

According to this calculation the lay days amounted to seven days three hours, and they accordingly expired on Thursday, 21st February, at six p.m. (3) It will be convenient now to advert to what the Lord Ordinary treats as the fourth question. Keeping in view that the lay days expired on Thursday, 21st February, at six p.m., the "Dalmally" was not completely unloaded until 7:30 on the 27th, being six days of twenty-four hours and one hour and a-half in addition. The pursuers claim that they are entitled to seven days' demurrage in respect that the unloading ran into a seventh day to the extent of one hour and a-half. The Lord Ordinary has unwillingly given effect to this contention, but I agree with my brother Lord Low, and upon the grounds set forth by him, that in this particular case the proper computation is not limited to a computation by days, but should also deal with fractions of days where the facts render that course equitable. The Lord Ordinary has applied this principle to the question of lay days, and I am of opinion that by parity of reasoning it ought to be applied to questions of demurrage arising under the same contract of charter-party. I entirely agree with the Lord Ordinary and your Lordships upon the question turning upon the construction of the strike clause.

The Court refused the reclaiming-note, and, proof not being required, gave decree against the defenders for £151, 11s. 3d.

Counsel for the Pursuers—Aitken, K.C.
 —C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Scott Dickson, K.C.—Spens. Agents—J. & J. Ross, W.S.

Friday, May 29.

SECOND DIVISION.

(Sheriff Court at Perth.)

BELL v. FINLAYSON (BELL'S TRUSTEE) AND OTHERS.

Bankruptcy—Sequestration—Discharge—Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6 (1)—Failure to Pay Five Shillings in the Pound—Proof that Failure Due to "Circumstances for which the Bankrupt Cannot Justly be Held Responsible"—Discretion of Sheriff-Substitute.

A bankrupt presented a petition for discharge in the Sheriff Court more than two years after the date of his sequestration; objections were lodged by the trustee and by certain creditors, on the grounds that no dividends had been paid, that the bankrupt had failed to keep proper business books, and that he had refused to make a *spes successionis* available for his creditors. It appeared also that the bankrupt had indulged for a number of years in business of a speculative nature. The

Sheriff-Substitute holding that the bankrupt's failure to pay a dividend of five shillings in the pound had arisen from circumstances for which he could not justly be held responsible, found him entitled to his discharge, but postponed the granting of the same for three months. On appeal the Court (*diss.* Lord Ardwall) *refused* to interfere with the discretion exercised by the Sheriff.

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, enacts—
 "Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act, and to bankrupts whose estates may be thereafter sequestrated, that is to say—(1) A bankrupt shall not at any time be entitled to be discharged of his debts, unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled—
 (a) That a dividend or composition of not less than five shillings in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors. (b) That 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.
 (3) Any deliverance of the Lord Ordinary or Sheriff, as the case may be, under this section shall be subject to appeal in the manner provided in sections 171 and 170 of the Bankruptcy (Scotland) Act 1856: Provided always that the judgment of the Inner House of the Court of Session on any such appeal shall be final and not subject to review."

On July 3, 1905, the estates of John Wanliss Bell, sheep dealer, were, on his petition, sequestrated by the Sheriff-Substitute at Perth (SYM), and on July 13, 1905, William Finlayson, secretary of Macdonald, Fraser, & Company, Limited, auctioneers and live stock salesmen, Perth, was appointed trustee. No dividend was ever paid by the trustee.

In October 1907 the bankrupt presented a petition in the Sheriff Court for his discharge. Objections were lodged by the trustee and by Macdonald, Fraser, & Company, Limited, averring the failure to pay a dividend, the bankrupt's neglect to keep proper business books, and his refusal to make a *spes successionis* available for his creditors.

The trustee reported, *inter alia*, as follows:—"(1) The bankrupt has made a fair discovery and surrender of his estate, except that he refuses to make available for his creditors—(a) An estate belonging to him in expectancy, namely, his hope of succession on the death of his mother (a lady whose age at present is about 65), to funds held in trust under a joint settlement by the bankrupt's parents, dated 3rd July 1891. By that settlement the whole estate of the bankrupt's parents (with the excep-

tion of some Australian bank shares which had belonged to the mother) is on her death to be divided into cash so far as necessary for purposes of division and subject to expenses to be applied in setting aside a legacy of £1000 for the three younger daughters equally, share and share alike, and the remainder is to be divided equally among the whole surviving children. The Australian bank shares are to continue to be held in trust for behoof of the daughters who may survive their mother and be unmarried at her death till their respective marriages or deaths. At the marriage of the last survivor of such daughters the bank stock is to be realised and divided among the then surviving children. The children of a child predeceasing the survivor are to succeed to the portion which their parent would have taken. The bankrupt is one of six children who survived their father. The father's estate alone amounted to £2700. . . . (4) The bankruptcy has arisen from culpable conduct on the part of the bankrupt. He carried on business from about the year 1894 as a dealer in live stock (chiefly sheep and cattle). His business appears to have been throughout the twelve years a series of speculations in the fluctuations of market prices of such stock. He never at any time made up a balance sheet, but his own story is that partly through the bad season of 1901 he was thenceforward embarrassed for money until he applied for sequestration in 1905. Yet he continued all the while to speculate as before. (5) The bankrupt kept no proper business books, and in particular no cash book or account of money received and paid by him. When called upon to deliver up his business books to the trustee the bankrupt gave up as all he had three bank pass books and three pocket diaries. The diary entries were not regular or complete, and ceased altogether in April 1904. He was then being pressed by his creditors more than before. His bank book shows that his turnover was above £4000 a-year. He said at his public examination that he had bought as much as £1000 worth of stock in one day. His liabilities at the date of sequestration according to his state of affairs amounted to £1003, 9s. 5d. (6) No dividend or composition has been paid to the creditors. The assets as stated by the bankrupt were £142, 11s. 9d., but the gross sum recovered by the trustee was £156, 19s. 5d. This fund was lost in an endeavour by the trustee to recover the bankrupt's legitim from his father's testamentary trustee."

On October 22, 1907, the Sheriff-Substitute appointed a copy of the petition and report to be transmitted to the Accountant in Bankruptcy, that he might report whether the bankrupt had fraudulently concealed any part of his estate or effects, or whether he had wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856.

The Accountant in Bankruptcy reported as follows—" . . . The Accountant has examined the sederunt book, and he begs respectfully to report to the Sheriff that, so far as regards the two points specified in the Sheriff's inter-

locutor, viz., 'fraudulent concealment,' and 'wilful failure to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856,' he has nothing unfavourable to submit. The trustee qualifies his report by a reference to the bankrupt's refusal to make available for his creditors (1) a *spes successionis* under a joint settlement of his parents, and (2) a portion of his salary as land steward or manager of a sheep farm."

The Sheriff-Substitute, on December 19, 1907, pronounced an interlocutor finding that the bankrupt's failure to pay a dividend of five shillings in the pound had arisen from circumstances for which he could not justly be held responsible, and that he was entitled to his discharge, but postponing the granting of the same till March 3, 1908.

Note.—"The sequestration of John W. Bell was awarded upon his own petition on 3rd July 1905.

"The trustee is Mr Finlayson, cashier of Macdonald, Fraser, & Company, the creditors who now object to the discharge. The claims lodged with the trustee amounted to £690. But they would have been greater had a relative lodged a just claim. The assets realised amounted to £169, about £15 more than the sum at which the bankrupt estimated them.

"It appears from the report of the trustee that the bankrupt has attended the diets of examination; also that he has made a fair discovery and surrender of his estates 'except' that he refuses to assign a certain *spes successionis*. That is not part of his 'property' or 'estate'—*Reid v. Morison*, 20 R. 510. The subject is referred to below.

"The Accountant of Court, to whom a remit was made, reports that upon the matters of fraudulent concealment or of wilful failure to comply with any of the provisions of the statute he has nothing unfavourable to submit, but reserves to the Sheriff-Substitute any questions arising as to the making available any or all of what may be contained in the said *spes successionis*.

"Thus the reports are to some extent favourable to the bankrupt. But then the estate has not paid a dividend of 5s. per £1 of the debts. It is the duty of the Sheriff (*Bremner*, 3 F. 1114) to consider whether the failure to pay the creditors a dividend of 5s. per £1 is due to circumstances for which he is not responsible, even if the trustee give a not unfavourable report and the creditors do not oppose. A bankrupt is not entitled to his discharge on merely producing favourable reports.

"In this case the Sheriff's duty is increased. This trustee's report has unfavourable features. The Sheriff-Substitute has thought it his duty to read carefully the report of the examination of the bankrupt, and to consider his conduct and the matters which have occurred since the sequestration.

"Grave objections are stated.

"(1) The Sheriff-Substitute takes first the matter of alleged reckless trading. The dealings of the bankrupt were chiefly in sheep, but also in cattle. They were at

times considerable in amount. The great bulk of them was conducted at the mart of the objecting creditors. Now, this kind of business is often speculative, and when it is so it often consists very much in buying at a mart merely to speculate on the 'turn of the market.' The stock is bought to be immediately resold if the market rises, and often such a dealer knows that he cannot keep the stock and must sell at a loss even if the market falls. If there is a course of dealing of this kind to which in the circumstances rashness and improvidence causing loss to others must be attributed, then the Sheriff-Substitute is of opinion that the person so acting ought not lightly to be freed of his debts. In this case he is not of opinion that by any means all the bankrupt's dealings were merely speculative and to be disapproved. It is true that the bankrupt admits that he was somewhat 'hard hit' in 1901, which was a bad season for the grazing trade, and it is true that he went on till 1905. But it is thought that on the whole his action does not deserve that he be kept in the status of an undischarged bankrupt for an indefinite time. The view taken is that while there is always risk in such dealings, because the sheep market fluctuates according to weather and many trade causes (which are out of the power of these graziers to shelter themselves from if they are doing business at all), the bankrupt did not act so rashly and unreasonably as to justify severe censure; on the contrary, that part of his dealing was wholesome and would not have been discouraged by the objecting creditors.

"(2) Along with the matter just mentioned must be taken the fact that records of transactions kept by the bankrupt were at the very best most scanty and imperfect. It is not an answer to this to say that most of his transactions could be discovered in the books of Macdonald, Fraser, & Company, and so that the defects in his bank books and little memorandum books could be filled up. It is one's own business to be able to give an account of one's own affairs. The Sheriff-Substitute does not leave out of view that the bank book entries cease to give any aid after a date some time before the application for sequestration, and that no memorandum book could be produced after 1904.

"Taking these two matters together the Sheriff-Substitute does not consider that the discharge should be refused, but at most that it may for a brief time be suspended.

"(3) The next matters relate to alleged means by which the bankrupt could lessen the loss to creditors.

"(b) The really interesting and important matter, and the sole matter on which the trustee (as distinguished from Macdonald, Fraser, & Co.) bases his objection to the discharge, is thus expressed by him, viz.—'The bankrupt refuses to make available for his creditors a *spes successionis* under a joint settlement of his parents. This is capable of being alienated and sold for a valuable consideration.'

"The answer may be also quoted. It goes beyond what the Sheriff-Substitute

considers that he is obliged to decide. It is this, viz. — 'Admitted that bankrupt refuses to assign estate which does not fall under the sequestration.'

"The position of John W. Bell, the bankrupt, as to a *spes successionis* is this, viz., by the joint settlement of his father and mother it is provided that the survivor of the spouses—that is, as the event has turned out, Mrs Bell—has a liferent of this joint estate. The husband's estate amounted to about £2630.

"On the death of the survivor the whole estate (always under a certain exception) is to be realised so far as the trustees consider that expedient, and the realised proceeds, after paying debts and the survivor's funeral expenses, is to be applied *primo loco* in setting aside therefrom and paying to the three younger daughters of the spouses equally among them the sum of £1000. Thereafter the residue of the trust fund (under the certain exception already mentioned) shall be divided and paid over 'equally to and among the whole of our then surviving children equally, including the said three daughters.'

"It will therefore be seen that the survivance of the widow is necessary to a vested right. There is, however, a declaration that if a child die before the surviving spouse leaving lawful children, such children are to take the share which would have fallen to the parent.

"The bankrupt has one brother and four sisters.

"The amount of the estate of Mrs Bell, the bankrupt's mother, is not so definitely ascertained. But from what appeared in the case of *Bell's Trustee v. Bell's Trustee*, 1907, S.C. 872, it is evidently not considerable in amount, and it seems to have been for long, if it is not still, locked up in Australian Bank liquidations.

"The widow is now 65 years old or thereby. The Sheriff-Substitute was told that she is still in good health. (See proof in *Bell's Trustee v. Bell's Trustee*, *supra*.)

"If then the bankrupt survive Mrs Bell, he will be entitled at all events to a share of his father's estate. What share will depend on whether all the children of Mrs Bell or only some survive? If any die without issue before her, his share will be larger.

"It is here proper to explain the reason why a small dividend has not been paid. It is simply because the £169 which might have availed was spent by the trustee in a litigation. This is said as fact and without imputing blame. The trustee thought that he could have it found that the bankrupt was still entitled to legitim out of the father's estate, and that he (the trustee) could claim it. He failed—*Bell's Trustee v. Bell's Trustee*.

"As matters stand now, the sum the bankrupt may get will be the one-sixth of £1600 out of the father's part of the joint estate, and some small sum of his mother's part. Now, the Sheriff-Substitute thinks that it cannot be denied that people would be found who would give a modest sum of money for this *spes successionis*,

receiving from the bankrupt (the trustee is powerless to give it) an assignation which would become valid by accretion if and when Mrs Bell died survived by the bankrupt. The trustee says that that is enough for him. The sequestration could be indefinitely kept up. A 'prudent trustee' would take the chance that this asset may fall into the sequestration, for though it do not so fall now, the acquisition of it before the discharge would make it fall under *acquirenda*. Reliance is placed upon the suggestions of learned judges in the case of *Reid, supra*, to the effect that ways and means may be found to induce the bankrupt to transfer what does not fall under the sequestration because it is not property, and on the principle of such *dicta* as this of Lord Adam in a later case (*Leslie v. Cumming & Spence*, 2 F. 643), which the Sheriff-Substitute thinks was not precisely cited to him, viz.—'In the case of a *spes successionis* which has not vested in the debtor, and therefore has not fallen under the sequestration, the only way in which the creditors can reach a valuable fund is by withholding a discharge till the bankrupt consents to assign it' (Lord Adam must mean by withholding their consent to a discharge).

'Special reliance, too, is placed on the case of *Bradshaw*, 7 F. 249. The matter was very analogous, though not the same. A bankrupt a few months after his sequestration desired to get free from it by an offer of composition, and (tendering a cautioner) he offered to pay 5s. per £1, with the expenses of the sequestration and the remuneration of the trustee. The assets were small, and the debts relatively very large. It looked the best thing the creditors could do. But then the bankrupt had an interest (which seems not to have been vested, but to have been rather of the nature of a protected succession) in the large means of his father. His father had died, but the property and funds were liferented by the father's widow; and the father's widow was 80 years of age, and in infirm health. Most of the creditors were inclined to accept the offer. But a dissentient creditor brought before the Courts the proposition that the offer was not reasonable, because the bankrupt had the said interest in his father's estate, which if realised would enable the bankrupt to pay 20s. per £1. The Court of Session thought that that was a fair description of the offer, and affirmed an interlocutor of the Sheriff holding the offer not reasonable, and refusing the discharge of the bankrupt.

'Now the difference both in the question in hand and in the speculation involved in the sale of this *spes successionis* is easy enough to point out. But it may be derived from the *dicta* referred to and from that decision that there may be cases wherein the Court will not aid a bankrupt (especially one who is seeking the benefit of sequestration) to be a free man if there be a high probability that the debts will be paid if the sequestration be kept up for a little. The Sheriff-Substitute cannot therefore affirm the naked proposition which lies

behind the answers that a bankrupt must get his discharge if the only thing to be said against him be that he could assign, but will not assign, something which does not fall within the sequestration. But does it follow that discharge will be refused whenever the creditors can point to something that could be sold for their behoof? Not so. The Sheriff-Substitute thinks the law to be this—that when it is unreasonable to close the sequestration because what is still *in spe* is likely very soon to be realised, the Court of Bankruptcy may refuse the benefit of discharge, but that the Court will not do so merely because something may yet come.

'In other words, the sequestration may be kept open for a reasonable early certainty, but not for what could fetch little at the time or must be left as a speculation if the bankrupt be unwilling to aid. It must always be remembered that it is the bankrupt's property only that is the creditors' property, and that the sequestration has accomplished its purpose as a diligence when that is ingathered. 'The Court has power to say on what conditions the discharge should be granted, and there may be cases, as for instance where the bankrupt possesses a large alimentary allowance or a valuable expectancy, in which it would be reasonable to keep the sequestration open unless the bankrupt would agree to some arrangement which would make at least a part of such beneficial rights available to his creditors.' (Lord President in *Leslie v. Cumming & Spence*, 2 F. at p. 645.)

'In this case the Sheriff-Substitute thinks that he should allow the discharge, suspending it only till the 1st day of March, because of the fact that, though part of the trading was risky, no proper record of the transactions was kept.

'He has felt some difficulty in the fact that the result of suspending the discharge even for two months has the effect of keeping the sequestration open on the last matter discussed in this note. That is just the thing which he is against on its own merits.'

The objectors appealed, and argued—The *onus* lay on the bankrupt to prove that his failure to pay five shillings in the pound had arisen from circumstances for which he could not justly be held responsible—Bankruptcy and Cessio (Scotland) Act 1881, section 6 (1). Not only had that *onus* not been discharged, but what evidence there was showed that the failure to pay five shillings in the pound was due to (1) the speculative nature of the business carried on by the bankrupt for twelve years before his sequestration, and (2) his failure to keep proper business books which would have shown him what his liabilities were from time to time. That was sufficient qualification for refusing to grant a discharge—*Wilson & Company*, September 14, 1882, 20 S.L.R. 17; *Clarke v. Crockett & Company*, December 8, 1883, 11 R. 246, 21 S.L.R. 180; *Neilson*, February 12, 1901, 3 F. 446, 38 S.L.R. 328. Further, the bankrupt had a *spes successionis* which had a market

value, and which he refused to make available for his creditors. The Court ought, therefore, either to withhold the discharge or grant it on condition of the assignation of the *spes successionis*—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sections 81, 95; *Leslie v. Cumming & Spence*, February 20, 1900, 2 F. 643, 37 S.L.R. 444; *Reid v. Morison*, March 10, 1893, 20 R. 510, 30 S.L.R. 477.

Argued for the petitioner (the bankrupt)—The Sheriff-Substitute had held that the bankrupt had discharged the *onus* which lay on him of showing that his failure to pay five shillings in the pound was due to circumstances for which he could not justly be held responsible. In deciding that question, which was one of fact, the Sheriff-Substitute had materials which were not before the Court. The bankrupt's failure to keep books had nothing to do with his inability to pay five shillings in the pound, while the mere fact that the course of business pursued by him involved risk was no qualification for refusing his discharge. Further, there was no authority for refusing a bankrupt his discharge because he declined to assign a *spes successionis* or for making the assignation a condition of the discharge. The Court had refused to make a discharge conditional on such an assignation—*Blackie v. Peddie*, November 27, 1871, 10 Macph. 140, 9 S.L.R. 114; *Kirkland v. Kirkland's Trustee*, March 18, 1886, 13 R. 798, 23 S.L.R. 546. In the case of *Reid v. Morison, cit.*, the question of the competency of such a course was not decided. Moreover, the Legislature had provided that a *spes successionis* should not fall into the bankruptcy assets, and had specified certain grounds for the refusal of a discharge, and failure to assign a *spes successionis* was not one of these—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), section 146; Bankruptcy (Scotland) Amendment Act 1860 (23 and 24 Vict. cap. 33), section 3; Bankruptcy and Cessio (Scotland) Act 1881, section 6.

At advising—

LORD STORMONTH DARLING—The discharge of a bankrupt is now regulated by section 6 of the Bankruptcy and Cessio (Scotland) Act 1881, which provides that . . . (*states provisions of section, supra*). . . .

In this case no dividend has in fact been paid, and the *onus* of proving that the circumstances are not such as to render the bankrupt justly responsible for not paying five shillings in the pound must lie on the bankrupt himself. But the puzzle remains, who is to be satisfied? Is it to be the Lord Ordinary or the Sheriff, whose opinion, as the case may be, seems to be made decisive by the terms of sub-section (b), or is it to be the Inner House in either Division, to whom an appeal is allowed, and whose judgment is made final and non-appealable by the terms of sub-section (3)? That is a real puzzle, which I think must be solved in some such way as that adopted by Lord President Inglis in the case of *Millar*, 5 R. (at page 146). There his Lordship had to deal with a somewhat similar difficulty

created by the Bankruptcy (Scotland) Amendment Act 1860. The third section of that statute made a change in the former law, under which, if no opposition was raised on the part of creditors, the Court was bound to grant a discharge to the bankrupt. The change made rendered it no longer obligatory to grant the discharge, and the Act effected its object by giving a discretion to the Sheriff or the Lord Ordinary or the Court to refuse the discharge even though there was no opposition offered by creditors "if it shall appear from the report of the Accountant in Bankruptcy, or other sufficient evidence, that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856." Now it was with reference to this change in the law—which, be it observed, gives a discretion equally to the Sheriff or the Lord Ordinary in the first place and to the Court in either Division in the second—that the Lord President used these expressions—"I confess that in a matter of this sort I am not willing to interfere with the discretion of an inferior judge, once exercised. The discretion of the Sheriff was appealed to, and the Sheriff has exercised his discretion, and has refused the application, and when a judge has once exercised his discretion and exercised it in such a way that it is impossible to say that he has done wrong, a superior Court will hesitate to interfere, even though looking at the matter independently they might feel inclined to come to a different conclusion."

It humbly seems to me that these observations are very relevant to the question how we are to reconcile the provision as to the question of the right of the bankrupt to discharge being in the first place one for the opinion of the Lord Ordinary (or the Sheriff as the case may be) with the provision that it shall be in the end one for the opinion of the Inner House. Plainly the two provisions can never be reconciled by making that for appeal incompetent. This Court has a certain duty of review thrown upon it of which it cannot rid itself. The two provisions, as I read the cases, are only to be reconciled by the Inner House not going against the opinion of the inferior judge in a matter of discretion unless it can say that he has gone clearly wrong. It is true that in *Millar's* case the Sheriff had refused the discharge, while here the Sheriff has found the bankrupt entitled to his discharge, but has merely postponed it to a day named, being less than three months from the date of his interlocutor. Nobody can say that that by itself makes any difference, because refusal of the discharge, or granting it, or postponing it, was equally within his competency if any one of these courses represented his real opinion. I should be prepared to follow Lord President Inglis' mode of dealing with a Sheriff's discretion all the more because the reference in section 6 (b) of the Act of 1881 to the "opinion of the Lord Ordinary or the Sheriff" is an express reference and not merely an implied one as in the case of the

Act of 1860, section 3. There is hardly any question which can more properly be described as one of pure discretion than to determine whether a man's conduct has or has not arisen from circumstances for which he cannot justly be held responsible. In *Millar's* case the Court, agreeing both with the Sheriff and with the Accountant in Bankruptcy, thought the case "a very bad one indeed." Here the Accountant of Court, to whom the matter was referred by the Sheriff, has nothing unfavourable to report of the bankrupt, *i.e.*, nothing unfavourable about his conduct as a bankrupt; and in the case of *Cooper v. Fraser & Scott*, 11 Macph. 38, where the Court decided that the bankrupt's discharge should no longer be delayed (although he had been convicted of embezzlement of trust funds and had suffered a sentence of three months' imprisonment) I observe that Lord Neaves (at page 42 of the report) distinguishes between a case where the bankrupt's conduct as a bankrupt has been unexceptionable and a case where he may have acted culpably towards one or more of his creditors.

Now, there being nothing here to which exception can be taken in the conduct of the bankrupt as a bankrupt—no concealment of funds or failure to comply with statutory requirements—the only thing to which the trustee or the objecting creditors can take exception is that his bankruptcy was brought about by what the trustee describes as "culpable conduct" in (a) carrying on business as a dealer in sheep and cattle from about the year 1894 as a "series of speculations" in the fluctuations of the market prices of such stock, and (b) in keeping no proper business books. I do not say that the conduct of the bankrupt in either of these respects was to be applauded. But the Sheriff points out that the great bulk of his dealings was "conducted at the mart of the objecting creditors," and he is of opinion on the whole that his action does not deserve that he be kept in the status of an undischarged bankrupt for an indefinite time. I think that in characterising part of his dealing as "wholesome," though that is not a very apposite phrase, the Sheriff must be taken to mean that the objecting creditors who encouraged him to go on speculating by giving him credit are the last persons to complain of such dealing, because for their own purposes they encouraged it. I do not find that peculiarity in any of the cases which involved more or less reckless trading. In *Clarke v. Crockatt & Company*, 11 R. 246, which was the first case in which the Court had to consider the effect of the Act of 1881, the bankrupt had lost £6000 by speculations on the Greenock Sugar Exchange and at last had attempted to evade apprehension by absconding in female attire, and the Sheriff-Substitute was against him on the question whether his failure to pay 5s. in the £ arose from circumstances for which he was not justly responsible. The Court refused the appeal, thus agreeing with the Sheriff-Substitute in the view that the bankrupt was entirely

responsible for having incurred debts at all, and in not being able to discharge these debts. So that case affords no countenance to the view that the Court ought without some strong and compelling ground to overrule the opinion of the judge of first instance when he has come to a conclusion, as the Sheriff does here, favourable to the bankrupt's right to a discharge. A strong example of the unwillingness of a court of review to interfere with the exercise of discretion of a local judge, particularly when it is in the favour of the bankrupt, is afforded by the case of *Buchanan v. Wallace* (in 1882), 9 R. 621, where the bankrupt had kept no books, and had speculated in house property and shares, with the result that he failed with liabilities over £19,000 and assets only £200, and the Lord President characterised his conduct as "extremely blameworthy"; and yet the Court refused to interfere with the discretion of the Sheriff-Substitute, who had found the bankrupt entitled to his discharge but delayed extract for three months.

Now, I think that the case of *Buchanan v. Wallace* establishes that, even where the Sheriff-Substitute imposes "a very mild penalty" on the bankrupt (as all the judges thought it was) for reckless trading or other misconduct, the matter is left to a great extent to the discretion of the Sheriff, and the Court will not interfere with his discretion except upon the strongest grounds. I think that this is especially so where the discretion of the inferior judge is exercised in favour of the bankrupt's discharge, because "a somewhat penal statutory discretion" (as Lord M'Laren calls it in *Petr. Shand*, 19 S.L.R. 562) must always receive the milder construction, if that be at all possible. His Lordship therefore adopted that construction in holding that the bankrupt was only partly responsible for the failure to pay 5s. in the £. It is true that in that case, where Lord M'Laren was Lord Ordinary on the Bills in vacation, and therefore exercising the functions of the statutory Court of Review, he did not adopt the view of the Sheriff-Substitute, but that was because he thought that the Sheriff-Substitute in refusing the discharge, had not acted on his own personal view of the evidence, but on a mistaken view of what the Act required. There is another case (*Petr. Boyle* (in 1885), 22 S.L.R. 767) which illustrates how strongly the Court leans to what may be called the more merciful view towards the bankrupt, because there the Sheriff-Substitute had been against the bankrupt, and yet the Second Division granted the discharge. In short, I do not know a single case where the Court of first instance has been in favour of discharge (either immediately or after an interval), and where the Court has in the end refused it.

In the present case the Sheriff-Substitute has found the bankrupt entitled to his discharge, but has postponed the granting of the same till Friday, 3rd March 1908 (now past). It is impossible to read his note without seeing that what has weighed with him chiefly has been (1) that the

objecting creditor was largely responsible for the speculative trading, and (2) that both he and the trustee (who is secretary of his auction mart) are trying to make available to the creditors what the bankrupt is not bound to assign—(*Reid v. Morison*, 20 R. 510). I am of opinion that, although speculative trading and the non-keeping of business books are to be condemned, they are not more to be condemned than the attempt to lay hands by a legal artifice on property which does not by law belong to creditors. In short, I think that the Sheriff-Substitute has properly exercised his discretion, and even if I disagreed with him as to his reasons for exercising his discretion in that particular way, I should be slow to disturb it. I cannot agree that the Act of 1881 has the effect of displacing all judicial discretion as to a bankrupt's discharge and making it obligatory to refuse the discharge when the bankrupt has been unable to pay 5s. in the £. That would practically be to read out of the statute the whole provisions of section 6 (b) and especially the words "cannot justly be held responsible." I am aware that the Act was passed at the instance of a private member of the House of Commons, and that its main intention was to make it more difficult for a bankrupt to obtain his discharge. But it was never intended to make that impossible, and the course of decision for the past twenty-six years does not show that the statute has been very extensively used in the interests of creditors, for it still left a large measure of discretion in the hands of the Court, and particularly, as I read the decisions, in the hands of the local judge. I am further of opinion that the objections which are stated to the bankrupt's discharge truly represent only one interest, that of the conductors of the auction mart, and that those objections may and ought to be taken into account when they are put forward for the purpose of securing for a necessarily inadequate price property which has not yet vested in the bankrupt. The course followed by the Sheriff-Substitute has already had the effect of leaving to the creditors nearly three months for the expectancy dependent on the bankrupt's survival of his mother to become a vested interest, and, in my view, the creditors have had all, and possibly more than all, they were entitled to. I am therefore in favour of refusing the appeal, and finding that the bankrupt is now entitled to his discharge.

LORD LOW—I have found this case to be attended with much difficulty. By section 6 of the Bankruptcy and Cessio Act 1881 it is enacted that in order to entitle a bankrupt who has not paid a dividend of 5s. in the pound to his discharge, it must be proved that his failure to do so has arisen from circumstances for which he cannot justly be held responsible. Here the trustee has reported that the bankruptcy arose from culpable conduct on the part of the bankrupt, and that his business had been, throughout a period of twelve years, a series of speculations in the fluctuations

of the market prices of sheep and cattle. That is the purport of the trustee's report, and the bankrupt has led no evidence to show that his failure to pay 5s. in the pound has arisen from circumstances for which he cannot justly be held responsible. The Sheriff-Substitute refers to the report of the examination of the bankrupt. I have read a copy of that report, and I cannot say that, to my mind, it throws much light on the question. If I had nothing but the examination of the bankrupt before me, I should have great difficulty in forming my opinion as to whether or not the bankrupt can be justly held responsible for his failure to pay 5s. in the pound.

In such circumstances it is very important to observe that the statute gives very great weight to the opinion of the Judge of first instance—the Lord Ordinary or the Sheriff as the case may be. The enactment is extremely badly framed, and indeed, if read literally, is nonsense, but I think that what was meant, and what the enactment must be read as meaning, is that the bankrupt shall not be entitled to his discharge unless, in the opinion of the Lord Ordinary or the Sheriff, he was not justly responsible for his failure to pay 5s. in the pound. If that be the sound construction of the enactment, then, although an appeal is allowed, it gives such weight to the opinion of the Lord Ordinary or the Sheriff, that the Court of Appeal is not justified in altering his determination unless it is so plainly wrong that there are no reasonable grounds upon which it can be supported. I am not prepared to go so far as that in this case. I read the Sheriff-Substitute's note as meaning that his investigations into the case have led him to the conclusion that to a considerable extent the bankrupt's losses were due rather to misfortune than to a course of dealing which could properly be described as rash or reckless speculation. That being so, I concur, although I confess with much hesitation, in the result at which Lord Stormonth Darling has arrived.

LORD ARDWALL—I am of opinion that in this case the bankrupt is not entitled to his discharge.

Under the Bankruptcy Act of 1860 the granting or refusing of a petition for discharge of a bankrupt was one entirely of discretion, and, as was laid down in the case of *Millar*, 5 R. 144, under that Act the Court would not on appeal readily interfere with the judgment of the Lord Ordinary or the Sheriff, but that case and others under the Bankruptcy Acts prior to 1881 have little application to the present question. By the Bankruptcy and Cessio Act of 1881 the law was altered and restrictions were placed on the right to discharge. By that Act, section 6 (1), it was provided as follows:—" . . . (quotes, supra) . . ." And by sub-section 3 of the same section it is provided that any delivrance of the Lord Ordinary or Sheriff, as the case may be, under this section shall be subject to appeal in the manner provided under sections 171 and 170 of the Bank-

ruptcy (Scotland) Act 1856, provided always that the judgment of the Inner House of the Court of Session on any such appeal shall be final and not subject to review.

It must be kept in view that the discretion reposed in the Lord Ordinary and the Sheriff under the Act of 1881 is much more restricted than in either of the previous Bankruptcy Acts, so far as they related to the discharge of bankrupts; but yet I am of opinion that under these sections the Judge of the first instance may exercise a certain amount of discretion in granting or refusing the discharge, but that only where there is something in the report of the trustee, or other evidence, going to show that the failure to pay five shillings in the pound has wholly or partly arisen from circumstances for which the bankrupt cannot justly be held responsible. An example of this is to be found in the case of *Shand, Petitioner*, 1882, 19 S.L.R. 562, where the deficiency was due in some measure to the bankrupt's fault, but in a greater degree to the forced realisation of his effects. In such cases I would agree with what has been said by your Lordships as to the undesirability of interfering with the decision arrived at by the Judge of the first instance on a balancing of evidence, but in my opinion the present is not a case of that sort at all. I must, however, say that I respectfully differ from the views expressed by my brother Lord Stormonth Darling as to the duty of the Court of Appeal in considering such a case as is presented to us by the Sheriff-Substitute's interlocutor and note.

Before considering what the facts in this case are upon which the Sheriff-Substitute has proceeded, I think it right to point out that the effect of the provisions of the Act of 1881 under consideration is not now being considered for the first time. In the case of *Clarke v. Crockett & Company*, 11 R. 246, the Court very clearly laid it down that the burden of proving that his failure had arisen from circumstances for which he could not justly be held responsible lay upon the bankrupt himself. Lord President Inglis says—"The enactment is that the bankrupt shall not be entitled to a discharge unless one of two things is proved, either that he has paid a dividend of five shillings in the pound or that his failure to do so has arisen from circumstances for which the bankrupt cannot justly be held responsible; and the statute further lays upon the bankrupt himself the burden of proving that the failure has arisen from such circumstances. The question therefore is, no dividend of five shillings having been paid in the present case, whether the failure so to do has been proved by the bankrupt to have arisen from circumstances for which he cannot be held to be justly responsible."

Then in the case of *Neilson, Petitioner*, 3 F. 446, Lord President Kinross expresses himself thus regarding the sub-section in question—"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 this 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?" And Lord Adam says, in the same case,—“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 Lord President Inglis in the case of *Clarke v. Crockett & Company*, and I do not think that 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.”

No doubt in thus stating the import and effect of the Act the learned Judges above referred to had in view the terms of subsections 1 and 2 of section 6 of the Act of 1881, which very plainly by their terms lay upon the bankrupt the duty of submitting such evidence as will prove to the Lord Ordinary or the Sheriff that one or other of the conditions (a) and (b) mentioned in subsection 1 have been fulfilled.

Accordingly the question comes to be in the present case whether the bankrupt has proved that either of the conditions has been fulfilled.

The Sheriff-Substitute has found in his interlocutor "that the bankrupt's failure to pay a dividend of five shillings in the pound has arisen from circumstances for which he cannot justly be held responsible," yet he has not pointed out in his note any such circumstance. After some observations about the buying and selling of stock at auction marts, the Sheriff-Substitute goes on to say in his note—"The view taken is that, while there is always risk in such dealings, because the sheep market fluctuates according to weather and many trade causes (which are out of the power of these graziers to shelter themselves from if they are doing business at all), the bankrupt did not act so rashly and unreasonably as to justify severe censure; on the contrary, that part of his dealing was wholesome and would not have been discouraged by the objecting creditors."

It is not very easy to extract any definite meaning from this somewhat strangely-worded paragraph. The Sheriff-Substitute seems to think that the question he had to decide was whether the bankrupt acted "so rashly and unreasonably as to justify severe censure." That is not the question which he had to determine; the question was whether the bankrupt had discharged the *onus* lying upon him of showing that his failure to pay five shillings in the pound had arisen from circumstances for which he could not justly be held responsible? The Sheriff-Substitute goes on to express the opinion that part of the bankrupt's dealings was "wholesome" (whatever that may mean) and would not have been discouraged by the objecting creditors. Here perhaps is an indication that the Sheriff-Substitute blames the objecting creditors for having contributed to the bankrupt's

failure, but of this there is no evidence. Taking the paragraph as a whole it seems to imply that because graziers occasionally cannot "shelter themselves" from the fluctuations of the sheep market, "according to weather and many trade causes," the bankrupt who has for twelve years carried on a series of speculations resulting in a sequestration showing £1003, 9s. 5d. of liabilities and £156, 19s. 5d. of assets is to be held to have been brought into that position "by circumstances for which he cannot justly be held responsible." It need hardly be pointed out that every trade and business is liable to fluctuations, and that every trader is liable to losses of more or less magnitude from time to time owing to circumstances for which possibly he cannot be held responsible; but it is manifestly the duty of any such trader when such inevitable losses occur to circumscribe his operations till his estate has recovered from such losses, and not to go on adding to the deficit by continued persistence in the same kind of dealings as led to them.

I must therefore hold that the Sheriff-Substitute's suggestion, made in the passage I have quoted, does not afford the slightest foundation for the finding above quoted from his interlocutor.

I now turn for a moment to the facts of the case as ascertained from the trustee's report. These, shortly stated, are that for the long period of twelve years the bankrupt carried on a series of speculations upon fluctuations in the market prices of stock—in short, his business for the most part was of the same character as that known as gambling for differences on the stock exchange; that he never made up a balance sheet, and kept no proper business books, not even a cash book. Apparently the only books that he can produce are three bank pass books and three pocket diaries. The entries in the diaries were neither regular nor complete, and ceased altogether in April 1904, about fourteen months before his sequestration.

It was pleaded that although failure to keep books might render the bankrupt liable to prosecution under the Debtors (Scotland) Act 1880, section 13 (6), yet it had no bearing on the present case. I must differ from this view, because it was just a piece of the bankrupt's reckless trading; that he went blindly on, speculating with other people's money, without knowing at any one time how his affairs stood so as if necessary to stop his speculative operations.

On the facts, therefore, as stated in the trustee's report, which under the Act is the proper evidence unless the Sheriff has required further evidence to be led, which apparently he has not done, I am of opinion that it has been shown that the bankrupt's failure to pay five shillings in the pound has arisen solely from circumstances for which the bankrupt, and the bankrupt alone, is responsible, and I have been unable to find in the whole proceedings any evidence to the contrary. But having regard to the dicta of the judges in the cases of

Clarke v. Crockatt & Company and Neilson, Petitioner, the *onus* lies upon the bankrupt of showing that the failure to pay five shillings in the pound has "arisen from circumstances for which the bankrupt cannot justly be held responsible," and what has to be decided in this case is whether the bankrupt has discharged that *onus*.

I have been unable to find in the whole proceedings a tittle of evidence to justify the view that he has discharged it. I cannot find a single fact proved, or even for that part of the matter averred, which goes any length towards discharging that *onus*. The Sheriff-Substitute's note, as I have shown, does not show that the bankrupt has discharged that *onus*, nor, so far as I have been able to follow them, do the opinions of your Lordships. There is no question of discretion here, the question is whether we are to affirm a finding which cannot be supported by a single fact in the case.

I am therefore of opinion that the Sheriff-Substitute has gone so far wrong in the present case, and has so completely disregarded the requirements of the Act of 1881 as expounded in former decisions of the Supreme Court, that it is the duty of this Court as a Court of Appeal to reverse his judgment and refuse the petitioner's discharge, on the ground that he has not discharged the *onus* lying upon him of showing that his failure to pay five shillings in the pound has arisen from circumstances for which he cannot justly be held responsible.

It is unnecessary in the view I take of the case to go into the question raised in the Sheriff-Substitute's note regarding the *spes successionis* of the bankrupt.

LORD JUSTICE-CLERK—I have found this case difficult, but I concur with the majority of your Lordships. The proceedings in a question of bankruptcy discharge have somewhat of a penal character, and the withholding of a discharge is a very serious matter for a bankrupt; the subsistence of his sequestration after a considerable lapse of time being like a chain around his neck, hampering him in any effort he may be making to recover himself and make progress as a citizen. It is therefore, I think, a case in which, except upon the strongest grounds, the Court should not interfere with the decision of the Judge of first instance where that has set the bankrupt free, even although his doing so may be held to go rather far in the exercise of his discretion. The present case is, I admit, not a very favourable one. But as the Judge of first instance has held that the door may open for the bankrupt to go free, I am not prepared to shut it in his face. I concur generally in what Lord Stormonth Darling has said, and while I agree with much of the animadversions which Lord Ardwall has expressed, I cannot see my way to set aside the decision of the Sheriff, a course which should only be taken if there are no reasonable grounds for the decision.

The Court dismissed the appeal.

Counsel for Petitioner (Respondent)—
Hunter, K.C.—Munro. Agents—Menzies,
Bruce-Low, & Thomson, W.S.

Counsel for Objectors (Appellants)—
Jameson. Agents—Carmichael & Miller,
W.S.

Saturday, May 30.

FIRST DIVISION.

TURNER'S TRUSTEES v. FERNIE AND OTHERS.

*Succession—Trust—Direction to Purchase
Government or First-Class Office Annuities—
Annuities not Declared Alimentary
—Right of Beneficiary to Capital Sum.*

A testator directed his executor to pay to his Scotch trustees certain sums to be invested by them in the purchase of annuities for certain parties named. He further provided—"And I declare that all annuities . . . shall be purchased . . . from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, . . . and any other first-class company or annuity office, as my said executor or Scotch trustees shall in this behalf . . . think fit, . . ." The annuities were not declared alimentary.

The beneficiaries having called on the trustees to pay over the principal sums instead of investing them in the purchase of annuities, held that the beneficiaries were entitled to payment.

Tod v. Tod's Trustees, March 18, 1871, 9 Macph. 728, 8 S.L.R. 445, followed. *Hutchinson's Trustees v. Young*, October 29, 1903, 6 F. 26, 41 S.L.R. 14, distinguished and commented on.

By his will the late Robert Blackburn Turner of Goosery, Bengal, India, who died, domiciled in Scotland, on 17th March 1906, directed his executor to pay to his Scotch trustees the sum of Rs. 10,000, to be invested by them in the purchase of an annuity for the benefit of Margaret Fernie, then residing in Glasgow, for her life. He also directed his executor to pay to the said trustees a sum sufficient for certain purposes therein mentioned, to be held upon the trusts therein declared, *inter alia*—"To set apart three several sums of Rs. 15,000 each, and to invest each of the said three sums of Rs. 15,000 in the purchase of three several annuities, that is, Rs. 15,000 to be expended in the purchase of each such annuity, one in the name and for the benefit of my sister Jane Wilson, wife of William Wilson, residing in Possil Park in Glasgow aforesaid, another for the benefit and in the name of my sister Jane Fleming, the widow of Joseph Fleming of Glasgow aforesaid, and the third for the benefit and in the name of my sister Martha Morgan, the wife of James Morgan, at present residing in

Slottville, in the state of New York, in the United States of America."

The testator further provided—"And I declare that all annuities which by this my will I direct to be purchased by my executor or my Scotch trustees shall be purchased by him or them from the British Government or from the Scottish Widows' Insurance Company, Limited, of Edinburgh, in Scotland, and any other first-class company or annuity office, as my said executor or Scotch trustees shall in this behalf think fit, and that such annuities shall be made payable to the persons in whose names and for whose benefit they have respectively been purchased, in equal half-yearly or quarterly portions, and shall be enjoyed by them respectively as their respective separate property, free from the control of any husband to whom any of them respectively may be married."

The annuitants having called on the trustees to pay them the principal sums instead of investing the money in the purchase of annuities, a special case was presented for (1) the trustees, who were in doubt as to their power to make such payment, and (2) the annuitants.

The case, *inter alia*, stated—" (6) The purchase of Government annuities is mainly regulated by the Acts 16 and 17 Vict. cap. 45, and 45 and 46 Vict. cap. 51, section 2. Section 25 of the former Act provides that 'the right, title, interest, and benefit in and to any annuity . . . purchased under the provisions of this Act shall not be assignable by the original proprietor thereof so as to enable the assignee to receive the same during the lifetime of the said proprietor, except in case of the insolvency or bankruptcy of an individual proprietor, when the same shall become the property of his or her assignee or assignees for the benefit of his or her creditors.' The section further provides that in case of any such bankruptcy or insolvency the commissioners for the reduction of the national debt shall repurchase and cancel the annuity, the receipt of the assignee or assignees to the commissioners being constituted a sufficient discharge thereof. (7) The first parties have ascertained that according to the practice of the Department with regard to annuities issued by it, while the right to an annuity itself cannot, apart from insolvency or bankruptcy, be assigned, the half-yearly payments are made either to annuitants themselves or parties holding powers of attorney granted by annuitants; and further, that under their regulations the Department cannot, or at any rate will not, grant a bond of annuity containing a clause that the annuity shall be strictly alimentary and shall exclude a trustee in bankruptcy.

"In these circumstances the first parties maintain that they are not bound to pay over said sums to the second parties, and that they are bound to purchase the annuities on behalf of the second parties; or otherwise, that they are entitled in their discretion to purchase annuities for the second parties, or such of them as they