counting house of Messrs. Hingston, Telfer & Co. in Montreal, and the assignee received notice thereof, and the books and papers were shortly after, as the insolvent has been informed and believes, offered to the assignee by Mr. James Hingston, of the firm of Hingston, Telfer & Co., but he declined to receive them:

That after the refusal of the application of the insolvent to be discharged, he procured the said books and papers to be forwarded from Montreal and delivered to Miles O'Reilly, Esq., who, as the insolvent was informed delivered them to Messrs. Burton & Bruce, the assignee having, as the insolvent was informed, authorized such delivery to them as a delivery to himself:

That on the 30th of August, 1867, the insolvent applied to the said judge to be discharged from further imprisonment, setting forth in his petition for that purpose the previous sentiments, which application was refused on the 16th of September last:

That the insolvent complied with the said order of the 26th of June last to the utmost of his power before making the last-mentioned application, and his further imprisonment can be of no use to any one, except thereby to coerce some of his friends or connections into assuming the payment of his debts, but, on receiving the said letter books from Montreal (which contained the insolvent's private as well as his business letters), he found that some leaves had been removed from the one of most recent date, and although he was unable to set forth what was contained on the said missing leaves, he is able to say, and does say, that they did not contain any matter of any use to the assignee or his creditors in ascertaining the state of his affairs or otherwise howsoever; and that he is unable to say how the missing leaves were removed, but they were removed without the insolvent's knowledge or consent, and against his will; and until he received the affidavit of James Hingston, of the 11th of September, and of Edward J. Lindsay, of the 10th of September, he was under the belief that they were removed while the said books were lying in the counting house of Hingston, Telfer & Co., in Montreal.

The insolvent, therefore, prayed that he might be allowed to appeal from the last-mentioned decision of the said judge, and that the said decision might be reversed, and he discharged from further imprisonment under the said warrant, being fully persuaded that he could not live the said six months if retained in his present place of confinement.

W. Sydney Smith shewed cause.

The warrant of imprisonment is not an order appealable by the statute, and the sentence of imprisonment when awarded cannot be remitted. *Ward v. Armstrong*, 4 U. C. Prac. Rep. 60;

Insolvent Act of 1864, sec. 8, sub-sec. 7; Insolvent Act of 1865, sec. 29.

Jas. Patterson and *Curran* supported the petition.

The insolvent may proceed in case of a wrongful imprisonment either by way of appeal under the statute, or by *habeas corpus* at the common law; *Deacon's Law of Bankruptcy*, 727; *Ex parte Jones*, 1 Mont. D. & D. 145.

The warrant should have stated that the insolvent had the books and documents in his possession which he was committed for not delivering; *Crowley's case*, 2 Swab. 1.

No jurisdiction is shown on the face of the warrant.

No demand of books was ever made of the insolvent, nor was any refusal by him to deliver them shown. There was therefore no contempt. It is not mere disobedience that is punished—it is wilful disobedience, and none is shewn here; *Miller v. Knox*, 4 B. N. C. 574.

That the power of imprisonment is conferred only to enforce compliance with the orders of the Court, and when that has been secured the imprisonment should no longer be continued. It was not intended strictly to be a proceeding in *paenam*: *Ex parte Oliver*, 1 Rose 407, 2 V. & B. 245; *Ex parte James*, 3 Jur. 538.

ADAM WILSON, J.—The clause under which the original order of the 26th of June, 1867, for the delivery by the insolvent of his letter books to the assignee or to any agent he might name, is sec. 29 of the Act of 1865. But the judge must have possessed such power, independently of that clause, under sec. 3, sub-secs. 9, 11, 22, of the Act of 1864, although what his power of punishment would have been in the absence of the express provision contained in the act of 1865 is not quite certain.

No complaint has been made in this present appeal against the order of the 26th of June, for the delivery up of the letter books, nor has any complaint been made against the warrant of commitment dated the 17th of August last, imposing six months' imprisonment upon the insolvent, "or until this Court (the County Court judge) shall make order to the contrary." Nor is any complaint made that the petition of the insolvent to the judge of the County Court, dated the 22nd of August last, praying to be discharged from custody under the warrant of commitment was improperly disposed of, the judge having been of opinion "that the insolvent was disobeying the order of the 26th of June," and "refusing to rescind or set aside the order for commitment, or to make any order for discharge of the insolvent, unless he complied with the order requiring him to deliver up these books and papers."

The appeal is merely against the order of the Judge of the County Court of the 16th of September last, refusing to grant the application of the insolvent, of the 30th August, to be discharged from further imprisonment, because he had complied with the order for the delivery up of the letter books, &c., so far as it was in his power to do.

In disposing of that application, the learned judge said that he considered sec. 29 of the Act of 1865 both compulsory and punitive, because the time fixed by it was definite and not