receiving that provision in full. Under the provisions of the will he can get no more. And that disposes of the second head of his claim. For if he has got all that the will gave him there is no room for any compensation. Getting all that the will gave him, and therefore suffering no loss by the other children's claim, there is nothing to compensate. I therefore think the reclaiming-note should be refused.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD MONCREIFF was absent.

The Court adhered

Counsel for the Pursuers, Mrs Gunn's Trustees, and for the Claimants William Macfarlane and Alexander Goodsir Macfarlane's Executor-Dative—Chree. Agents —Scott Moncrieff & Trail, W.S.

Counsel for the Claimants, the Marriage-Contract Trustees of Mrs Helen Macfarlane or Horne—Blackburn. Agents—Gillespie & Paterson, W.S.

Counsel for the Claimants, the Trustees of Malcolm David Macfarlane—Watt. Agents —Morton, Smart, & Macdonald, W.S.

Counsel for the Claimants, the Marriage-Contract Trustees of Mrs Agnes Goodsir Macfarlane and Miss Eliza Macfarlane—Kincaid Mackenzie — Balfour. Agents—Blair & Cadell, W.S.

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*Saturday, March 3.*

## SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

## HURST *v.* BEVERIDGE.

*Bankruptcy — Sequestration — Discharge — Assignation of Pension for Debt—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 146 *and* 149.

A bankrupt's estates were sequestrated in 1896. His chief asset was a life pension of £266 from the Board of Customs, and of this £120 a-year was, with the consent of the Commissioners, assigned to the trustee on the bankrupt's estate for payment of the latter's debts. In 1899, 10s. in the £ having been paid to his creditors, the bankrupt petitioned for his discharge, with a view to having the assignation of his pension recalled under sec. 149 of the Bankruptcy (Scotland) Act 1856. The petition was opposed by certain of his creditors.

The Court *refused* the petition *in hoc statu.*

In October 1899 John Hurst, an undischarged bankrupt, presented a petition to the Sheriff of the Lothians praying the Court to pronounce a deliverance finding the petitioner entitled to his discharge, and on again considering this petition, with the declaration or oath made by the petitioner, in terms of the 146th section of the said Bankruptcy (Scotland) Act 1856, and on being satisfied with said oath or declaration, to pronounce a deliverance discharging the petitioner of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration, and thereafter to recal the deliverance, dated 19th August 1896, under which the Commissioners of Her Majesty's Customs, London, consented to payment being made to the trustee on the petitioner's estate of a sum of £120 per annum out of the pension payable to petitioner.

The facts of the case were set forth as follows in the report of James Craig, C.A., Edinburgh, trustee on the sequestrated estate of the bankrupt, which was produced and referred to in the petition: —"The estates were sequestrated in the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Edinburgh on the bankrupt's own petition on 27th May 1896. The estates disclosed consisted of a small quantity of furniture which had previously been removed from bankrupt's house to an auction sale-room for disposal by public roup. This furniture was subject to a claim at the instance of the landlord for rent, and the expenses of a sequestration for rent. The bankrupt disclosed an income of £266 per year of pension from Her Majesty's Board of Customs, and liabilities were stated at £543, 7s. 1d. The liabilities consisted of claims for money lent and household accounts, and the trustee feels that as the bankrupt had for a considerable time prior to his sequestration been earning a good income, his financial embarrassments were caused by extravagance. By agreement with the trustee the bankrupt assigned £120 per annum out of his stipend or salary, and the trustee, with the concurrence of the bankrupt, presented a petition in the Sheriff Court at Edinburgh, in terms of section 149 of the Bankruptcy (Scotland) Act 1856, that part of the said pension be paid to the trustee for behoof of the creditors, and a deliverance was pronounced appointing the petition and interlocutor to be laid before the Commissioners of Her Majesty's Customs in order that they might give their consent in writing to the sum of £120, or such other sum as the said Commissioners might consider reasonable, to be paid to the trustee, in order that the same might be applied in payment of the debts of the bankrupt. After consideration the Commissioners of Customs consented to the same being paid to the trustee, and the trustee has regularly each month received £10 from the Commissioners. The trustee has already divided in all amongst the creditors dividends equal to 7s. 4d. per £ on the claims as lodged, and has declared a further dividend of 2s. 6d. per £ payable on 27th September current."

In terms of section 146 of the Bankruptcy (Scotland) Act 1856, the trustee reported "that the aforesaid John Hurst has complied with all the provisions of the statute; that he has made a fair discovery and surrender of his estate; that he has attended the diet for his examination; and that his bankruptcy has arisen

from excessive expenditure. Further, that the bankrupt has not been guilty of collusion, and that, save in so far as the bankrupt was extravagant in his expenditure, the bankruptcy has arisen from innocent misfortune, and not from culpable and undue conduct. . . . The trustee reports that if the bankrupt will agree that his being discharged will not affect the payment to his creditors of the sum set aside from his pension, he should be discharged from the bankruptcy process; but if, on the other hand, his discharge is to reinstate him so that he may draw his full pension, the trustee would respectfully submit that the discharge should be refused in view of the circumstances attending the bankruptcy and the nature of the liabilities."

The petition was opposed by Robert Beveridge and other creditors of the bankrupt.

On 11th December 1899 the interim Sheriff-Substitute (HARVEY) refused *in hoc statu* the prayer of the petition.

*Note.*—"The petitioner's estates were sequestrated in May 1896. His chief asset was a life pension of £266 from the Board of Customs, and of this £120 a-year was, with the consent of the Commissioners, assigned to the trustee for payment of the petitioner's debts. He has now paid a dividend of 10s. in the £ to his creditors, and he asks for discharge with a view to having the assignation of his pension recalled under section 149 of the Bankruptcy Act 1856. His petition is opposed by certain of his creditors. The matter is therefore one for the discretion of the Court, and the rule to be applied seems to me to be, that to entitle a bankrupt to discharge he must show that he has made a full surrender of all his available funds to his creditors for payment of his debts. Upon this principle a discharge was refused in a case closely resembling the present (*Learmonth* v. *Paterson*, 1858, 20 D. 418), and I can find nothing in the Bankruptcy Acts of 1860 and 1881 to modify this decision. These Acts, as regards the question of discharge, are primarily intended to meet the case where the bankrupt's creditors do not oppose the application, and are meant to prevent its being granted even then as a matter of course. Nor is there anything in the subsequent cases to impugn the authority of the case of *Learmonth*. In the cases of *Kirkland* v. *Kirkland's Trustees*, 1886, 13 R. 798, 803; and *Reid* v. *Morrison*, 1893, 20 R. 510, 516, it was pointed out that it might be a sufficient ground for refusing a discharge that the bankrupt refused to assign for the benefit of his creditors future or expectant rights which did not fall within the vesting clauses of the Act. Where the expectancy is immediate, and, *a fortiori*, where the right is a certain future right, the observations of Lord President Inglis seem clearly to imply that assignation should be a condition of discharge (13 R. 803).

"Apart from authority there seems to be no sufficient reason why a difference should be made between a debtor who has a certain future income, more than sufficient for his subsistence, and vested in him at the time of his bankruptcy, and a debtor who has capital invested but no future income. The latter is bound, if he contracts debts, to pay them in full, although this should exhaust his whole means and leave him dependent on his personal exertions for his livelihood, and he is thus in a worse position than a debtor who is allowed to retain sufficient for subsistence from a pension or other fixed income. It seems absurd to say that the latter should also have the advantage of obtaining reinstatement in his surplus income whenever he has paid 10s. or 5s. in the £. That is the contention of the present applicant, and I am unable to accede to it."

The petitioner reclaimed, and argued—Under the 146th section of the Bankruptcy Act 1856, if a bankrupt, after two years had expired from the date of his sequestration, presented an application for his discharge, and if the Court were satisfied from the report of the trustee that the bankrupt had acted honestly, and made a fair surrender of his estate, and that his bankruptcy arose from innocent misfortunes, then they had no discretion but were bound to grant his discharge in the event of no creditors appearing to oppose it. If creditors did oppose the petition, then the judge was to consider the objections, and either grant or refuse the petition. In the present case some of the creditors opposed the petition, but their objections were not based on the conduct of the petitioner—his having concealed part of his estate, or otherwise acted in bad faith. They desired that he should pay them from estate which was not in his hands at present, but which was in the same position as income to be earned in the future. In such circumstances the Court should not give effect to these objections.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I think the creditors of this petitioner have behaved very well towards him in taking a portion of his pension—£120 out of £266—and allowing him to retain the balance. Proceeding on these conditions he has already paid 10s. in the £. If any change has to be made, I think, as Lord Young has suggested, it ought to be in the direction of making the debtor pay a larger proportion of his pension to his creditors. But I can see no ground whatever for his asking for discharge. I am therefore of opinion that this application should be refused.

LORD YOUNG—I think that the judgment of the Sheriff-Substitute is clearly right. In my opinion the petitioner's creditors are behaving very generously in allowing him to keep the whole of his money allowance except £120 a-year. I think it is quite clear that this application must be refused, and I should like to add that in such circumstances as this case discloses no discharge ought to be granted till the debt has been paid in full. To grant a discharge in such circumstances would be simply iniquitous.

LORD TRAYNER—I think this application proceeds on a total misapprehension of the

provisions of the Bankruptcy Statutes. The petitioner seems to be of opinion (and it was to maintained at the bar) that a bankrupt is entitled to his discharge whenever two years has elapsed from the date of the sequestration and a dividend of 10s., or at least 5s. in the £ has been paid to the creditors. That is not so. After two years a bankrupt is entitled to his discharge if he complies with certain conditions and his application is not opposed by his creditors. But here the petitioner's creditors are opposing, and I think with good reason. The petitioner has already paid a dividend of 10s. in the £ out of a pension which he is entitled to receive during his life, and out of that fund he is just as able to pay 10s. in the £ more—that is, to pay his debts in full. No bankrupt is entitled to claim his discharge on payment of a dividend if he has funds which will enable him to pay his creditors in full. I therefore think that we should refuse the petition.

LORD MONCREIFF was absent.

The Court dismissed the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Petitioner—T. Trotter. Agents—Stirling & Duncan, Solicitors.

Counsel for the Respondents — Craigie. Agent—Marcus J. Brown, S.S.C.

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*Tuesday, March 6.*

## FIRST DIVISION.

### CHRISTIE *v.* CRAIK.

*Reparation — Defamation — Diligence to Recover Documents—Remoteness—Injury to Business—Receipts for Income-Tax.*

In an action of damages for defamation in respect of a speech alleged to have been made by the defender in October 1898, in which he accused the pursuer of having, while a member of the Police Commissioners of Forfar, sold hay to that body above the market price, the pursuer, who was in business as a produce merchant, averred that in consequence of the accusation "his business had greatly suffered." The defender moved for a diligence to recover the receipts for income-tax paid by the pursuer for the last four years, and cited *Johnston* v. *Caledonian Railway Company*, December 22, 1892, 20 R. 222. The Court, without giving opinions, *refused* the motion.

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*Wednesday, March 7.*

## FIRST DIVISION.

### GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* LAIDLAW.

*Reparation — Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *and Schedule* 2, *sec.* 14—*Appeal—Question of Law or Fact — Serious and Wilful Misconduct.*

Two workmen were employed as night watchmen on a railway at a point where a landslip had occurred. It was the duty of one of them to remain at the site of the landslip, and of the other to stand 500 yards down the line, so as to give warning to approaching trains should the landslip increase. A fire was lighted on the six-foot-way opposite the landslip. It was left to the workmen themselves to arrange which post each should occupy. About 5 a.m. A was stationed at the outpost and B at the fire. A left his station between 5 and 6 a.m., and both sat down at the fire, and B fell asleep. On his awakening he discovered that A had been struck by a train and killed. In a claim by A's representatives, the Sheriff awarded compensation under the Workmen's Compensation Act, and found that it was not proved "that he was asleep, or that there was serious or wilful misconduct on his part, or that, if so, the said injuries were attributable to such misconduct." The defenders asked a case to be stated for appeal, with the question of law, whether the injury was attributable to serious and wilful misconduct on the part of the deceased within the meaning of section 1, sub-section 2 (*c*) of the Act. They maintained that his desertion of his post constituted such serious and wilful misconduct. The Sheriff refused to state a case, on the ground that, assuming the conduct of the deceased amounted to serious and wilful misconduct, the accident was not attributable to it. Note to have the Sheriff required to state a case *refused.*

In a claim under the Workmen's Compensation Act 1897 at the instance of Mrs Agnes Young or Laidlaw, widow of the late Samuel Laidlaw, railway surfaceman, against the Glasgow and South-Western Railway Company, the Sheriff-Substitute (HALL), acting as arbitrator, found that the following facts were proved:—"Finds that the deceased Samuel Laidlaw was a surfaceman in the employment of the defenders, and that for the three years preceding his death his average wages were 18s. 1½d. per week: Finds that in January 1899, in consequence of a landslip which had begun to show itself on the up-line side of Blackfaulds cutting on the defenders' railway, the said Samuel Laidlaw and another surfaceman named Walter M'Quat were appointed night watchmen to give warning to approaching trains in the