Tuesday, July 4.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COOPER *v.* FRAME & COMPANY.

Process—Pursuer Discharged Bankrupt—Caution.

Held that a pursuer who had been bankrupt, and had been discharged without composition, the trustee in bankruptcy having also been discharged, was entitled to sue a claim with which the trustee had elected not to proceed, without finding caution for expenses.

Robert Grier Cooper, Motherwell, brought an action in January 1892 in the Sheriff Court at Hamilton against Messrs Frame & Company, coalmasters, Larkhall, to recover a sum of money which he alleged was due to him in connection with the working of certain coalfields between 1885 and 1888.

Cooper's estates had been sequestrated in 1889, but before the raising of the action he had been discharged, without, however, paying any composition, and the trustee in bankruptcy had also been discharged.

In these circumstances the defenders pleaded—"(1) No title to sue. (2) The pursuer should be ordained to find caution, and to intimate the action to the creditors, heritable and personal, in his sequestration."

Upon 17th February 1892 the Sheriff-Substitute (DAVIDSON) ordained the pursuer to find caution.

"*Note.*—The ordering of caution is always a matter for the discretion of the Court. It is a procedure which is rarely used, and properly so; but this seems to be a case in which it is proper. The case of *Teulon* v. *Seaton*, 12 R. 971, was perhaps a stronger case for caution, but I refer specially to Lord Young's remarks in the case of *Ritchie* v. *M'Intosh*, 8 R. 747. The case his Lordship figures as one where caution is necessarily ordered is that in which the bankrupt is yet undischarged, and is therefore divested. But the reason why caution is ordered in this case is also stated in Lord Young's judgment; it is because 'the person vested in the claim refuses to make it, and so, *prima facie*, it cannot be considered a good claim.' That is the case here, and it can make no difference to the defenders that the bankrupt has very recently been discharged as far as the *ex facie* character of the claim is concerned. I think he is therefore entitled to ask the pursuer to find caution for expenses."

In a second action, for an accounting, raised in March 1892 by the same pursuer against the same defenders, similar pleas were stated by the latter, and a similar interlocutor was pronounced by the Sheriff-Substitute, who referred to his note in the previous action.

Against these interlocutors the pursuer appealed to the Sheriff (BERRY), who upon 28th November 1892 adhered.

"*Note.*—There is a strong presumption against the claim now put forward by the pursuer. No claim was made by the trustee in his sequestration. The pursuer has been discharged under the bankruptcy, but his discharge was without composition, and under these circumstances the beneficial interest in any property which passed to the trustee by the sequestration still really belongs to the creditors unless there has been on their part abandonment of the right, of which there is no sufficient averment—See *Whyte* v. *Northern Heritable Securities Investment Company*, 18 R. (H. of L.) 37.

"The pursuer's want of means is certainly not of itself sufficient to justify the requiring of caution, but the whole circumstances tell so strongly against the validity of his claim that I am not disposed to interfere with the discretion which the Sheriff-Substitute has used in ordering caution."

The pursuer appealed to the First Division of the Court of Session, and argued—The bankruptcy proceedings were entirely at an end; he was therefore in the position of an ordinary pursuer. The fact of a man having once been bankrupt did not make it necessary for him all his life to find caution before raising an action. He was the only person who had any title to pursue this action—*Whyte* v. *Murray*, November 16, 1888, 16 R. 95; *Geddes* v. *Quistorp*, December 21, 1889, 17 R. 278.

Argued for the defenders—This was a case in which caution should be found, because (1) the pursuer was suing a claim which the trustee in bankruptcy had not thought worth prosecuting; (2) the pursuer had been discharged without paying any composition. Accordingly he was not reinvested in his estate, and the sequestration was not at an end. The only persons interested in his success were his creditors, who had not abandoned this claim, and could revive the sequestration — Opinions in *Ritchie* v. *M'Intosh*, June 2, 1881, 8 R. 747; *Northern Heritable Securities Investment Company, Limited* v. *Whyte*, November 21, 1888, 16 R. 100, and June 16, 1891, 18 R. (H. of L.) 37; *Whyte* v. *Forbes*, June 11, 1890, 17 R. 895; *Dunsmore's Trustee* v. *Stewart*, October 17, 1891, 19 R. 4.

At advising—

LORD M'LAREN—One is always reluctant to interfere with the judgment of a Sheriff in matters which involve the exercise of discretion, such as questions of expenses or security for expenses.

This case, however, involves a definite principle requiring examination. The facts are as follows—The pursuer was at one time insolvent, and took the benefit of the Sequestration Acts. He has now been discharged, and is in the uncontrolled administration of his own affairs. Not only so, but the trustee who had the management of his estates during the sequestration proceedings has also been discharged, presumably because he had recovered all that the creditors thought they could recover. Now, there is a claim which the

pursuer thinks he is able to vindicate, although the creditors did not think fit to try and establish it, and meantime are not seeking to vindicate it. In these circumstances the Sheriff supports the judgment of the Sheriff-Substitute ordaining the pursuer to find caution, not because he thinks this a very suitable case for the application of that practice, but because, while he doubts the Sheriff-Substitute's reasons, he thinks the claim has very little merit, and ought not to be encouraged. I am not disposed to proceed on that ground. Of the merits of a case we know nothing until it is argued to us, and we are not to be influenced by the probability or improbability of the pursuer's success in determining whether or not he is to be disabled in the prosecution of his claim by having to find caution.

We have a rule that while bankruptcy continues a pursuer can only sue on condition of finding caution, but I am not satisfied that the true ground of that rule is that there is another person with a better title, namely, the trustee for creditors. My impression is that the motive of the rule lies in this. A man under bankruptcy has been publicly deprived of his property, the fact that he has been so deprived is made known to everyone by the act and warrant, and under these circumstances he is not allowed to litigate on the ordinary terms. But then the whole ground and motive for the rule is taken away whenever the bankrupt by his discharge is re-invested with the management of his affairs. No doubt he may not technically be re-invested in any unrecovered part of the sequestrated estate, but the status of a bankrupt is taken away, and he is reinstated in the ordinary rights and privileges of a subject for the rest of his life unless he should be so unfortunate as again to become bankrupt, and these privileges include the unqualified right of suing and appearing in the courts of law. No reason exists for ordering the pursuer to find caution which would not arise in every case where the defender was able to say that the pursuer was a person of no substance. Our practice is too well established to allow the adoption of any such rule. There are no doubt many actions brought by persons of no means entailing hardship upon the defenders, but that is a hardship to which under our present law they must submit. I think therefore that as the pursuer has been discharged, as his trustee has been discharged, and as there is no one at present except the pursuer *in titulo* to prosecute this claim, he must be allowed to do so without finding caution, and that the judgments of the Sheriff and Sheriff-Substitute should be recalled.

LORD ADAM—I confess that it is with reluctance that I agree with Lord M'Laren's opinion, because I think there is something of a hardship to the defender in this recently discharged bankrupt being allowed to sue without finding caution, and if I could discover any authority for requiring him to find caution I should willingly give effect to it, but I am unable to discover any such authority.

The facts of this case must be attended to. The pursuer was at one time a bankrupt; he is so no longer. There was at one time a sequestration; that no longer exists, for the trustee has also been discharged. The result is, as in the case of *Whyte* and another case referred to, that the bankrupt, whether he has paid a composition or not, is re-invested in his estate. Now, if that be so, in what different position is the present pursuer from every other poor pursuer? It is said to be hardship to the defender that he is obliged to litigate with a man who has recently been a bankrupt, and consequently may be expected to be poor; but it has never been laid down that because a pursuer is poor he must find caution.

It was suggested that the trustee in bankruptcy did not regard this claim as good because he did not seek to vindicate it; but I do not find that because a trustee in bankruptcy may not be willing to incur the expense of prosecuting a claim, the claim must be so hopeless that the discharged bankrupt can only sue upon it after finding caution.

Again, it is said the pursuer here is really suing not for himself but for his creditors who may come in and revive the sequestration. I do not know whether if he were successful they could step in or not; that depends upon facts. Meanwhile the pursuer here is just in the position of any other poor pursuer, and is I think entitled to sue without finding caution.

LORD KINNEAR—I am of the same opinion, although I agree with Lord Adam that if this were a question of discretion there would be some reason for exercising that discretion as the Sheriffs have done. I think, however, that the Sheriffs had no discretion, and that we have none. The pursuer has been discharged, and his trustee has also been discharged, and there is no one but the pursuer himself who has any apparent title to his estate. Whether he is solvent or not he has a good title to sue any action that may be necessary to enforce outstanding claims or to vindicate property. It is said this action is really in the interests of the pursuer's creditors, because although the bankrupt and trustee have been discharged, the creditors did not retrocess the bankrupt in his property. That may be so, but it is a question of fact as Lord Adam has said. The creditors may say that the discharge of the bankrupt was granted in ignorance or through inadvertence, and that their right to this claim may be set up unless it is proved to have been abandoned. But Lord Watson pointed out in the case of *Whyte* that it is not necessary that there should be retrocession of the bankrupt in order to bar the creditors from making such a claim, because the actings of the creditors might be such as to indicate that the bankrupt is to be regarded as master of the property, and that they have abandoned it.

It is therefore a question of fact whether the creditors are entitled to say they did not abandon this claim, or the bankrupt to

say they did. That being so, I cannot agree with the Sheriff in thinking it is necessary for the bankrupt before suing his debtor to make a relevant averment of abandonment by the creditors. If it were necessary to make that averment, it must also be necessary to prove it; and it would be out of the question to require such a proof in an action to which the creditors are no parties. Whether the creditors may have a good claim against the pursuer in case he should succeed is a question with which the defenders have no concern.

The LORD PRESIDENT concurred.

The Court recalled the interlocutors complained of, found that the pursuer was entitled to sue without finding caution for expenses, and remitted the case to the Sheriff-Substitute.

Counsel for Pursuer and Appellant—A. S. D. Thomson—Cullen. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Macfarlane. Agents—Morton, Smart, & Macdonald, S.S.C.

Thursday, July 6.

SECOND DIVISION.

SUTHERLAND'S TRUSTEES *v.* CHALMERS.

Trust—Special Trust Created by Letter—Subsequent General Trust-Disposition—Settlement—Revocation not Expressed or Implied.

A by letter intimated to B his intention of leaving some of his means to certain persons, by sending B a certain sum and writing out "a kind of will or assignation" giving the names of the parties he had in view. He added—"I want this to be a separate thing from my general will."

Thereafter A wrote a letter of instructions to B, in which he committed to his charge £1150, and requested him to pay over this amount in various fixed sums to persons named. The interest of the sum was to be paid by B to A till the latter's death, after which the division was to be made. A reserved power to withdraw the whole or any part of the sum, or vary the division as he might at any future time be disposed.

Nine years after, A, by trust-disposition and settlement, disponed and made over, for the purposes therein mentioned, to trustees, the whole estate, heritable and moveable, belonging to him at his decease, "but excluding from the foresaid conveyance such heritable or moveable property as may have been, or may be specially conveyed by me, under a separate deed or writing, such excluded property being at present"—[*Here followed a description of two heritable properties*]. No reference was made in the deed to the £1150 made over to B by the letter of instructions. After A's death—*held* that the trust created by the letter of instructions had not been revoked by the general trust-disposition or settlement.

Succession — General Settlement — Bequest of Residue to Trustees, to be Disposed of as they thought Proper—Invalid Disposal of Residue—Intestacy.

A truster conveyed the whole estate, heritable and moveable, belonging to him at the time of his decease to trustees. The trust-disposition, after containing bequests of various legacies, provided in the last place with regard to the residue of the estate, "I leave and bequeath the same to be disposed of by my said trustees in such manner as they may think proper, subject to such instructions and directions as I may hereafter make."

After the death of the truster without leaving any instructions and directions regarding the disposal of the residue of his estate—*held* that the clause applicable to residue was not a valid disposal thereof.

On 1st February 1882 John Sutherland, fish-curer, Wick, wrote to Condie Stevenson Chalmers, 9 Bonnington Terrace, Edinburgh, as follows.—"It has been in my mind for years back to leave some of my means to some of the young people whose parents I hold and held in the greatest respect, those who have been my best friends and of a very long duration. I had intended to have mentioned a certain sum in my *will*, p. deposit-receipt in your name, and a letter from me attached to the D.-receipt with the names of those mentioned in letter, and the sum I wanted each to get.

"I have now altered my mind, and as you know having full confidence in yourself that I would send you a certain sum in your name, and you could get some one to do it for you, or you are able enough to do it yourself.

"*Private.*—I mean to write out a kind of *will* or assignation, and I would sign it and I would give you the names of the parties I have in view. Now, my dear sir, give your opinion on this matter. I hope you fully understand what I mean. I want this to be a separate thing from my general *will*."

Thereafter Mr Sutherland sent to Mr Chalmers the following letters of instruction:— "*Leith, 26th April* 1882.

"My dear Friend,—Having entire confidence in your integrity, and being desirous in the event of my death to show the great regard I have to the name of our old respected and deceased friend Mr James Methuen senior, and having a tender regard, esteem, and attachment to my oldest friends, Mr George S. Seater, Leith, and yourself, I wish to evince it, and in the event of my predeceasing you both, to give token of this esteem, and desire that my memory be held in kind remembrance in the three families after my decease. I now, therefore, commit to your charge the sum of eleven hundred and fifty pounds sterling, and request you will pay over the sums