

delivery to be taken of the whole in three weeks. This is the first reference to the bargain subsequent to January, and it is made obviously by the defender's agents to induce the pursuer to discharge his claim for damages in respect of wrongful arrestment which he had reserved in his defence. It cannot, I apprehend, be held to indicate that the defender still held the original bargain binding; and the proposal of the agents rather points to the opposite inference. But, however this may be, it was not agreed to, and on 4th of April 1862 the pursuer reverts to the bargain as if still entire, and intimates his intention now to take delivery of the remainder of the potatoes. Possibly the reference to the undelivered potatoes in Messrs Clark & Boyd's letter of 27th March led to this intimation of 4th April, for the price of potatoes is proved to have then greatly risen. But, whether so or not, the pursuer's continued silence from the end of January until April, and his total inaction in the matter, affords powerful confirmation of the evidence that exists of the bargain having been mutually departed from as alleged by the defender in the record.

Entertaining these views, I am of opinion that in addition to the findings in fact contained in the interlocutor, there ought to be a finding that the proof establishes that the bargain was departed from by mutual consent at a meeting of the parties towards the end of January. With this addition and a corresponding alteration on the finding in law, so that the legal ground on which the Court has proceeded may not be misunderstood, I am of opinion that the interlocutor of the Lord Ordinary should be affirmed, and the reclaiming note refused.

The other Judges concurred, and the interlocutor of the Lord Ordinary was therefore substantially adhered to.

Agents for Advocate—J. & J. Gardiner, S.S.C.  
Agent for Respondent—D. F. Bridgeford, S.S.C.

Wednesday, March 20.

## FIRST DIVISION.

PET.—SCOTT AND ANOTHER.

*Trustee—Removal—Resignation.* A petition having been presented for the removal of a trustee, who put in a deed of resignation, *Held* that this rendered it unnecessary to consider the application.

This was a petition by a trustee and beneficiary and another beneficiary, under a voluntary trust-deed, for the removal of another trustee under it on the ground of alleged misconduct. It was ordered to be served and answered.

When the petition again appeared in the roll,

FRASER, for the respondent, stated that the allegations in the petition were denied, but he put in a deed of resignation of his office, which had been executed by the respondent under section 1 of the Act 24 and 25 Vict., c. 84.

M'LAREN, for the petitioners, asked an order upon the respondent to deliver up the whole books, papers, and documents, belonging to the trust-estate in his possession.

LORD PRESIDENT—There is no prayer for such an order.

M'LAREN—Then I ask leave to amend the petition by adding it.

FRASER—I can't consent to that.

LORD PRESIDENT—We cannot allow any amendment except of consent.

M'LAREN then submitted he was entitled to the order without a special prayer for it.

The LORD PRESIDENT—We appointed this petition to be served and answers to be lodged. But a deed of resignation has been put in which seems to me to put an end to the petition; for the prayer is simply to remove the respondent from the office of trustee, and the only other prayer is for such interim order as may be necessary pending the consideration of the application. There is no prayer for delivery of trust papers. The sole object of the application is removal, and that having become unnecessary, the petition just drops.

The other Judges concurred.

Agents for Petitioners—White-Millar & Robson, S.S.C.

Agent for Respondent—J. F. Wilkie, S.S.C.

PET.—SHEARD.

*Proof—Deposition of Aged Witness to lie in retentis.*

Commission granted to take the deposition of an aged pursuer of an action, without deciding whether it could ever be used as evidence.

The petitioner is pursuer of an action in which defences have not yet been lodged. She now, in respect of her old age, applied for a commission to take her deposition as a witness to lie *in retentis*.

ASHER for the petitioner.

The Court granted the commission without expressing any opinion at present as to whether the deposition could be used in evidence, or whether, in any circumstances, a pursuer of an action can make his own deposition, when taken on commission, evidence.

Agents for Petitioner—Murdoch, Boyd & Co., S.S.C.

DIXON AND OTHERS v. CAMPBELL.

*Bankruptcy—Discharge of Bankrupt—Trustee's Report.* A bankrupt's discharge refused in respect he had been engaged in reckless speculation which had caused his bankruptcy. Observations (per Lord President) as to what a trustee's report under sec. 146 of the Bankruptcy Act should consist of.

This was an appeal by the trustees of Mr Dixon, of Govan Colliery, and the Commercial Bank against an interlocutor pronounced by Sheriff-Substitute Galbraith, of Glasgow, finding John Campbell, junior, of the firm of Campbell Brothers, entitled to his discharge. The interlocutor proceeded upon a report by Mr Wylie Guild, the trustee on the estate, that Mr Campbell had complied with all the provisions of the statute; that he believed he had made a fair discovery and surrender of the estate, and had not been guilty, so far as known to the trustee, of any collusion; and that his bankruptcy had arisen from innocent misfortunes, and not from culpable or undue conduct. There was also a minute of concurrence in the application for discharge by a majority in number and four-fifths in value of the creditors who had produced oaths in the sequestration.

According to the state of affairs given up by the bankrupts, the amount of their assets was £4925, 4s. 6d., and of their liabilities £187,225, 7s. The appellants, Dixon's trustees, have lodged claims to the amount of £80,098, 6s. 10d.; and the Commercial Bank for £10,840, 17s. 8d.; and the claim of Dixon's trustees to the extent of £73,137, 10s. was not lodged till after expiry of six months from the date of the sequestration.

The first ground on which the appellants asked a recall of the Sheriff's judgment was that the report of the trustee did not satisfy the requirements of sect. 146 of the Bankrupt Act, in respect it only stated what the trustee *believed* to be the fact, not what *was*. In the next place, it was maintained that the petitioner's bankruptcy had not arisen from innocent misfortunes but from culpable conduct. His and his firm's transactions in iron were not within the limits of legitimate trade. As an illustration it was stated that during the month of April preceding their sequestration they had purchased 224,000 tons of iron, the price of which was £269,307, 5s. 10d. It was also averred that the petitioner's firm, or at least his brother, in name of the firm, and with the petitioner's knowledge, had been guilty of frauds upon Mr Dixon's trustees.

YOUNG and THOMSON for the appellants.

GIFFORD and WATSON for the bankrupt.

The Court to-day recalled the Sheriff-Substitute's interlocutor, and remitted to him to refuse the discharge *hoc statu*. The application had not been opposed in the Sheriff Court.

The LORD PRESIDENT said—This firm of Campbell Brothers was sequestered in May last; and in November last, just six months after the sequestration, the petitioner, John Campbell, applied for his discharge; and after the usual preliminary proceedings, the Sheriff-Substitute, on 2d January last, found him entitled to his discharge, and appointed him to appear and make a declaration in terms of the statute. Now, the petitioner required, in terms of section 146, to lay before the Sheriff-Substitute a report by the trustee in the sequestration, and the first objection stated by the appellants is that the trustee's report is not in terms of the Act of Parliament. I am not prepared to sustain that objection. The report is not just what it should be, but I don't think it is so far a departure from the statute as to induce me to refuse the discharge on that ground. I think the true form in which such a report ought to be framed is an expression of the trustee's judgment in the matter after making the fullest inquiry. I don't think it is sufficient for him to say that he "believes" a thing to be so and so, or that it is so "so far as known" to him. I think he ought to make himself master of the subject and express his opinion. But I am rather inclined to proceed on the second objection—that the report is not well founded when it says that the bankruptcy arose from innocent misfortune. There are a few facts which it is important to keep in view. It appears that these brothers had been in business for some time prior to 1864, but in that year they became bankrupt, and settled with their creditors by a composition. Their liabilities then were £60,000, and they undertook to pay a composition of 5s. a pound. I presume that the instalments of that composition were only in course of being paid when the second sequestration took place; but this is clear, at all events, that when they started the second time they did so with borrowed capital. They came down again last year with enormous liabilities as compared with their assets. It is quite true that, so far as the London house is concerned, the assets and liabilities look more favourable, and I am willing to believe John Campbell when he says that the London house was solvent. But in Glasgow the position of the firm was quite the reverse. Now, if John Campbell, living in London and managing only the London business, and having no knowledge of the kind of business going on in Glasgow, only became

involved through the misconduct of his brother, of which he had no knowledge, he might be entitled to his discharge; but the question is whether he was in that state of innocent ignorance. *Prima facie*, I think it highly improbable that he was; but I further think there is pretty conclusive evidence of the contrary. What, then, was going on in Glasgow? It was about as reckless speculation as any merchant could possibly engage in, and the correspondence between the brothers discloses this to my mind, that John Campbell was perfectly aware of the nature of the speculations in which his brother David was engaged as representing the house in Glasgow. I do not say he knew their amount, but he knew that they were of very large amount, and he also knew this, that his brother was enabled to carry on his speculations by means of assistance derived from his father, which assistance I will not characterise further than by saying that it was illegitimate, and a betrayal of his employer's trust. On these grounds, I think the Sheriff Substitute ought to have refused this discharge. The petition may be renewed at a greater distance of time and under more favourable circumstances, but at present it cannot be entertained.

Lords CURRIEHILL and ARDMILLAN concurred.

Lord DEAS declined, being a shareholder of the Commercial Bank.

Agents for Appellants—Melville & Lindesay, W.S.  
Agent for Bankrupt—James Webster, S.S.C.

#### MURRAY v. HUTCHISON.

*Poor—Relief—Proper object.* Held that a married woman whose husband was able-bodied and had not deserted her was not a proper object of parochial relief.

This was an advocacy from the Sheriff Court of Lanarkshire. The question at issue was whether or not Mrs Marion Frame or Hutchison is entitled to alimony for herself and her children who are under age. She claimed alimony as a pauper from the parish of Carstairs, her parish of settlement, on the ground that, although she is a married woman, her husband is unable to support her, not being an able-bodied man, and besides has deserted her. A proof was led before the Sheriff Court, and the Sheriff-Substitute (Dyce) pronounced an interlocutor, in which he "finds that the applicant has failed to establish her averments, and, on the contrary, finds it proved that she and her children reside in the house of her father, who is in good circumstances; that the applicant's husband is of lazy indolent habits, is neither mentally nor physically incapacitated, but fully able to maintain his wife and family if willing to work; that the applicant's husband was desired to quit her father's house; and that neither she nor her children are in a destitute condition: Finds, in point of law, that the petitioner is not a fit object of parochial relief, recalls the order of 12th April 1865, and dismisses the application."

The Sheriff (Alison) took a different view. By his interlocutor he "finds it pleaded that the husband of the pursuer is of weak mind and feeble in body, and only earning 1s. 9d. a week, and is unable to maintain his children: Finds that the inspector pleads that the petitioner's father is a wealthy *cadger*, and bound to support the petitioner: Finds it stated in reply that the petitioner's father is an insolvent *cadger*, labouring under asthma, with a bedridden wife entirely dependent on him: Finds it proved that the petitioner at one time received parochial relief from the parish of Hamilton, and is now living on the 1s. a week