

wholly different events apply, or could be made to apply, to it.

Upon this part of the case I need only add that the question in what cases repayment of estate-duty should be directed was considered and provided for in sections 8 (12) and 9 (3) of the Finance Act 1894, and that these sections make no provision for repayment in such a case as the present.

The provision in section 14 of the Finance Act 1898, that where in the case of a death occurring after the commencement of that Act, settlement-estate-duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen and cannot arise, the duty paid in respect of such property shall be repaid, seems a very reasonable and proper one, but the fact that it was considered necessary to make it by subsequent legislation affords additional evidence that the right to repayment in such a case did not already exist under the Finance Act 1894.

For these reasons I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN not having been present at the hearing gave no opinion.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Ure, K.C.—Clyde, Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Defender and Respondent—Solicitor-General (Dickson, K.C.)—A. J. Young, Agent—P. J. Hamilton Grierson, Solicitor for Inland Revenue.

Tuesday, February 12.

## FIRST DIVISION.

[Sheriff Court at Airdrie.

### NEILSON, PETITIONER.

*Bankruptcy—Sequestration—Discharge—Failure to Pay Five Shillings in the Pound—Circumstances for which Bankrupt not Responsible—Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, sub-sec. 1.*

By section 6, sub-section 1, of the Bankruptcy and Cessio (Scotland) Act 1881, it is enacted that a bankrupt shall not be entitled to his discharge unless he has paid or found security for 5s. in the £, or unless "the failure to pay five shillings in the pound, as aforesaid, has in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible."

A bankrupt who had been sequestrated in 1896, and whose estate had

paid no dividend to his creditors, presented a petition for discharge in 1898. Objections were lodged by one of his creditors. The reports of the trustee in the sequestration and of the Accountant of Court were favourable. *Circumstances* in which the Court (affirming the decision of the Sheriff-Substitute) refused the prayer of the petition *in hoc statu*.

On 7th September 1896 the estates of David Neilson, Coatbridge, were sequestrated, and Mr John Wishart, accountant in Glasgow, was elected trustee. In 1898 Neilson presented a petition for discharge in the Sheriff Court of Lanarkshire at Airdrie. No dividend had been paid on the estate.

Objections were lodged by Messrs Murray, timber merchants, Coatbridge, who were creditors of Neilson, for the sum of £230 lent to him. They alleged (1) that he had not paid five shillings in the pound; (2) that his failure to do so arose from circumstances for which he was responsible; and (3) that he had obtained from them a loan of £230 by falsely representing that he was negotiating for the sale of his business (the lease of a coal mine), that he was solvent and merely wanted a temporary loan, whereas he was insolvent at the time and used the loan to pay off other creditors.

The trustee reported that the bankrupt had complied with all the provisions of the statute, that he had made a fair discovery and surrender of his estate, that he had attended the diets of examination, and had not been guilty of any collusion, but that his bankruptcy had arisen from innocent misfortune and not from culpable or undue conduct. The Accountant of Court reported that the bankrupt had not fraudulently concealed any part of his estate, and that he had not wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856.

On 23rd November 1898 the Sheriff-Substitute (MAIR) allowed Neilson a proof that his failure to pay five shillings in the pound had arisen from circumstances over which he had no control, and to the objecting creditors a proof of their objections.

On 16th December 1898 proof was led. Neilson deposed that for about five years before his bankruptcy he had been carrying on business as lessee of Gartsheugh Colliery, and had during that period lost his whole means, amounting to about £1500. He attributed his loss to the fact that the mine had a bad roof, and was much troubled in the strata, and with water. He admitted that other people had previously tried to work the pit, and had been unsuccessful. With reference to the loan obtained from Messrs Murray he deposed that he had obtained it about eight months before his bankruptcy, and that he was pressed for money at the time, but did not consider his position hopeless. He also deposed that he was now assisting in a business carried on by his son, but that he got little from his son except his food.

After hearing parties on the proof the

Sheriff-Substitute adjourned the case until 6th October 1899, to give the bankrupt an opportunity of offering and providing for a dividend of 5s. in the pound. By interlocutor dated 6th October 1899 the case was again continued until 8th December 1899, to give the bankrupt a further opportunity of offering and providing for 5s. per £ to his creditors. Both these interlocutors contained an intimation that failing such offer and provision of 5s. in the pound the petition would be refused.

On 17th October 1900 the Sheriff-Substitute pronounced the following interlocutor:—"The Sheriff-Substitute . . . Finds that the creditors on the petitioner's sequestrated estate have received no dividend whatever: Finds that the petitioner has failed to adduce satisfactory evidence that his failure to pay five shillings in the pound, or indeed any dividend whatever, has arisen from innocent misfortune or from circumstances over which he had no control, and accordingly refuses the prayer of the petition *in hoc statu*, and decerns."

Note.—"When the proof in the present application was led before me I was not favourably impressed by the petitioner's demeanour when under examination, nor was I satisfied with his explanation as to the business alleged to be his son's, and in which he stated he was assisting, but was receiving 'very little from my son except my food.' So much was I dissatisfied that on 24th March 1899 I pronounced an interlocutor deferring consideration of the petition to give the petitioner an opportunity of offering and providing for 5s. in the £ to his creditors, failing which I had in view to refuse the present application. When the case again came before me at the expiry of the period mentioned, it was only at the urgent request of the petitioner's agent that I again continued the case to give the petitioner a further opportunity of offering or providing for 5s. in the £ to his creditors. When the case was again called on 8th December 1899 the petitioner appeared and stated that he could not offer or pay 5s., or indeed any sum whatever, and in order to give him a further opportunity of satisfying me that he was really unable to make any offer to his creditors I again ordered parties to be heard. No additional facts were, however, elicited through the debate, but in other proceedings before me in the Court here in connection with the business said to be carried on by petitioner's son, and in which the petitioner alleges he only assists, my previous unfavourable impression has been confirmed, and I am reluctantly, but in the interests of the creditors, compelled to refuse the present application for discharge *hoc statu*."

Neilson appealed to the Court of Session. Messrs Murray, the objecting creditors, did not withdraw their objection, but were not represented at the hearing of the appeal.

Argued for the appellant—The petitioner was entitled to his discharge. He had now been an undischarged bankrupt for four and a half years, and it was not the

policy of the Bankruptcy Laws to keep a man in that position until he paid a dividend which he might never be able to pay. It was a strong point in his favour that he had favourable reports from the trustee and from the Accountant in Bankruptcy, and that his sequestration had arisen from losses in legitimate trade. Discharge had been granted under circumstances like the present in *Boyle*, June 20, 1885, 12 R. 1147; *Philipps*, October 29, 1885, 13 R. 91; and *Bremner*, June 30, 1900, 1 F. 1114. In *Shand*, April 14, 1882, 19 S.L.R. 562, the discharge was suspended for a year. These cases were to be contrasted with *Clarke v. Crockatt & Co.*, December 8, 1883, 11 R. 246, where the petition was refused. In that case the reports of the trustee and Accountant in Bankruptcy were unfavourable.

LORD PRESIDENT—This case depends on the effect of section 6, sub-section 1 (b), of the Bankruptcy and Cessio Act 1881, which is a provision restrictive of the right of a bankrupt to obtain his discharge. It provides—[his Lordship quoted the sub-section]. This sub-section clearly lays upon the bankrupt the onus of proving that the failure to pay five shillings in the pound arose from circumstances for which he cannot justly be held responsible, because it declares that unless that or another condition has been fulfilled he shall not be entitled to be discharged. That proposition must be established affirmatively by the bankrupt, and the question is, has it been so established in this case?

I think that the Sheriff-Substitute has dealt leniently and discriminatingly with the bankrupt, because he has adjourned the case several times to give him an opportunity of paying his creditors five shillings in the pound, and it is only after his prolonged failure to do so that he has refused the application *hoc statu*. The Sheriff-Substitute seems to have carefully followed the statute, and to have placed the onus in the right quarter. We are asked to reverse his decision, but I do not think there are any grounds for doing so. The Sheriff-Substitute says that he formed an unfavourable opinion of the bankrupt's demeanour in his examination, and he seems to have a shrewd suspicion that he has an interest in the business alleged to be carried on by his son. Mr Anderson says truly that neither the trustee nor the Accountant in Bankruptcy has stated any objection to the discharge, but here there is an objecting creditor, which there was not in some of the cases to which we have been referred, and I think that creditor has very good reason to object. The following are the material facts:—The bankruptcy arose from losses incurred by the bankrupt in working a mine, which was an unpromising enterprise, as the strata were troubled, there was a bad roof, and several people had previously lost money in it. The bankrupt says that he was able to go on for a time, losing money all the while, and then, not at the commencement of the working, but when he was pressed for

money, he borrowed £250 from the objecting creditor to enable him to carry on what he must have seen to be a bad business. That is conduct which requires explanation, —whether he had any, and if any what, grounds for thinking that the £250 would not follow the money which he had already lost. Under the circumstances it was not unreasonable to ask him for some such justification, and none such was forthcoming. In these circumstances it is impossible to hold that the conditions of the statute have been fulfilled. That would be *pessimi exempli*, and would defeat the object for which the condition was enacted. If the bankrupt shall hereafter find money to pay a dividend of five shillings the question can be reconsidered, but as nothing has been paid after a course of reckless working and borrowing I can hardly conceive a stronger case for upholding the judgment of the Sheriff-Substitute.

LORD ADAM—I am of the same opinion. The bankrupt here has not in point of fact paid five shillings in the pound—he has not paid anything at all; but that is not an absolute bar to his getting a discharge, because if he is able to show that the failure to pay five shillings in the pound has arisen from circumstances for which he cannot be held responsible he may still get his discharge. I agree, however, that the onus is on the bankrupt of showing that he cannot justly be held responsible for the failure to pay five shillings. That was most distinctly stated by the Lord President (Inglist) in the case of *Clarke v. Crockett & Company*, 11 R. 246, and I do not think it is possible to maintain the contrary. Now, it appears to me that this is a case of reckless—not perhaps trading—but of reckless speculation. The bankrupt became the lessee of a coal mine which several people had experimented in before him with the uniform result of failure. No doubt a man who has capital of his own is entitled to risk it if and as he likes; but here the bankrupt, starting with a small amount of capital of his own, and some borrowed money, goes on year after year losing it until the whole of his original funds are gone, and then he borrows a sum of £250 which goes in exactly the same way as the rest. Now, I think that this course of conduct discloses a perfectly different case from that of *Bremner*, 2 F. 1114. I can quite understand that there the failure arose from circumstances for which the bankrupt could not be justly held responsible; for it appears that there came about a great depression in the particular trade in which he was engaged which the bankrupt was not bound to anticipate, and besides, he had apparently stopped trading before all his assets were gone, for these when valued as at the date of the sequestration were sufficient to pay eight shillings in the pound to his creditors. Here, on the other hand, the bankrupt only stopped trading after he had lost everything—after the whole of his creditors' money had gone. Accordingly, in my opinion, not only has the failure to pay five shillings in the pound not been proved to have arisen from conse-

quences for which the bankrupt is not responsible, but it has been distinctly proved to have been due to the bankrupt's own fault. I agree, therefore, that the Sheriff's judgment should be affirmed.

LORD M'LAREN—I concur with your Lordships. It is not necessary to support our judgment that we should be of opinion that the bankrupt was morally culpable, but I cannot hold that he was irresponsible for the form which his bankruptcy has taken—that it is one in which no dividend is available for his creditors.

LORD KINNEAR was absent.

The Court refused the appeal.

Counsel for the Appellant—A. M. Anderson. Agent—William Balfour, S.S.C.

Thursday, February 14.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### MARWICK v. GRAY.

*Public-House — Certificate — Decision of Magistrates Reversed on Appeal—Proper Official to Grant Certificate — Home Drummond Act 1828 (9 Geo. IV. cap. 58).*

Where a public-house certificate is refused by the magistrates of a burgh, and their decision is reversed on appeal by quarter sessions, the town clerk of the burgh as clerk to the magistrates, and not the clerk of the peace as clerk of the Appeal Court, is the official whose duty it is to make out and deliver a certificate to the successful appellant.

This was an action at the instance of Mrs Marion Mann or Kerr, spirit merchant, Anchor Tavern, Glasgow, with consent of her husband, and her husband for his interest, against (1) Sir James David Marwick, LL.D., Town-Clerk of Glasgow; and (2) George Gray, Clerk of the Peace for the county of the city of Glasgow.

The following narrative of the facts in the case is taken from the opinion of the Lord Ordinary (KINCAIRNEY):—“The pursuer Mrs Kerr seeks by this action to obtain a public-house certificate for the Anchor Tavern, 21 Argyle Street, Glasgow. Her position is somewhat embarrassing, but the facts are as simple as possible. An application by her for renewal of her public-house certificate for these premises was refused at the general half-yearly meeting for granting publicans' certificates held by the Magistrates of Glasgow on 11th April 1900. Against this deliverance she, as empowered by section 14 of the Home Drummond Act, appealed to the Quarter Sessions of the Peace. Her appeal was sustained on 9th May 1900, and a remit was made by the Justices ‘to the Town-Clerk of Glasgow to issue the necessary certificate under the Public-House Acts.’