Friday, November 16.

FIRST DIVISION.

[Bill Chamber, Lord Shand.

MILLAR, PETITIONER.

Bankruptcy—Refusal of Discharge to Bankrupt under the Act 23 *and* 24 *Vict. c.* 33, *sec.* 3.

The 3d section of the Act 23 and 24 Vic. cap. 33, leaves it to the discretion of the Court to grant or refuse discharge to a bankrupt, even when two years have passed since sequestration, and the petition is unopposed.

Circumstances in which the Court *refused* to grant discharge to a bankrupt where the application was made ten years after sequestration, and there was no opposition by the creditors.

The estates of a bankrupt were sequestrated on 17th January 1868. This was a petition by him to the Sheriff of Mid-Lothian in June 1877 praying for his discharge. The Sheriff-Substitute (HALLARD) ordered intimation by advertisement and by circular to each creditor, and further appointed a copy of the petition and of the trustee's report on the bankrupt's conduct to be transmitted to the Acconntant in Bankruptcy.

The trustee's report bore—" . . . The conduct of the bankrupt, however, was such that I cannot certify that he was not guilty of collusion; considerable quantities of goods having been concealed, although afterwards discovered to be in pawn and surrendered to the creditors; and recollecting all the circumstances of this particular case, I am unable to certify that the bankruptcy arose from innocent misfortune or losses in business."

The report of the Accountant in Bankruptcy was, *inter alia*, as follows:—" 1st, As to whether the bankrupt concealed any part of his estate or effects—The Accountant finds from an examination of the sederunt book, that the trustee, in his report to the second general meeting of creditors, reports, *inter alia*, as follows:—'The trustee feels it is his duty to bring under the notice of the creditors that the bankrupt pawned goods when he was hopelessly unable to meet his payments. When pressed by the trustee to say if he had carried away any of his stock and pawned the same, he denied that he had done so.' . . . .

" When called upou to report with reference to the bankrupt's present application, the trustee states in his report as follows:—[*see report above*]. It would thus appear that there is evidence in the reports of the trustee that the bankrupt fraudulently concealed certain parts of his estates. It also appears from the same evidence that they were afterwards discovered to be in pawn, and surrendered to the creditors. It will be for the Sheriff to consider what effect this evidence ought to have on the bankrupt's application for discharge.

" If this evidence had come to the knowledge of the Accountant at an earlier period of the sequestration, it would have been matter for his consideration whether he ought not to have given an information to the proper authorities; but as over nine years have elapsed, he does not do so, as he has found in other similar cases that a criminal prosecution in such circumstances could not be carried through from the loss of evidence and otherwise.

" 2d, There is no evidence before the Accountant that the bankrupt has wilfully failed to comply with any of the provisions of the Bankruptcy Statutes."

The Sheriff-Substitute, on 20th July 1877, nearly ten years after the sequestration, and where no creditors appeared to oppose, refused to grant the discharge, explaining that he would not feel justified in doing so on the Accountant in Bankruptcy's report. The bankrupt appealed to the Lord Ordinary in the Bill Chamber, (SHAND) who reported the case to the First Division of the Court, with the following note:—

" *Note.*—The appeal raises a question of considerable importance in the administration of the Bankrupt Law. If the application had been subject only to the provision of section 146 of the Bankrupt Statute of 1856, the appellant would at once have obtained his discharge, in respect the application was not opposed by any of his creditors. But by section third of the Act of 1860, 23 and 24 Victoria, cap. 33, it is provided that 'the Court may refuse the application for the discharge of any bankrupt although two years have elapsed from the date of the sequestration, and although no appearance or opposition shall be made by or on the part of any of the 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 has wilfully failed to comply with any of the provisions of the 'Bankruptcy (Scotland) Act 1856.'

" In the present case there is evidence that the bankrupt fraudulently concealed part of his estate, and the question arises whether he has thereby forfeited all right to his discharge, and if not, whether the time has now arrived at which his discharge may be granted. The case of *Cooper* v. *Fraser and Scott*, Nov. 5, 1872, 11 Macph., 38, cited by the appellant, was of a very special nature, but it may be usefully referred to.

" The points in favour of the bankrupt are that a period of about ten years has elapsed since the date of the sequestration, which was wound up on payment of a dividend of 6s. per pound, and that none of the creditors oppose the application; and it will be for consideration whether in this state of circumstances the discharge may now be granted."

Authority—*Cooper* v. *Fraser and Scott*, Nov. 5, 1872, 11 Macph. 38.

At advising—

LORD PRESIDENT—This is a petition for the discharge of a bankrupt, which was presented to the Sheriff of Mid-Lothian. The sequestration was awarded about ten years ago, and the bankrupt has of course been since then undischarged. Under the provisions of the Bankruptcy Act of 1856 the bankrupt would have been entitled to discharge after an interval of two years if no creditor opposed the motion. Accordingly, by the terms of the Act as interpreted in practice, the Court had no discretion, and were bound to grant discharge if there was no opposition. But that was altered by the third section of the

Act of 1860 (23 and 24 Vict. cap. 33)—[*reads as above*].

Now, it seems to me that that enactment leaves it in the discretion of the Court, Lord Ordinary, or Sheriff, to grant or refuse a discharge after two years have elapsed, and even if unopposed, and the grounds for refusal are suggested in the statute. It is an unpleasant discretion, but we are bound to exercise it to the best of our ability.

The Sheriff-Substitute has refused to grant a discharge, and the petition being presented to the Lord Ordinary on the Bills, he has reported the case to us. I confess I am not willing to interfere with a discretion once exercised. The Sheriff was applied to, and he, after consideration, refused the discharge. His decision is of course subject to revision; but where a judge has given his mind to a case, and exercised his discretion in such a way that no one can say he has acted wrongly, it is a very strong step to alter his decision, and I am the less disposed to do so here as this is a very bad case. The one point in favour of the bankrupt is the lapse of time since the sequestration, but I can by no means say that that is always sufficient to justify a demand for discharge. If we look at the report, we must be struck by the unfavourable view the Accountant has taken of the case. There can be no doubt the bankrupt was guilty of the very offence contemplated by the statute; in fact he is a fraudulent bankrupt, and might have been prosecuted criminally. The Accountant says that if the evidence had been before him earlier he would have suggested to the proper authorities the propriety of criminal proceedings being taken. It is a circumstance in the case that there has been no punishment, and that is a consideration against taking a favourable view of the application. The trustee not only records this, but goes on to say that he cannot hold that the bankruptcy was the result of innocent misfortune or losses in trade. That is not further explained, and all we can take is that the bankruptcy was due to something else. Considering all the circumstances, I cannot say I think the Sheriff-Substitute has decided either wrongly or too hardly, and therefore I am of opinion that the application should be refused.

Lords Deas and Mure concurred.

Lord Shand concurred, and added—At the same time, I should like to say, that of course we can only deal with the case as we know it at present, and I am not prepared to say that if this application is again brought forward after a long interval, or if additional mitigating circumstances can be shown by the bankrupt, or if the creditors were to join him in his application, I might not be disposed to treat the matter differently.

The Court adhered, and refused the prayer of the petition, intimating that it was open to the bankrupt, if so advised, to renew the application at some future date.

Counsel for Bankrupt (Appellant)—M'Kechnie. Agent—R. Finlay, S.S.C.

Friday, November 16.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

VEITCH *v.* KALNING AND OTHERS.

Ship—Master—Bottomry Bond—Cargo—Power of Shipmaster to include Cargo in a Bond of Bottomry.

Circumstances *held* sufficient to take a case out of the general rule of law that where a master of a vessel in a foreign port is unable to communicate with the owners of the vessel or the owners of cargo, and finds it necessary to raise funds by means of a bond of bottomry, and to include the cargo therein, he is entitled to do so.

Process—Multiplepoinding—Claim.

A party whose claim in one character in a multiplepoinding had been rejected, *allowed* to lodge a claim in a different character upon payment of expenses found due in the former branch of the action.

The "Anna Alida" was chartered to proceed with a cargo from Newcastle to Libau. In leaving the former port she came into collision with another vessel, for which her owners became liable in damages. Notwithstanding of this occurrence she continued on her voyage, but in consequence of bad weather she was disabled, and was forced to take refuge in the port of Leith. While she was at Leith an action of damages was raised against the master in respect of the collision, on the dependence of which she was arrested on 22d January 1876. The arrestments were not withdrawn till 10th March.

On her arrival at Leith it was found that she needed considerable repairs. The cargo was discharged. Mr Becker was employed by the master as shipbroker, and he took charge of the cargo, and also saw to the repairing of the ship. Including the damages for the collision, amounting as paid to £106 or thereby, an account was incurred to him of £580, of which by much the larger part fell on the ship and freight exclusively. But even this account did not include the whole cost of the repairs which were executed on the ship.

The charterer William Scott, and the owners of cargo Thiedemann & Company and Schulte & Schemmann, raised an action against Kalning, who was captain and part-owner of the ship, for repetition of the freight and damages, on the ground that the ship was unseaworthy when she started, and that the repairs executed on her at Leith were insufficient. The defender was assoilzied, but the same parties made application to the Sheriff of Midlothian, on the ground that their adventure had been defeated by these delays, to grant warrant for the unshipment and sale of the cargo and consignation in the hands of the Clerk of Court. This warrant was granted, and the proceeds, £888, 11s. 10d., were lodged with the Clerk of Court, the nominal raiser of this action, which was a multiplepoinding for division of that fund, and by him placed in the Royal Bank.

While the ship lay at Leith, Kalning, who with his mate was owner of the whole ship, had re-