Tuesday, January 22.

FIRST DIVISION.

[Bill Chamber, Lord Adam.

PET.—MYLNE (M'CALLUM'S TRUSTEE), *v.* M'CALLUM.

Bankruptcy — Trustee, Discharge of — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 152—*Intimation to Creditors.*

Where a trustee in bankruptcy presents a petition for discharge, there should be intimation made to such of the creditors as have expressed an unfavourable opinion of his conduct at the statutory meeting of trustees held previously to the making of the application under the 152d section of the Bankruptcy Act of 1856.

This was a question arising under an application by W. R. Mylne, C.A., trustee on the bankrupt estate of John M'Callum, distiller in Crieff. The petitioner was elected trustee on 24th July 1874. He divided the funds of the estate, and on November 7, 1877, called a meeting of creditors under the 152d section of the Bankruptcy Act of 1856. That section provides that the trustee—"Shall call a meeting of the creditors . . . to consider as to an application for his discharge, and at such meeting he shall lay before the creditors the sederunt book and accounts, with a list of unclaimed dividends, and the creditors may then declare their opinion of his conduct as trustee, and he may thereafter apply to the Lord Ordinary or the Sheriff, who, on advising the petition, with the minutes of the meeting, and hearing any creditor, may pronounce or refuse decree of exoneration and discharge." At this meeting four creditors, representing a value of £11,699, voted for a resolution declaring that the creditors were satisfied with the conduct of the trustee. Two creditors, representing a value of £3290, one of whom was M'Callum the bankrupt himself, as mandatory for his wife, moved a resolution that the trustee should not be discharged, in respect that he had been guilty of gross mismanagement. On November 15, 1877, Mr Mylne presented a petition for his discharge and exoneration to the Lord Ordinary on the Bills. The prayer craved the Lord Ordinary, "after or without hearing the parties who voted for the motion submitted to said meeting," to pronounce decree of exoneration and discharge. The Lord Ordinary ordered intimation to the Accountant in Bankruptcy.

In the report issued by the Accountant he noticed that there had been a motion made at the meeting of creditors that the trustee ought not to be discharged, but that there was a majority both in number and value against it. His report concluded thus—"(1) That a majority both in number and value of the creditors present or represented at a meeting duly called for the purpose of considering as to the trustee's application for his discharge, declared themselves satisfied with the conduct of the trustee, and with his accounts, and authorised him to apply for this discharge. (2) The Accountant has not found evidence in the sederunt book to support the charges of mismanagement and failure to account contained in the said motion. (3) The Accountant is of opinion, seeing that no creditors have appeared to oppose this application to the Court, that the petitioner is entitled to his discharge, and to delivery of his bond of caution, in terms of the prayer of the petition." The Lord Ordinary thereupon exonerated and discharged the petitioner.

The minority of creditors brought the judgment under review by reclaiming note.

It was objected to the competency that this was not properly a reclaiming note, the minority not having been parties to the process in the Outer House. To that it was answered that they should have been made parties to the petition by intimation, and the petitioner could not now take advantage of this omission.

At advising—

LORD PRESIDENT—I think there is raised here an important point of practice, and I am not sorry that it has been brought before the Court and deliberately argued. I do not think that the 152d section of the statute throws much light on the point. It provides that the trustee—[*reads ut supra*].

Now there is no necessity for the creditors to pass any resolution approbatory of the trustee's conduct as a preliminary to his presenting his petition for discharge; and indeed it may be doubted if it is necessary for them to pass any resolution at all. It is only said that they "may declare their opinion of his conduct." It seems rather that the only necessary preliminary is that he shall have laid before the meeting the sederunt book and accounts and a list of the unclaimed dividends. When the petitioner presents a petition for his discharge, the question arises—Does it require to be intimated to the creditors? There is always intimation to the Accountant in Bankruptcy. Should there not also be intimation to the creditors—be they a majority or be they a minority of the whole creditors—who have at the meeting previous to the application for discharge announced that they have objections to such an application being made? It does not appear how they are to know without intimation that such a petition has been presented. It may be presented either to the Sheriff or to the Lord Ordinary, and there is no time within which it must be presented. I think it would be a highly dangerous thing that the creditors should not have the opportunity of making their appearance and taking such objection to the trustee's discharge as they may have.

Where the minute of meeting, which is a probative instrument, bears that all the creditors expressed their concurrence, there may be no such necessity, but where the minute bears, as it does here, that there is a difference of opinion which is not altogether contemptible in amount, that constitutes a serious objection to the trustee's discharge. I think that in such a case there ought to be some intimation; and there having been none such here, notwithstanding that there is some sort of suggestion of it in the prayer of the petition, I am for recalling the Lord Ordinary's interlocutor, and remitting to him that he may hear parties.

LORDS DEAS, MURE, and SHAND concurred.

The Court recalled Lord Adam's interlocutor,

and remitted to the Lord Ordinary in the Bill Chamber to hear the reclaimers on their objections to the trustee's discharge.

Counsel for Petitioner (Respondent)—Lorimer. Agents—Davidson & Syme, W.S.

Counsel for Defenders (Reclaimers)—A. J. Young. Agents—Watt & Anderson, S.S.C.

HOUSE OF LORDS.

Thursday, December 13.

BURRELL *v.* SIMPSON & COMPANY AND OTHERS.

(Before the Lord Chancellor, Lord Penzance, Lord Blackburn, and Lord Gordon.)

(*Ante*, November 24, 1876, vol. xiv. 120, 4 R. 177.)

Ship — Insurance—Loss by Collision—Where both Ships belong to one Owner—Right of Underwriters to Recover—Merchant Shipping Act Amendment Act 1862, *sec.* 54.

Two steamships belonging to the same owner came into collision. One was sunk, the fault being solely attributable to the other. In a petition, brought under the Merchant Shipping Acts 1854 and 1862, for a limitation of the liability of the petitioner *qua* owner of the offending vessel, and for a ranking of claimants upon the fund—*held (rev.* the Court of Session) that the right of the underwriters on a total loss was merely to make such claim of damages as the insured himself could have made, and that if the person insured, as in this case, caused the damage, a claim by the underwriters was not maintainable.

William Burrell, shipowner in Glasgow, owned two steamships, the "Fitzmaurice" and "Dunluce Castle," of Glasgow, trading between Leith and London. On 14th February 1876 the "Dunluce Castle" was totally lost through collision with, and by the fault of, the, "Fitzmaurice." No lives were lost. Burrell, as owner of the offending vessel, presented a petition for limitation of liability under the Merchant Shipping Acts 1854 and 1862, and paid the sum so ascertained to be due into Court. Claims were made against the fund by various parties, including the owners of cargo, the seamen, and also by Thomson and others, the underwriters, on the ground that they had paid on the policy for the loss of the "Dunluce." The claim of the underwriters was opposed by the other claimants, but was sustained by the Court of Session, as reported *ante*, of date November 24, 1876, vol. xiv. 120, 4 R. 177.

Simpson & Company, the owners of cargo, appealed to the House of Lords, and argued—A person could not sue himself, neither could his assignee. The contract of insurance was a mere contract of indemnity, and the insurers could recover from the wrong-doers no more than the assured himself could recover. The insurers had no independent right of their own, and were wholly identified with the insured. If an owner chose to run down his own ship, there was no reason why he should recover, or why his assignees should. No instance could be produced of insurers ever having a larger interest than the assured. In the present case the insurers might have set up the negligence of the assured as an answer to his claim on them for the amount of the policy. But inasmuch as they had paid they were entitled to recover back the sum as paid in error.

Argued for the respondents—The fact of both ships having the same owner made no difference to the underwriters. Ships were deemed almost living persons, and were so treated by all the Continental nations, though England and the United States had not been in the habit of bringing this point out clearly. This was a case which required this view to be acted upon, and the Legislature had practically so treated the matter when they said a maximum sum might be fixed on to represent the liability of the ship. The insurer of a ship had an inchoate interest from the moment of the contract being made, and had a right to pursue his remedy against her whatever shape the ship took.

On delivering judgment—

Lord Chancellor—My Lords, the appellants in this case dispute a claim which was made by the respondents (other than William Burrell) in the Court of Session, and allowed by them to rank as creditors upon a sum of £3590, which was paid into Court under circumstances which I will shortly mention.

William Burrell was the owner of two ships, the "Dunluce Castle" and the "Fitzmaurice," trading between Leith and London. The "Dunluce Castle" was insured by two time policies. The policies were in the usual form, and were against (among other things) the perils of the seas. They were underwritten by the respondents, other than William Burrell, and those respondents I will afterwards call the underwriters. The "Dunluce Castle," on her passage from London to Leith on the 4th of February 1876, came into collision with the "Fitzmaurice" off Lowestoft, and in consequence of the collision the "Dunluce Castle" with her cargo was sunk and totally lost. The "Fitzmaurice" was entirely in the wrong, and it was through the negligent navigation of those in charge of her that the collision took place.

This being so, Burrell, as the owner of the vessel that was in fault, and admitting his liability, petitioned the Court of Session, under the Merchant Shipping Acts 1854 and 1862, to stop all actions instituted against him, paying into Court the sum of £3590 already mentioned, being the tonnage liability fixed by the Acts, and leaving those who had any claim or right of action against him to establish their claim or right against that sum.

In the proceedings consequent on this petition the appellants, as owners of the cargo on board the "Dunluce Castle," made and established a claim against the fund, as did also the master and seamen of the ship in respect of their effects lost in the collision, and the respondents, the underwriters, also made a claim, on the ground that they had paid £6000 to Burrell under the