Tuesday, December 9.

FIRST DIVISION.

[Sheriff of Argyllshire.

ALISON *v.* ROBERTSON'S TRUSTEES.

Bankruptcy — Sequestration — Discharge — Appeal — Competency — Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 170.

The 170th section of the Bankruptcy Act provides that "It shall be competent to bring under the review of the Inner House, or before the Lord Ordinary in time of vacation, any deliverance of the sheriff after the sequestration has been awarded (except when the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the sheriff-clerk within eight days from the date of such deliverance, failing which the same shall be final."

In a petition by a bankrupt for discharge, the Sheriff, by interlocutor of 1st October 1888, found the bankrupt entitled to his discharge, and appointed him to make a declaration in terms of the statute, and by interlocutor of 10th October found the declaration made by the bankrupt satisfactory, and discharged him. Against this last interlocutor an objecting creditor appealed. *Held* that under this last interlocutor it was not competent to review the previous interlocutor.

Bankruptcy — Sequestration — Discharge — Bankruptcy and Cessio Act 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 6.

Section 6 of the Bankruptcy and Cessio Act 1881 provides, by sub-section (1), that a bankrupt shall not be entitled to a discharge unless it is proved to the Lord Ordinary or sheriff either that his estate has paid 5s. in the pound, or that the failure to pay such dividend has arisen from circumstances for which the bankrupt cannot justly be held responsible; and by sub-section (2) that in order to determine these points the Lord Ordinary or sheriff "may require the bankrupt to submit such evidence as he may think necessary," in addition to the declarations or oaths made by the bankrupt, and the report made by the trustee, under the Bankruptcy Act 1856, and may "allow any objecting creditor such proof as he may think right."

In an appeal by an objecting creditor against the interlocutor of a Sheriff discharging a bankrupt—*held* (1) that the Sheriff might require the bankrupt to submit additional evidence under sub-section (2) at any time before actually discharging him; (2) that it was a matter for the discretion of the Sheriff whether he should require such additional evidence or not; and (3) that the fact that he had discharged the bankrupt without requiring such evidence afforded no ground for supposing that he had not taken the provisions of the section above quoted into consideration.

George Jamieson Alison junior, a partner of the firm of J. & A. Gardner & Company, quarry-masters near Ballachulish, which had been sequestrated in May 1889, presented a petition to the Sheriff of Argyllshire on 16th July 1890 craving his discharge.

The petitioner stated that he had obtained the concurrence of a majority in number and two-thirds in value of the creditors in the sequestration, conform to minute of concurrence and certificate by the trustee produced; that no dividend had been paid in the sequestration, but that the failure to pay such dividend had arisen from circumstances for which he could not justly be held responsible; and that the trustee had, in terms of the Bankruptcy Act 1856, prepared a report, which was produced.

Objections to the discharge of the petitioner were lodged by Mrs Robertson and others, the trustees of the deceased Robert James Robertson, W.S., who were bondholders on the estate of Lagnaha, in which the quarries let to the bankrupt firm of J. & A. Gardner & Company were situated, and creditors of that firm and the individual partners thereof, in virtue of decrees obtained in an action of maills and duties raised by them on 21st April 1888.

The objectors averred, *inter alia*—"At and prior to the raising of said action of maills and duties the petitioner was insolvent, and during his insolvency entered into (1) an agreement with his said copartners, who were also insolvent, whereby the assets of the said firm, including their lease of Lagnaha Quarries, Argyllshire, were transferred to him; and (2) agreement whereby he sold the same to the said Duncan Macgregor Gardner, all for the purpose of carrying through a composition arrangement under which 7s. 6d. per pound was to be paid to the said firm's creditors, and conferring other material benefits, present and prospective, upon themselves, or the said John, Alexander, and Duncan Macgregor Gardner. The same was done outwith the knowledge of the objectors, from whom the said purposes were concealed. The said agreements are dated 7th, 9th, and 11th April 1888, and the petitioner is called upon to produce the same. Immediately thereafter the petitioner, along with the said John and Alexander Gardner assigned the said lease to the said Duncan Macgregor Gardner. In the character which they nominally held of two of the heritable proprietors of the said leasehold subjects, the said John and Alexander Gardner accepted intimation of said assignation, and the said Duncan Macgregor Gardner also did so as factor and commissioner for James Young Gardner, he having nominally the character of the other heritable proprietor."

The objectors received no notice of this disposal of the firm's assets till 24th April, and in consequence of the culpable, undue, or collusive conduct of the petitioner and his partners, the objectors had been de-

prived of the tenants' part of the lease, which was a valuable asset, and as such ought to have been made available to the objectors as creditors foresaid. The objectors had received no composition on their claim against the petitioner, though the other creditors had received a composition from Duncan Macgregor Gardner. They had, however, obtained payment from Duncan Macgregor Gardner of the rents and lordships due to them under the decree in the action of maills and duties, amounting to £268, 5s. They were still creditors of the petitioner and his firm for the amount of the expenses of that action, being £33, 8s. 1d. The petitioner had not averred any innocent misfortune he had suffered to account for his estate having paid no dividend.

The petitioner in answer admitted that an agreement had been entered into under which the assets of the firm had been handed over to Duncan Macgregor Gardner for carrying through the composition arrangement mentioned, and explained that the objectors had not been informed of the agreement or of the subsequent assignation, because at their date they had not entered into possession of the estate of Lagnaha, and so had not put themselves in the position of landlords and creditors of the petitioner's firm.

By the 6th section of the Bankruptcy and Cessio Act 1881 it is provided, *inter alia*, as follows—"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; or (*b*) that the 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. (2) In order to determine whether either of the foresaid conditions has been fulfilled, the Lord Ordinary or the sheriff, as the case may be, shall have power to require the bankrupt to submit such evidence as he may think necessary in addition to the declarations or oaths, as the case may be, made by the bankrupt under sections one hundred and forty and one hundred and forty-seven of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), and the report made by the trustee under section one hundred and forty-six of the said Act, and to allow any objecting creditor or creditors such proof as he may think right."

On 1st October 1890 the Sheriff-Substitute (MACLACHLAN) repelled the objections, and found the bankrupt petitioner entitled to his discharge, but before granting the same appointed him to appear and make a declaration in terms of the statute.

On 10th October the Sheriff-Substitute, having advised the declaration made by the petitioner, found the same satisfactory, and discharged the petitioner.

By section 170 of the Bankruptcy (Scotland Act 1856 it is enacted—"It shall be competent to bring under the review of the Inner House of the Court of Session, or before the Lord Ordinary in time of vacation, any deliverance of the sheriff after the sequestration has been awarded (except where the same is declared not to be subject of review), provided a note of appeal be lodged with and marked by the sheriff-clerk within eight days from the date of such deliverance, failing which, the same shall be final, and such note, together with the process, shall forthwith be transmitted by the sheriff-clerk to the clerk of the Bill Chamber, and the Lord Ordinary's decision shall, when not expressly made final by this Act, be subject to review of the Inner House, and it shall be competent to the Inner House or the Lord Ordinary to remit to the sheriff with instructions."

The objectors appealed to the Court of Session on 15th October against the Sheriff's interlocutor of 10th October, and the petitioner objected to the competency of raising under this appeal the question whether he was entitled to his discharge, which had been decided by the Sheriff's interlocutor of 1st October.

Argued for the objectors—*On the competency*—The appeal only brought the last interlocutor of the Sheriff under review, and the question whether the bankrupt was entitled to his discharge, which had been settled by the previous interlocutor, could not be raised. That previous interlocutor was a substantive judgment, and not a mere interlocutory order, and if the objectors wished to raise the question there disposed of, they should have appealed against said interlocutor to the Court of Session—*Pilling* v. *Drake*, June 30, 1857, 19 D. 938; *Scottish Provincial Assurance Company* v. *Christie*, January 27, 1859, 21 D. 333; Goudy on Bankruptcy, 375. It required an express enactment in the Court of Session Act 1868 to give appeals the effect of bringing up previous interlocutors not appealed against, and that enactment only applied to appeals which came in place of advocations—31 and 32 Vict. c. 100, secs. 64–69. This appeal was under the 170th section of the Bankruptcy Act 1856, and it had never been competent to advocate judgments of the Sheriff pronounced under the Bankruptcy Act. *On the merits*—It was too late to consider whether the Sheriff had fully considered the provisions of sec. 6 of the Bankruptcy and Cessio Act 1881. The questions raised for the Sheriff's consideration under that section had to be disposed of before he found the bankrupt entitled to his discharge—*Boyle*, June 20, 1885, 12 R. 1147; *Clarke* v. *Crockatt & Company*, December 8, 1883, 11 R. 246. There was also nothing to show that the Sheriff had not considered the questions arising

under the provisions of sec. 6 of the Act of 1881.

Argued for the objectors—*On the competency*—It was quite reasonable that the appeal against the last interlocutor should bring up the interlocutor of 1st October. Both interlocutors were connected with the matter of the bankrupt's discharge, and the one led up to the other. Though it was true that the provisions of the Court of Session Act did not apply to such an appeal as the present, the considerations which prompted these provisions were applicable to the present case. *On the merits*—The Sheriff had not observed the provisions of sec. 6 of the Act of 1881. He had not found that the petitioner's failure to pay dividend had arisen from circumstances for which he could not justly be held responsible. The Sheriff could require additional evidence to satisfy himself on this point at any time before he actually discharged the bankrupt. It appeared on the face of the objections and answers that the bankrupt's failure to pay a dividend in his sequestration had arisen from the collusive arrangement by which the assets of his firm were conveyed away to a third party before sequestration. The petitioner was therefore not entitled to his discharge.

At advising—

LORD PRESIDENT—As regards the question of the competency of this appeal, I am of opinion that the appeal brings up quite regularly for review by this Court the interlocutor of 10th October, as it was lodged within the prescribed time. I think it is just as clear that the appeal does not bring up for review the interlocutor of 1st October. Any attempt to bring the appeal within section 69 of the Court of Session Act 1868 is necessarily hopeless, because the provisions of that section are confined to appeals from Sheriff Court judgments which come in place of advocations, and the section has no application to appeals in bankruptcy proceedings. In the present case the appeal is made lawful by section 170 of the Bankruptcy Act of 1856, and upon that section it must stand or fall.

Now, we have been told, with reference to the interlocutor of 10th October, that the Sheriff-Substitute pronounced that interlocutor without considering the application of the provisions contained in the 6th section of the Act of 1881 to the question before him. I see no evidence of that in the proceedings. There is no reason to suppose that the Sheriff had not in view at any stage of the case the statutory provisions applicable to the case before him. It seems to me that there is just as much reason to suppose that the Sheriff disregarded the provisions of the Act of 1856 as the provisions of the Act of 1881. We are bound to assume that the Sheriff took the provisions of both these Acts into consideration in deciding on the course which he adopted. The provision of the Act of 1881 is to the effect "That notwithstanding anything in the Bankruptcy Acts, a bankrupt is not entitled to be discharged unless it is proved to the Lord Ordinary or sheriff, either that a dividend of not less than 5s. 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, or that the failure to pay such dividend has, in the opinion of the Lord Ordinary or the sheriff, arisen from circumstances for which the bankrupt cannot be held responsible."

The questions therefore which the Sheriff had to consider under that section were, first, the mere question of fact whether a dividend of 5s. in the pound had been paid by the bankrupt, and, in the second place, whether, if the bankrupt had not paid such a dividend, his omission to do so could be satisfactorily accounted for, and for the purpose of enabling the Sheriff to determine this question the statute goes on to give him certain powers as follows—"In order to determine whether either of the foresaid conditions has been fulfilled, the Lord Ordinary or the sheriff, as the case may be, shall have power to require the bankrupt to submit such evidence as he may think necessary, in addition to the declarations or oaths, as the case may be, made by the bankrupt under sections 140 and 147 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), and the report made by the trustee under section 146 of the said Act, and to allow any objecting creditor or creditors such proof as he may think right."

Now, the whole nature of this inquiry is in the discretion of the Sheriff. If he has before him without inquiry evidence to satisfy his mind that the non-payment of dividend has not arisen from circumstances for which the bankrupt can justly be held responsible, he is entitled to discharge the bankrupt. He is not bound on the application of a creditor to allow a proof at large, first to the creditor and then to the bankrupt. The matter is entirely within his own discretion.

In the present case I am not going to give any opinion as to whether the interlocutor of the Sheriff is right or wrong on the merits. All I say is, that the matter is left to the Sheriff by the statute, and it appears to me probable that he had very good grounds to satisfy him that the failure of the bankrupt to pay 5s. in the pound under the sequestration did not arise from circumstances for which the bankrupt could justly be held responsible, because it is quite admitted that when the bankrupt first became insolvent he executed a private trust-deed for behoof of his creditors, under which 7s. 6d. in the pound was paid to all the creditors. It is true that the objector was not at that time a creditor of the bankrupt. He held a security over the entire estate, of which the lease of the Ballachulish quarries formed part, but he had not at that time obtained the decree in an action of maills and duties which was necessary to make him a creditor of the bankrupt, and therefore a dividend of 7s. 6d. was not set apart for him, but under the action of maills and duties he afterwards received payment in full of his claim though not of the costs of the action. He was therefore

in at least as favourable a position as any other creditor, and it would seem to be rather hard upon the bankrupt to say that such circumstances as I have detailed make him responsible for a dividend of 5s. not having been paid under the sequestration, and that though a dividend of 7s. 6d. was paid under the private trust the provisions of section 6 of the Act of 1881 were not complied with because a dividend of 5s. was not paid under the sequestration. The Sheriff held that he had quite sufficient information before him without further inquiry to enable him to dispose of the objection to the bankrupt's discharge. He was quite entitled, I think, to hold that opinion, and it is not necessary to go much into the argument as to the time at which the Sheriff was bound to consider the matter referred to him by the Act of 1881. I entirely concur, however, with the view expressed by Lord Kinnear during the discussion, that at any time the Sheriff is entitled to say, "Here is something which is uncertain, and there must be inquiry to clear it up." And if the Sheriff is not satisfied as a result of that inquiry that the failure to pay 5s. has not been due to circumstances for which the bankrupt can justly be held responsible, I think he is entitled at any time before discharge is actually granted to inquire and satisfy his mind as to how matters stand.

I am therefore in favour of holding that this appeal is incompetent as regards the interlocutor of 1st October, and that as regards the interlocutor of 10th October it must be refused on the merits.

LORD ADAM—I agree that this appeal is competent so far as regards the interlocutor of 10th October, but that the effect of the appeal is not to submit to review by this Court the interlocutor of 1st October.

I think the interlocutor of 1st October is a substantive judgment, which in terms of section 170 of the Bankruptcy Act of 1856 requires to be appealed against within eight days. If that is not done—and it has not been done in this case—the interlocutor becomes final, and it is incompetent for us to inquire whether the judgment of the Sheriff is well-founded or ill-founded. Though that is the case, I think, nevertheless, that it is competent for us to inquire into the matters disposed of by the interlocutor of 10th October, which discharges the bankrupt.

All that is said against this last interlocutor on the merits is that the Sheriff in finding the bankrupt entitled to his discharge did not have in view the provision of section 6 of the Act of 1881, which requires that before he gets his discharge a bankrupt must pay a dividend of 5s., unless the Sheriff is satisfied that the bankrupt's failure to pay such dividend has arisen from circumstances for which he cannot justly be held responsible. The only ground for suggesting that the Sheriff has not taken that provision into consideration is that there is no finding to that effect in his interlocutor of 10th October, but I can see no proof that the Sheriff did not take the provision of the statute into consideration or that he has not done as he ought. It was perfectly competent for the Sheriff, notwithstanding the interlocutor of 1st October, before actually discharging the bankrupt, to consider any matter bearing on the question of that discharge, whether such matter had occurred since the interlocutor of 1st October or not, and accordingly the Sheriff was, in my view, quite entitled, if he thought it necessary, before pronouncing the interlocutor of 10th October, to have called for evidence in addition to the declaration or oath of the bankrupt and the report by the trustee, that the bankrupt's failure to pay a dividend of 5s. under the sequestration was due to circumstances for which he could not justly be held responsible. There was no difficulty in the Sheriff requiring such additional evidence, and it is pretty evident that he did not do so, because he had dealt with that question raised by section 6 of the Act of 1881 before pronouncing the interlocutor of 1st October. It was quite within the Sheriff's discretion to require additional evidence or not, and we cannot interfere with his decision on that matter.

LORD M'LAREN and LORD KINNEAR concurred.

The Court refused the appeal as incompetent so far as it seeks to submit to review the interlocutor of 1st October; further, refused the appeal as an appeal against the interlocutor of 10th October.

Counsel for the Petitioner—Ure. Agent—David Turnbull, W.S.

Counsel for the Objectors—MacWatt. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Sheriff Court of Forfarshire.

WHITE *v.* BRIGGS.

Copyright — Trade Circular — Advertisement—Drawing—Infringement.

The patentee of a building cement advertised it by a pamphlet, which was registered at Stationers' Hall, and in which he described the buildings for which it might be used, gave instructions for its use, and illustrated its application to brick walls by a simple sketch. Another manufacturer issued a leaflet advertisement claiming in similar terms that his cement was applicable to similar purposes and buildings, and illustrating its application to brick walls by a similar sketch. The patentee raised an action for interdict against him on the ground of piracy, but did not allege infringement of the patent. *Held* that as the complainer's pamphlet was merely an advertising medium, without any literary or artistic merit,