Feb. 28, 1826. comes this question, that part of the interlocutor being right,—Have the Court exercised a sound discretion with respect to the costs? My Lords, when I first read this interlocutor, without attending to those words, to which I first called your Lordships' attention, it struck me as a little singular, that, if the Court found the trustee guilty of any irregularity, they should give him the whole costs of the proceedings in Court; but that is not the effect of the interlocutor—it finds expenses due, 'subject to modification,'—that is to say, that they do not give the whole expense against the petitioner, but thinking, as they do, that a great part of this complaint ought never to have been made, as casting unfounded calumnies upon this respondent, they say, that as to that part of the complaint he ought to have his costs; and I must confess, I agree with the Court of Session in that view of the case. If the Court of Session had found the petitioner liable to all expenses of this proceeding, the judgment might have been charged with the inconsistency charged upon it, at your Lordships' bar; but it only finds the petitioner liable to expenses, subject to modification—that is, it finds him liable, when the report of the auditor comes back, for the costs of that part of the proceeding, in which the Court think he has completely failed, and which ought, therefore, never to have been insisted in by him.

My Lords, in this view of the case, I feel it my duty to move your Lordships, that these interlocutors be affirmed; and thinking as I do, though I would not prevent a fair creditor bringing forward a fair complaint against a trustee, and, on the contrary, holding that the door ought to be open to him, but thinking that many of the complaints in this petition are unfounded, it does appear to me that this appeal to your Lordships, which is not so much an appeal on the merits of the interlocutor, as against that part fixing the appellant with costs, is an appeal which ought not to be encouraged; and I shall therefore move your Lordships, that this interlocutor be affirmed, with costs.

J. GREGGSON and J. RICHARDSON, Solicitors.

No. 4. ALEXANDER EWING, Appellant.—*Shadwell—Robertson.*
HUGH GILCHRIST, Respondent.—*Keay—Jas. Campbell.*

Bankrupt—Discharge.—Judgment, affirming that of the Second Division, discharging a bankrupt under the Act 54 Geo. III. c. 137, and repelling various objections to the discharge being granted.

Feb. 28, 1826. 2D DIVISION. HUGH GILCHRIST, merchant in Glasgow, having become insolvent, his estate and effects were sequestrated on the 21st July 1820, under the statute 54 Geo. III. c. 137. Thereafter, having obtained the statutory concurrence, he presented a

petition, on the 19th January 1822, to the Court of Session, praying for his discharge. Alexander Ewing, a creditor, objected inter alia, that the sequestration had been resorted to by the bankrupt and the trustee as a mere pretext, to procure for the former a discharge of his debts; that the concurrence of many of the creditors was gained by illegal and unjustifiable means; that this concurrence was given before they had claimed or were ranked on the estate; and that the amount of his claim, which had not been computed, was sufficient to turn the balance, and exclude the application. Gilchrist, in answer, denied the truth or relevancy of these charges, and contended, that it was competent for the creditors to concur prior to being ranked; and that as one of the non-acceding creditors had now acceded, there was a majority in his favour. The Court, on the 24th May 1823, appointed the trustee to give in a new report, 'showing the proportion, both in number and value, on which 'the creditors, who have produced grounds of debt and oaths of 'verity at this date, concur in the application.' The trustee having reported, that, including the creditor who formerly did not accede, but who now did, there was a majority, the Court found 'the bankrupt entitled to be finally discharged of all his debts 'contracted prior to the application to sequestrate his estate.' And on the 8th July, having resumed consideration of the petition for discharge, and the petitioner's oath in terms of the statute, 'found him finally discharged of all his debts con-'tracted before the 21st July 1820;' and decerned and declared accordingly. Ewing petitioned, and the petition being followed with answers, the Court unanimously adhered, and found the petitioner liable in the expenses of the answers.* Ewing appealed from these judgments, on the grounds on which he had relied in the Court of Session. The respondent, in addition to his former statement and argument, maintained that the appellant had allowed the judgment of the 8th July to become final, and could not be heard against the previous one; that even if the point were open, he had relinquished his old pleas, and betaken himself to new grounds equally untenable; and that appeals against discharges are to be viewed with great unwillingness and jealousy.

Feb. 28, 1826.

The House of Lords ordered and adjudged that the appeal be dismissed, and the interlocutor complained of be affirmed, with £150 costs.

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* See 2 Shaw and Dunlop's Cases, No. 716.

Feb. 28, 1826. *Lord Gifford.*—My Lords, this case of Ewing *v.* Gilchrist arises out of the last case of Ewing *v.* Lawrie. It is, I think, a case of great importance.—Mr Gilchrist, who had carried on business as a merchant in Glasgow, having become embarrassed in his circumstances, his estates and effects were sequestrated; Mr Lawrie was appointed trustee, and Mr Gilchrist obtained his discharge from a competent number of creditors having concurred; but Mr Ewing, the present appellant, chose to apply to the Court of Session to recall that discharge, alleging various complaints. The Court of Session, however, found Mr Gilchrist entitled to be finally discharged of all his debts, and found the petitioner liable in the expense of the answers to his petition. An appeal has now been brought to your Lordships' house against these judgments.

My Lords, I apprehend such an appeal is certainly competent; but I fully concur in an observation made by the noble and learned Lord who usually presides in your Lordships' house, that an appeal of this description, although competent to your Lordships to entertain, is one that ought to be looked at with great caution by your Lordships. The bankrupt had obtained his discharge with the concurrence of a competent number —that discharge was complained of before the Court of Session, on the ground of misconduct on the part of the bankrupt—not only misconduct in his bankruptcy, but misconduct in obtaining improperly the concurrence of his creditors; and another charge was made, which I apprehend it to be incompetent for this gentleman to make, namely, as to the manner in which the sequestration had issued; because if it had improperly issued, there was a remedy in recalling that sequestration. He also complained of the manner in which the creditors had been permitted to rank on the estate, alleging that the bankrupt was not entitled to ask any creditor to sign his discharge, if that creditor had been improperly permitted to rank by the trustee; though, with respect to ranking, it was competent for any creditor to have brought that before the Court of Session.

The Judges of the Court of Session minutely investigated the case, and were of opinion that there was no ground whatever to impeach the discharge of the bankrupt, and therefore refused to recall that discharge.—Against that decision, an appeal was brought to your Lordships' house by Mr Ewing. My Lords, although I say an appeal be competent to your Lordships, yet, considering the situation of a bankrupt, who has thus obtained his discharge, and whose case has been thus investigated by the Court of Session, your Lordships would expect to have it most clearly made out, that the Court of Session have decided wrong in allowing that discharge, before you would think of setting aside such a decision of the Court of Session.

My Lords, after attending to the argument at your Lordsbips' bar, and the statement made in these papers, it does not appear to me that any case has been made out, to my satisfaction at least, and I should conceive not to your Lordships', to disturb the decision of the Court of Session 'allowing this bankrupt's discharge.' That being so, I apprehend your Lordships will feel no difficulty whatever in affirming the interlocutors complained of. If your Lordships do affirm the interlocutors upon such a

ground, then I apprehend, that viewing the respondent in the situation of a bankrupt who has properly surrendered up all his property to his creditors, who, it appears by the decision of the Court of Session, has, in the opinion of the majority of his creditors, acted honestly under the sequestration; and considering that this petition complained of the discharge of a bankrupt under such circumstances, your Lordships, if the appeal appear to be unfounded, will take care, that a bankrupt who has been thus dragged before your Lordships' house, shall be fully indemnified against the expenses which he has incurred in being brought here to support the decision of the Court of Session. My Lords, in this case, therefore, I shall submit to your Lordships, not only that these interlocutors be affirmed, but that your Lordships will take care, that that shall be accompanied with such an addition as shall indemnify the bankrupt against the costs he has incurred in supporting his discharge, which he properly obtained, and which has been sanctioned by the Court of Session, after a minute investigation of his case. In this case, therefore, I shall take the liberty of moving, that these interlocutors be affirmed, and that they shall be affirmed with such costs as shall indemnify the bankrupt in coming before your Lordships to support the decision of the Court of Session in his favour.

J. GREGGSON and J. RICHARDSON, Solicitors.

Feb. 28, 1826.

CAMPBELL, RIVERS, and COMPANY, and Others, Appellants.— No. 5.
Adam—Kaye.

DAVID BEATH, Respondent.—*Sol.-Gen. (Wetherell)—Keay.*

Recompense—Partnership—Mutual Contract.—Circumstances under which it was held (reversing the judgment of the Court of Session) that a partner in a joint adventure, the terms of which were arranged by a written contract, had no right to recompense for personal trouble connected with the adventure, for which no stipulation had been made, but which it was alleged was casus improvisus; nor to indemnity for the adventure having been put an end to as ruinous.

CAMPBELL, Rivers, and Company, Thomson, Wright, and Company, and David Beath, engaged in a joint mercantile adventure to India, in terms of the following contract:— Mar. 3, 1826. 1ST DIVISION. Lord Alloway.

'1st, That the adventure by the ship Prince Regent, in addition to the vessel purchased for £5250, and the scheme of goods furnished by Mr Beath, shall consist of £10,000—£12,000 sterling in dollars to be purchased and shipped at Gibraltar.

'2d, That of this adventure one half shall be assigned to Campbell Rivers and Company, one fourth to Thompson Wright and Company, one fourth to Mr Beath; in which pro-