a Roman Catholic girls' school in all time coming. But then that is not the main purpose of the truster. His main intention is, not that this particular building shall be so held in all time coming, but that there shall be a good Roman Catholic girls' school in this particular town which he desired to favour. That principle is the foundation of the judgment in the case of *Weir's Trustees*, in which we thought it right to take the opinion of the other Division, and which consequently must be regarded as a very authoritative decision. I think that the present case is entirely ruled by *Weir's Trustees*. I therefore must say that I cannot agree with the Lord Ordinary, and I am not in the least moved by his Lordship's argument as to the impossibility of the Court seeing to the application of the price. He seems to think that it would be a very awkward thing to leave the price to be applied according to the discretion of the trustees. But the petition does not contemplate that. It contemplates that the price shall be applied in accordance with the intention of the truster. Whether the prayer is quite properly expressed or not, it is hardly worth while to inquire. It is quite plain that it means that. I am therefore for recalling the interlocutor of the Lord Ordinary.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court, after allowing the following addition to be made to the prayer of the petition,—viz. "the titles to the said [new] feu, and school buildings to be created thereon, containing such clauses and conditions as may be appointed by your Lordships to be engrossed therein, in accordance with the present titles and constitution of the trust; and in the meantime, and until the said free price shall be required to be so applied, to grant to the petitioners leave to consign the said free price in bank in name of the petitioners and their successors in office, and to uplift the consigned fund when required for the purposes foresaid"—recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to authorise the petitioners to sell and to proceed further in terms of the prayer of the petition.

Counsel for Petitioners—Kinnear—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

ALLAN AND OTHERS (SMITH'S TRUSTEES) *v.* M'CHEYNE.

Bankrupt—Expenses—Caution—Where Bankrupt was Defender and Decree of Constitution only was sought.

The defender in an action of damages for the non-fulfilment of a contract of sale became bankrupt during the dependence of the action. He did not offer caution for expenses, and the trustee on his sequestrated estate declined to sist himself. The Lord Ordinary decerned against the bankrupt for the damages concluded for, but "to the effect of granting a decree of constitution only." *Held* that the bankrupt having no interest to resist such a decree, was not to be permitted to continue his defence without finding caution.

In November 1877 the pursuers, the trustees of the late Andrew Smith, upholsterer in Dundee, agreed to sell to the defender John M'Cheyne, and the defender agreed to purchase from them, certain heritable subjects in Dundee belonging to the trust-estate, at the price of £2400, with entry at the term of Whitsunday 1878, when the price was payable, all conform to the conditions specified in certain missives of sale. The pursuers averred that on the faith of this contract they had made alterations on the adjoining trust-property still in their hands; and that the defender entered upon possession of the subjects, made alterations thereon, removed tenants, and in February 1878 advertised the property for sale, but that he refused to pay the price. In consequence they raised this action, concluding for specific implement, or alternatively for £1000 damages. M'Cheyne lodged defences, and on 3d December 1878 the Lord Ordinary (Adam) pronounced this interlocutor—"Having heard counsel, decerns against the defender for implement in terms of the first conclusion of the summons, and *quoad ultra* continues the cause." The defender afterwards became bankrupt, and on 30th January 1879 the Lord Ordinary pronounced the following interlocutor—"In respect it is stated at the bar that the defender has become bankrupt, appoints intimation of the dependence of this process to be made to the trustee on his sequestrated estate, and ordains him to sist himself as a party thereto, if so advised, within the next eight days." The trustee did not sist himself as a party to the cause, and in consequence the Lord Ordinary on the 25th February ordained the defender to find caution for expenses within the next eight days. This the bankrupt failed to do, whereupon, on the 8th March, the Lord Ordinary pronounced this interlocutor—"In respect the defender has failed to implement the decrees of 30th January and 25th February 1879, decerns against him for £1000 of damages as concluded for: Finds the defender liable in expenses, and allows an account thereof to be lodged for taxation, and remits the same to the Auditor, but that to the effect of granting a decree of constitution only of the said damages and expenses."

The defender reclaimed, and argued—It was not a universal rule that a bankrupt pursuer even should find caution for expenses—*M'Alister* v. *Swinburne*; and so where a pursuer sued for damages for defamation. The case of a defender was *a fortiori*—*Taylor* v. *Fairlie's Trustees*. Since *Taylor* no bankrupt defender had in any reported case been found liable to find caution for expenses, and there were cases in which the defender had not been so found liable—*Russell* v. *Crichton*—*Ferguson* v. *Leslie*.

Authorities—*M'Alister* v. *Swinburne*, 7th November 1873, 1 R. 166; *Taylor* v. *Fairlie's Trustees*, March 1, 1838, 6 W. and S. 301; *Russell* v. *Crichton*, March 5, 1839, 1 D. 617; *Ferguson* v. *Leslie*, October 31, 1873, 11 Scot. Law Rep. 16; *Bell* v. *Forrest*, July 17, 1840, 2 D. 1460.

Argued for the pursuer—The defender had no

personal interest to oppose such a decree as the Lord Ordinary had pronounced; the trustee represented the creditors, who alone had an interest, and he declined to interfere—*Taylor* v. *Fairlie's Trustees*, *supra* (Lord Chancellor); Bell's Comm. 434.

The Court continued the case in order that the trustee might again consider the propriety of sisting himself.

At advising—

Lord President—This action is laid on a contract of sale, and the summons concludes for implement or damages. On the 3d December the Lord Ordinary "decerns against the defenders for implement in terms of the first conclusion of the summons, and *quoad ultra* continues the cause." Then on the 30th January it appears that the defender became bankrupt, and the Lord Ordinary appointed "intimation of the dependence of this process to be made to the trustee on his sequestrated estate, and ordains him to sist himself as a party thereto, if so advised, within the next eight days." On the 25th February, having again heard counsel, the Lord Ordinary "in respect the trustee on the sequestrated estate of the defender has not sisted himself as a party to the cause, ordains the defender to find caution for expenses within the next eight days," and then the Lord Ordinary pronounced the interlocutor of the 8th March which is now under review; and that interlocutor appears to me to be sound in law and perfectly well expressed, with the single exception of a slight verbal inaccuracy. It should have been the decrees of 3d December and 25th February 1879 instead of 30th January and 25th February.

Now, the effect of that decree is to enable the pursuer to rank on the bankrupt estate for damages and expenses, and it has no other effect whatever. The defender, who reclaims, is bankrupt, and we gave another opportunity to the trustee to sist himself, but he declines, and probably for good reasons. He may think that there is no answer to this demand, and that it would be throwing away the funds of the estate unnecessarily to attempt to meet it. It appears to me that the trustee as representing the creditors is the only person who has a direct and present interest in the matter. And although I am not prepared to go the length of saying that the Court will not permit the defender to continue to defend the action upon finding caution, still even in that case his title and interest would be very remote. But without caution it is, I am of opinion, altogether out of the question. In these circumstances, I am of opinion that we ought to adhere to the interlocutor of the Lord Ordinary with the exception of the small verbal inaccuracy.

Lord Deas and Lord Mure concurred.

Lord Shand—If it had been proposed to do diligence against the bankrupt, a different principle would have applied, and probably a different result would have been reached. But the bankrupt's interest here is of the most indefinable character, and if those who have the real interest do not appear, I think the bankrupt ought to be allowed to appear only on finding caution for expenses. The rule is very well expressed in Mr Bell's Commentaries, and I think we are only giving effect to the rule as there stated.

The Court adhered.

Counsel for Pursuers (Respondents)—Guthrie Smith—Lang. Agent—J. Smith Clark, S.S.C.

Counsel for Defender (Appellant)—Rhind. Agents—M'Caskie & Brown, S.S.C.

Wednesday, June 4. *

OUTER HOUSE.

[Lord Shand, Ordinary on the Bills.

BRUCE *v.* LORIMER AND M'GREGOR.

Bankrupt—Personal Protection—Bankruptcy (Scotland) Act 1856, *secs.* 45 *and* 77—*Power of the Sheriff to Grant Liberation after Trustee Appointed, and where Personal Protection Refused by Creditors.*

Section 45 of the Bankruptcy (Scotland) Act 1856 provides—"The Lord Ordinary or the Sheriff by whom sequestration was awarded may, on application made either in the petition for sequestration, or by a separate petition by the debtor, grant warrant for liberating the debtor if in prison, after such intimation to the incarcerating creditor or his known agent as the Lord Ordinary or the Sheriff may deem just, and after hearing any objection to the granting of such warrant; and if the application be refused, it shall be competent for the debtor to make a new application for liberation, with consent of the trustee and commissioners, and on the intimation and hearing objections as aforesaid, the Lord Ordinary or the Sheriff may grant warrant to liberate," &c. *Held* that the first part of that section applies only to the period prior to the appointment of a trustee, and that after that date the Lord Ordinary or the Sheriff has no power to grant an application for liberation unless it is based upon a resolution of the creditors agreeing to give the protection, or at least unless it be concurred in by the trustee and commissioners.

Doubt (*per* Lord Shand) as to the soundness of the judgment of Lord Kinloch in the case of *Summers* v. *Marianski*, Dec. 29, 1862, 1 Macph. 214, to the effect that an application under the second branch of section 45 of the Bankruptcy (Scotland) Act 1856 would be incompetent even if in the circumstances above stated the creditors should resolve to give personal protection.

The estates of Mr J. L. Bruce were sequestrated in the Sheriff Court of Lanarkshire, and by the interlocutor awarding sequestration personal protection was also awarded until the first meeting of creditors. At that first meeting the creditors refused to grant it any longer. The bankrupt then applied to the Sheriff for liberation from prison under the 45th section of the Bank-

* Decided September 20, 1878.