report. W. GUTHRIE.' The defenders' account of expenses in said action has not yet been taxed. The said action of 4th August 1890 was in dependence when the present summons was signeted, executed, and called."

The defenders pleaded—"*Lis alibi pendens.*"

The Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Sustains the first plea-in-law for the defenders, and dismisses the action and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—I am of opinion that the plea of *lis alibi pendens* must be sustained. It is founded on an action to the same effect as the present, raised in the Sheriff Court at Glasgow on 4th August 1890. On 21st October that action was dismissed as irrelevant, with expenses. The defenders have not laid their account before the Auditor.

"This action was raised on 29th January 1891, and the record was closed on 24th February. Thereafter the pursuer moved in the Sheriff Court action that the defenders should be ordained to proceed with the taxation of their account, and the defenders resisted that motion. The pursuer made the motion in order to obviate the plea of *lis alibi.* The defenders do not conceal that they resisted it in order to be able to maintain their plea. The Sheriff-Substitute on 10th March refused the motion, which in his note he describes as unprecedented.

"The pursuer maintained that the plea of *lis alibi pendens* only applied when the earlier action was in dependence when the plea came up for decision, and he referred to *dicta* by the Lord President in the case *M'Aulay* v. *Cowe*, December 13, 1873, 1 R. 307, which he represented to be to that effect. But I think it was decided in the cases of *Aitken* v. *Dick*, July 9, 1863, 1 Macph. 1038, and *Kennedy* v. *M'Dougal*, June 12, 1876, 3 R. 813, that the plea applies if the former action was pending when the second action was raised. I think I am bound to follow these decisions and to hold that the *dicta* of the Lord President in *M'Aulay* v. *Cowe* were not intended to conflict with them.

"The action in the Sheriff Court was in dependence when this action was brought, and at that time the pursuer had taken no steps to have it brought to a conclusion. It is in dependence still, but the pursuer has done his best to have it brought to an end, and I doubt greatly whether a defender is entitled to hold up his account so as to keep the action in which he has been awarded expenses alive for the purpose of disabling the pursuer from bringing a second action. I am disposed to think that I would be entitled to defeat such an attempt by repelling the plea. But if the plea applies whenever the second action is raised, as I think it does, no such question arises, because although the defenders had certainly delayed to submit their account to the Auditor, the pursuer had taken no step to endeavour to compel them to do so, and he has therefore no equitable ground to urge against the plea receiving its ordinary effect."

Counsel for the Pursuer—Orr. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders—Deas. Agents—Hope, Mann, & Kirk, W.S.

Saturday, October 17.

FIRST DIVISION.

[Sheriff Court at Hamilton.

STEWART *v.* GORDON (DUNSMORE'S TRUSTEE).

Bankruptcy—Claim by Undischarged Bankrupt—Appeal—Caution.

Held that an undischarged bankrupt, who had lodged a claim in a sequestration which had been rejected, must find caution as a condition of being allowed to proceed with an appeal against the trustee's decision.

On December 16th 1884, James Stewart, accountant, Motherwell, lodged a claim in the sequestration of Peter Dunsmore, merchant in Blantyre, for the sum of £301, 5s. 2d., being the amount of two bills at three months granted him by Dunsmore on 12th June (£100) and 1st August 1884 (£200) respectively, with the interest due on the first of said bills.

The claim was rejected by Alexander Gordon, S.S.C., the trustee in Dunsmore's sequestration.

Stewart appealed to the Sheriff.

On 22nd May 1891 the Sheriff-Substitute (BIRNIE) appointed parties to lodge minutes prepared in terms of the statute within six days, each to be exchanged, revised, and re-lodged within six days thereafter.

The following minute was lodged for Stewart—"The appellant submits and avers that the bills on which his claim is founded were granted for value, and that therefore he is entitled to succeed in this appeal."

The following minute was lodged for Dunsmore's trustee—"(1) The claimant acted as factor for the bankrupt, and collected rents and other moneys belonging to him, and has all along failed to account to his trustee for his intromissions. (2) In the commencement of the sequestration a petition was presented in this court for the examination of the claimant, and to have him ordained to produce an account. Repeated diets were fixed for his examination and the production of these, but claimant never attended but made continual excuses. Up to this date he has produced no account. (3) The bills on which the claim is made were given by the bankrupt to cover advances to be made by the claimant on behalf of the bankrupt in the management of his affairs, and not for cash advanced at their dates. The claimant has made no advances and he has all along failed to satisfy the trustee that the bankrupt was indebted to him in anything at the date of the bills or the sequestration.

On the contrary, on an accounting there is, the trustee believes, a large balance due by the claimant to the trustee, and the trustee therefore rejected the claim. (4) The claimant is not entitled to a ranking until he satisfies the trustee of his intromissions with the funds of the bankrupt. (5) The claimant is an undischarged bankrupt."

On 29th June the Sheriff-Substitute refused a motion by Dunsmore's trustee that Stewart should be ordained to find caution.

"*Note.*—The appellant's claim is founded on bills, and he is virtually a defender. No doubt he has failed to convince the trustee, who has no interest except to do justice, that the bills were granted for advances at their dates, but having in view the more recent decisions this is not to my mind sufficient to compel the appellant to find caution."

Dunsmore's trustee appealed. In addition to the statements made in the minute lodged for him, he stated that Stewart's trustee had been discharged, but that before his discharge he had considered the propriety of taking action upon this claim, and had decided not to do so.

He argued—Whether Stewart was to be looked upon as in the position of a defender or not, he should in the circumstances be ordained to find caution—*Stevenson* v. *Lee*, June 4, 1886, 13 R. 913. Further, the Sheriff was mistaken in thinking Stewart virtually a defender. He was claiming a sum of money, and his position was like that of a pursuer in a petitory action, while the answers of the trustee—viz., (1) Compensation, (2) No value given—were of the nature of defences. The ordinary rule should therefore be applied, and he should be ordained to find caution.

There was no appearance for Stewart.

At advising—

LORD PRESIDENT—In this case the claim by Stewart is a claim for the amount of certain bills granted to him by the bankrupt. The claimant himself is an undischarged bankrupt. It is true that there is no trustee at present acting in his sequestration, but it has been stated to us that the trustee when in office had this claim before him, and resolved not to take action upon it. The trustee is now discharged, but the beneficial right to the sum which the bankrupt claims is in the creditors; the money, if recovered, will have to be administered in some form for the benefit of his creditors, and this might be done by reviving the sequestration.

Now, in this state of affairs the question is, whether, if he desires to prosecute this claim, the claimant must not find caution, and whether the claim can be treated otherwise than a suit to recover money at the instance of an undischarged bankrupt. It is true the claim is made in a sequestration, but it is not the less a proceeding by an undischarged bankrupt to recover money. The ordinary rule in such a case is that the claimant must find caution, and I cannot see anything stated on record to take the present case out of that rule. The origin and substance of the claim are not very fully divulged by the claimant on record. He was very pointedly challenged on this subject, and under the interlocutor of 22d May 1891, which appointed the minutes of the parties to be exchanged and revised, he had very full opportunity of explaining the origin of the bills, but his explanation on the subject is confined to the three lines in the print which boldly state that the bills were granted for value.

I think therefore that he must find caution before he can proceed with his appeal.

LORD ADAM concurred.

LORD M'LAREN—I am very unwilling to disturb the finding of the Sheriff with regard to a matter of so purely a discretionary nature as the present. It seems, however, to be the policy of the Bankruptcy Act to give an unlimited or almost unlimited right of appeal from the Sheriff to this Court, and as the case is competently brought before us, we are bound to exercise the jurisdiction which the statute gives us to the best of our ability. That being so, I think that there is no reason in this case to depart from what is the ordinary rule as to finding security for expenses, and I agree with your Lordship that Stewart must find caution.

LORD KINNEAR concurred.

The Court sustained the appeal, recalled the judgment of the Sheriff-Substitute, and remitted to him to ordain Stewart to find caution in ordinary form.

Counsel for Dunsmore's Trustee — Strachan—Clyde. Agent—James Ayton, Solicitor.

Wednesday, October 21.

SECOND DIVISION.

[Sheriff of Lanarkshire.

TAYLORS *v.* MACLELLANS, *et e contra.*

Contract—Implement—No Specific Time for Delivery — Unavoidable Delay — Reasonable Time.

A firm of iron merchants in May 1887 contracted to supply the malleable ironwork of certain proposed buildings. The estimate provided — "The prices for the above to include all charges for carriage to and delivery at the job at such times as may be required by the mason, who will take delivery of joists and beams and lay the same." Following a usual course the iron merchants exported iron to Belgium, to be manufactured into girders and joists and returned to them, but owing to strikes and excessive heat in that country certain girders which were ordered between 6th and 15th June were not delivered till the end of September and beginning of October, from a month to six weeks beyond