it has not been said—and I question if it could be said—that the Courts of any civilised country look upon the *locus* of the adultery, combined with personal citation in that country, as a sufficient ground to entitle their Courts to entertain an action of divorce. I am clearly of opinion for myself that that is a bad ground of jurisdiction, and the only question in my mind is whether we are bound by the decisions of our predecessors in this matter. It is true that some of the decisions, and not very long ago, have gone to a view opposed to that which I hold, but, on the other hand, I think the case of *Jack* entitles us to disregard these views. The whole Court came in that case to a careful decision after full arguments, and their jurisdiction was sustained, but it is clear from the report that if the Judges who decided that case had been prepared to sustain their jurisdiction *ratione delicti commissi*, following the authority of the earlier cases, there was no need for the very elaborate discussion of the other grounds of jurisdiction that took place there. Besides, I observe that in the opinion of Lords Neaves and Mackenzie the following passage occurs:—"It is plain that the *locus delicti* has nothing to do with jurisdiction in such a case. A Scotch Court is entitled to grant divorce for adultery wherever the adultery may have been committed, and the mere fact that adultery has been committed within its territory cannot entitle it to deal with the status of parties not otherwise subject to its laws." That is a very distinct repudiation of the doctrine sustained in the earlier cases, and in the opinion so expressed I quite concur. I think the place where the adultery is committed has nothing to do with the question of jurisdiction.

The Dean of Faculty for the pursuer moved for expenses. The defender's counsel objected on the ground that he had been successful, and further that if the Court had no jurisdiction to give decree in the action neither could it give decree for expenses.

Lord President—The Court are of opinion that the pursuer must have her expenses. No difficulty arises on that point from the question of jurisdiction. Expenses are always awarded according to the way in which the litigants have proceeded, and it is necessarily inherent in the power of the Court which deals with a case, even where they finally dismiss the action on the ground that they have no jurisdiction to entertain it, to deal with the matter of expenses.

The Lords recalled the Lord Ordinary's interlocutor, sustained the defender's first plea-in-law, found that they had no jurisdiction to entertain the action, accordingly dismissed it, and decerned, finding the pursuer entitled to expenses.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—J. M. Gibson—Gillespie. Agent—A. P. Purves, W.S.

Counsel for Defender — Mackay — Wallace. Agent—Adam Shiell, S.S.C.

Friday, February 3.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

BUCHANAN *v.* WALLACE.

Bankruptcy — Discharge of Bankrupt — Concurrence — Oath — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 146.

The 146th section of the Bankruptcy (Scotland) Act 1856 provides that a bankrupt might petition for his discharge six months after the date of the sequestration, with concurrence of "a majority in number and four-fifths in value of the creditors who have produced oaths," and twelve months after sequestration with the concurrence of "a majority in number and two-thirds in value of the creditors." *Held* that in the second case, as well as in the first, the concurrence must be the concurrence of creditors who had produced oaths.

Bankruptcy — Discharge of Bankrupt — Concurrence—Mandate.

A mandate by a creditor authorised the mandatory "to attend, act, and vote for us and on our behalf at all meetings in the sequestration of the estates of John Wallace, pork butcher, 305 Argyle Street, Glasgow, with the whole powers belonging to us." *Held* that this mandate empowered the mandatory to concur in a petition for the bankrupt's discharge, although the concurrence was not given at a meeting in the sequestration.

This was an appeal in a petition for discharge by John Wallace, pork butcher, Glasgow, whose estates were sequestrated by the Sheriff of Lanarkshire on 10th August 1880. Buchanan, a creditor, objected to the granting of the discharge on a variety of grounds, two of which only were insisted in on appeal.

The first objection related to the concurrence of William C. Johnstone, as mandatory for the Heritable Syndicate (Limited), whose debt was £4505, 11s. 9d., and of the same person as mandatory for the Clydesdale Land Company (Limited), their debt being £779, 1s. 1d. The mandates empowered the mandatory "to attend, act, and vote for us and on our behalf at all meetings in the sequestration of the estates of John Wallace, pork butcher, 305 Argyle Street, Glasgow, with the whole powers belonging to us." The objection was that the mandate did not empower the mandatory to act except at meetings in the sequestration, and consequently did not empower him to concur in a petition for discharge, unless where the concurrence was given at such a meeting, which had not been done in the present case, and was not the practice.

The third objection was thus stated—"The bankrupt has not made a full and sufficient disclosure of his estate, and has not accounted for his means, and has kept no books showing his transactions. His deposition in his examination and his state of affairs show liabilities exceeding £20,000, and that moneys to the extent of nearly £20,000 passed through his hands during the four years prior to his sequestration; and there

is no cash-book, ledger, or other book showing the disposal of said sums, or disclosing the bankrupt's position at any time during the said period."

In reply to this objection the bankrupt stated—"The bankrupt has made full and sufficient disclosure of his affairs; and the books kept by him have always contained a true and complete record of his business transactions. The money employed or expended in the transactions in heritable property is fully disclosed in the conveyances of the different properties sold or acquired by the bankrupt, states for settlement of the price of said properties, the factor's statements of rents and disbursements in connection therewith, and in the bank-book kept by bankrupt. The losses of bankrupt are satisfactorily accounted for by the great shrinkage in the value of property during the last three or four years."

The Sheriff-Substitute (ERSKINE MURRAY) pronounced this interlocutor:—"Sustains the objection to the effect that the bankrupt did not keep books showing his property transactions, or the manner in which the funds received by him were applied in the purchase or maintenance of these properties; and also to the effect that for some time previous to his sequestration he must have known his insolvent position; but otherwise, and under reference to the annexed note, repels the objections that have been stated by the respective objectors: Finds that the result of the above finding is, that while petitioner may get his discharge, he can only do so subject to the condition that it shall not be extractable by or available for him for the space of three months: Therefore finds the bankrupt entitled to his discharge, but that under the condition that it shall be available to him only at the expiration of three months from the date hereof; but before granting same appoints him to appear and make a declaration in terms of the statute: Finds no expenses due to or by either party."

In his note, besides dealing with the objections which were eventually departed from, the Sheriff-Substitute observed—"The first objection is founded on a misconception, as shown by the dates. . . . . The mandate granted to W. C. Johnstone entitles him to attend, vote, and act for them 'at all meetings' in the sequestration. If the words 'at all meetings' had been left out there could have been no doubt in the matter, for the interpretation clause of the Bankruptcy Act says that 'vote' shall include a consent to a discharge. The words 'at all meetings,' however, might fairly be argued to have a limiting power; but in the case of *Morison* v. *Balfour*, 16th February 1849, 11 D. 653, Lord Fullerton held that a mandate in exactly these terms was a mandate to vote and act in the sequestration, and 'fully enabled him to concur in any steps in that process recognised by law.' This is an express opinion of an eminent judge on the point in question, to which the Sheriff-Substitute must therefore defer. Such a form, however, ought to be avoided, as *ex facie* ambiguous, and calculated to raise questions. . . . . The seventh [original] objection is that which the Sheriff-Substitute has partially sustained, and which has had the effect of making the bankrupt's discharge not available to him for three months. It is not really so serious as it appears, as the conveyances and factor's statements afforded the means of ascertaining the facts after some trouble. Still the satisfactory and proper mode would have been for the bankrupt to have kept a regular book for his properties."

The objecting creditor reclaimed to the First Division of the Court of Session.

Besides arguing upon the objections just stated, the appellant urged another objection which was not stated to the Sheriff-Substitute, and which depended on the construction of the 146th section of the Bankruptcy (Scotland) Act 1856, which provided that "the bankrupt may at any time after the meeting held after his examination petition the Lord Ordinary or the Sheriff to be finally discharged of all debts contracted by him before the date of the sequestration, provided that every creditor who has produced his oath as aforesaid shall concur in the petition; and the bankrupt may also present such petition on the expiration of six months from the date of the deliverance actually awarding sequestration, provided a majority in number and four-fifths in value of the creditors who have produced oaths concur in the petition; and the bankrupt may also present such petition on the expiration of twelve months from the date of the deliverance actually awarding sequestration, provided a majority in number and two-thirds in value of the creditors concur in the petition; and the bankrupt may also present such petition on the expiration of eighteen months from the date of the deliverance actually awarding sequestration, provided a majority in number and value concur in the petition." This petition was presented on the expiration of twelve months from the date of the deliverance awarding sequestration. The state of affairs showed the bankrupt's liabilities to be £19,806, 13s. 6d., two-thirds of which was £13,204, 9s., but the concurrences to the petition amounted in value only to £12,482, 8s. 5d. The sum of £19,806, 13s. 6d., however, included the debt of a creditor named Romanes, amounting to £6384, 11s. 3d. Romanes had not produced oath for this debt at the date of the petition for discharge, and if in consequence his debt were deducted from the sum of the bankrupt's liabilities the concurrences would be more than either two-thirds or four-fifths of the whole. It was admitted that if the case fell under the clause of the statute with reference to presenting a petition for discharge on the expiration of six months from the date of the deliverance awarding sequestration, the four-fifths in value was four-fifths of the creditors who had produced oaths, that being what the statute in terms required. But in the event of the first of the foregoing objections being sustained so as to bring the case within the rule of twelve months and two-thirds, by reducing the value of the concurrences, it was argued for the objecting creditor that on the construction of the statute the two-thirds must be two-thirds of the creditors generally, and not merely of those who had produced oaths, the effect of sustaining the objection being to include Romanes' debt, and thus make the concurrences less than two-thirds of the whole.

Authorities—*Dixon's Trustees* v. *Campbell*, March 30, 1867, 5 Macph. 767; *Scott* v. *Couper*, March 16, 1872, 10 Macph. 626; *Ewing* v. *Watson*, Jan. 11, 1860, 22 D. 354; *Reid* v.

Buchanan, Feb. 15, 1838, 16 S. 549; *Cant* v. *Bayne*, Feb. 11, 1868, 6 Macph. 368; *Millar*, Nov. 16, 1877, 6 R. 144; *Smith* v. *Mackenzie*, May 16, 1860, 22 D. 1078.

At advising—

Lord President—The first objection which we have to dispose of here is that the bankrupt has not obtained the requisite concurrence of creditors to his discharge. The objector says that the liabilities appearing on the bankrupt's state of affairs amount to £19,806, and that the concurrences which have been obtained are only £12,482, which is neither two-thirds nor four-fifths of £19,806. But then that sum of £19,806 is made up by taking into account a person of the name of Romanes, whose debt is £6384, and if his debt be deducted the total amount of creditors is only £13,422, and the bankrupt has got the concurrence of £12,482, which is more than either two-thirds or four-fifths, if none of the other objections are good. Romanes did not lodge his claim until after the petition for discharge had been presented to the Sheriff, and the question comes to be, whether under the 146th section of the Act he is one of the creditors whose vote is to be counted in ascertaining whether the requisite concurrence to the petition for discharge has been obtained? Under the 146th section the bankrupt may present his petition at the end of six months, provided "a majority in number and four-fifths in value of the creditors who have produced oaths concur in the petition." Now, if none of the other objections as to the concurrence of creditors is to be given effect to, the bankrupt has obtained the requisite four-fifths, for the statute distinctly states that it is the concurrence of four-fifths of the creditors who have produced oaths at the date of the concurrence which is required. But supposing that some of the other objections are sustained, and that the amount of concurrence is not more than two-thirds of the whole, then the objection is, that under the third head of the 146th section the two-thirds must be two-thirds of the entire body of creditors, whether they have produced oaths or not. I cannot assent to that view. I am satisfied that the same class of creditors is referred to in each sub-section, although the third sub-section is somewhat more elliptical than the two first, in going over, as it does, the same grounds.

Another objection which has been taken to this discharge relates to two mandates, granted, one by the Heritable Syndicate (Limited), and the other by the Clydesdale Land Company, in favour of two gentlemen who have subscribed the concurrence on behalf of these companies. The terms of these mandates are substantially the same. They empower the mandatory "to attend, act, and vote for us, and on our behalf, at all meetings in the sequestration of the estates of John Wallace, pork butcher, 305 Argyle St., Glasgow, with the whole powers belonging to us." Now, I do not think that there is any doubt that this form of mandate is very common, and though I quite agree that the form suggested in Mr Murdoch's very useful work is much better, yet I cannot come to the conclusion that the party granting a mandate in the terms I have read intended that his mandatory should not vote or act in any way in the sequestration except at meetings duly authorised. I have no doubt that the mandate was intended to include all ordinary matters relating to the sequestration, and accordingly it bears to be granted "with the whole powers belonging to us." It is not unimportant to observe that this form of mandate is not only common in the present day, but has been used for a very considerable period, for we find it in a case in 1849—the case of *Morison* v. *Balfour*, referred to by the Sheriff-Substitute. Its terms were criticised by the Court at that time, and one of the Judges expressed the decided opinion that such a mandate was not to be held as confined to proceedings at meetings duly authorised. Though that opinion was merely *obiter*, there can be no doubt that it gave credit and authority to that form of mandate, which may perhaps account for its use to the present day. But apart from practice, though the form is not one such as one sitting down to frame a style would choose, I have no doubt that it was intended that with such a mandate the mandatory should come in place of the mandant in all necessary acts in the sequestration. The case of *Ewing* v. *Watson* was very different, because there the mandatory was proceeding to bring an appeal. But a mandate to act in a sequestration does not confer authority to incur expense, and least of all to an expense by embarking in a litigation. Therefore I am for repelling this objection.

The only other objection is that which relates to what may be called the merits of the case. The Sheriff-Substitute, while finding that the petitioner is entitled to his discharge, has provided that it is not to be extractable for three months; and he does so because of what he thinks has been the misconduct of the bankrupt in some respects. That the bankrupt is not free from blame there can be no doubt. His liabilities are over £19,000, and his assets are £200. He keeps no books, and being a pork butcher, with a trade and business to which he had much better have devoted himself, he thinks fit to embark in transactions on house property and in the buying and selling of shares in the purest spirit of speculation. Having no money, he never either receives the shares or pays their price, but he carries on by tiding over from one settling-day to another and paying the difference. All this is extremely blameworthy, but I am not disposed to interfere with the discretion of the Sheriff-Substitute. He is satisfied that though the bankrupt has kept no books the state of his affairs has been fairly disclosed. He has fairly attached what seems a mild penalty in the circumstances, but I hesitate to add to it, having great respect for the discretion of the Sheriff-Substitute in such a matter.

Lord Deas — As regards all the objections which directly or indirectly affect the amount of concurrence, I am of the same opinion. I shall therefore advert only to the objection regarding the form of the mandate, because I think that that is a very important question. The question I take to be this, What is the fair construction of a mandate like the present? I agree that the form given in Mr Murdoch's book is a better form—it is, I think, a decidedly better form. But every mandate must be construed in order to see what is its real meaning, and what powers the

mandant intended to give; and I cannot read the mandate before us without coming to the conclusion that the words "at all meetings" were not intended to be taken in any limited sense. I think that the mandate is to be read in the same way as if these words were not there. I cannot think that the granter ever contemplated that they should have a restrictive application.

Then, as regards the objection that this bankrupt though in trade and contracting large debts has kept no books, I cannot help looking upon this as a very serious objection, and if your Lordships had seen your way to inflict a severer penalty than the Sheriff-Substitute has imposed, I should not have objected. But this matter is left very much to the discretion of the Sheriff-Substitute, and it is a strong measure to interfere with his discretion. He has certainly exercised his discretion in this case very mildly, and if the penalty which he imposed had been heavier I should have concurred more easily than I now do.

Lord Mure—I am of the same opinion. As to the construction of the mandate, I think it ought to be extended so as to include acts which do not take place at formal meetings. Lord Fullerton's decided opinion in the case of *Morison* has created a precedent which has been acted on, and which we ought not now to alter.

Lord Shand—I agree, and shall only add a few observations on two points, namely, the objection to the mandate and the merits of the question.

In dealing with the question of the meaning of the mandate, it is to be kept in view that the statute reads "vote" as including the giving of consent to a discharge. If one reads the mandate in that sense, and bearing in mind that such a consent is never in practice given at a formal meeting, I think it is a circumstance which aids one in coming to a conclusion on this matter; and adding that to the other circumstances mentioned by your Lordships, I have come to the same result as your Lordships.

Then, as to the conduct of the bankrupt, there are two points in favour of the judgment of the Sheriff-Substitute. In the first place, the report by the trustee on the bankrupt's conduct is favourable; and secondly, this sequestration was granted in August 1880, so that under the Sheriff-Substitute's interlocutor nineteen months will have elapsed before the bankrupt obtains his discharge, during which period he is unable to trade or obtain credit of any sort. Keeping that in view, I am not disposed to disturb the Sheriff-Substitute's judgment. As I understand the case, it is not one in which the bankrupt has kept no books in the strict sense. He has kept books relating to his proper business, but his property and share transactions outside his business he has carried on without books. There is a growing feeling among mercantile men that the Court should enforce the keeping of books with greater strictness, and it was that feeling which led to the recent statute being passed. I confess that if the Sheriff-Substitute had imposed a severer penalty I should have been inclined to agree with him, but, on the whole, I do not think we should interfere.

The Court adhered.

Counsel for Appellant—Macfarlane. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondent—Murray. Agents—J. & A. Hastie, S.S.C.

Friday, February 3.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

PORTPATRICK RAILWAY COMPANY *v.* GIRVAN AND PORTPATRICK JUNCTION RAILWAY COMPANY AND ANOTHER.

Railway — Agreement embodied in Statute — Running Power — Payment of Rent for Running Power—Arrears—Interdict—Defence of Public Convenience.

An Act of Parliament authorised a railway company, "and all persons or companies lawfully working or using their railway or any part thereof," to run over, work, and use with their engines, carriages, &c., and with their clerks, officers, &c., certain portions of the line of another company, in the same way and to the like extent and effect as if these portions of line had been held by the two companies jointly for their joint and separate use and benefit on equal terms in every respect. As the counterpart of this right the company enjoying it came under an obligation, embodied in the Act of Parliament, to make certain half-yearly payments of rent. The company exercised the running powers for several years, but did not make any payment of rent, having become hopelessly insolvent. In an action by the company whose line was subject to the running powers, against the other company—*held* that the pursuers were entitled to have the defenders, or anyone claiming right under them, interdicted from exercising the running powers until payment of the arrears of rent; but opinions *reserved* as to the rights of parties who might claim to exercise the powers otherwise than as representing the defenders.

The Portpatrick Railway Company was a company whose line extended from Castle Douglas to Stranraer and Portpatrick, a distance of 61 miles. In 1872 the Girvan and Portpatrick Junction Railway Company, which was a company incorporated in 1865 for the purpose of constructing a line from Girvan in Ayrshire to East Challoch in Wigtownshire, obtained an Act of Parliament by which they were authorised to run over and use certain portions of the Portpatrick Company's line. The section conferring this power was in these terms—"The company" (that is, the Girvan Company), "and all companies and persons lawfully working or using their railway, or any part thereof, may from time to time run over, work, and use with their engines and carriages, waggons and trucks, and with their clerks, officers, agents, carting agents, and other servants, and for the purposes of their traffic of every description, including the reception, handling, booking,