and while it was in Mr Brodie's power in apportioning the fund to exclude some or indeed all but one of his children, he could not exclude them all, or the issue of all predeceasing children.

It might perhaps be argued, on the authority of certain decisions, that there being no ulterior destination, the testator's intention was that the residue of his estate should vest absolutely in the last survivor of the residuary legatees, although all of them should predecease him. It may be doubted whether this principle applies to a case like the present in which the bulk of the residue fell to be paid to the residuary legatees immediately on the death of the testator, and where vesting would in general be dependent on survivance of the testator. But in any view, the terms in which the survivorship clause is expressed are not those in which I should have expected a power of apportionment such as that in question to be executed.

I am therefore of opinion that this expression in the residue clause indicates (especially when taken in combination with the terms of the second purpose) that Mr Brodie did not intend to execute the power of apportionment in his settlement. I therefore agree that the first question should be answered in the negative.

I also agree that as Mr Brodie did not exercise the power of apportionment, Mrs Brodie was entitled to do so, and that she did so effectually.

LORD YOUNG was absent.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First and Fourth Parties—Grainger Stewart. Agents—Dundas & Wilson, C.S.

Counsel for the Second and Fifth Parties—Dundas, Q.C.—Blackburn. Agents—Russell & Dunlop, W.S.

Counsel for the Third and Sixth Parties—Rankine, Q.C.—M'Lennan. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, June 30.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

BREMNER, PETITIONER.

Bankruptcy—Sequestration—Discharge of Bankrupt—Failure to Pay Five Shillings in the Pound—Failure to Pay not Due to Circumstances for which Bankrupt Responsible—Evidence Required—Trustee's Report not Necessarily Conclusive—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 146—*Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 6, *sub-sec.* (1).

Where a bankrupt, who has been sequestrated for a period of two years, but has not paid a dividend of 5s. in the £, presents an application for his discharge along with a favourable report by his trustee, and the application is not opposed by his creditors, he is not entitled *de plano* to his discharge, but must satisfy the Court that his failure to pay 5s. in the £ has arisen from circumstances for which he cannot justly be held responsible, and the trustee's report is not necessarily conclusive evidence to that effect.

On such an application for discharge being made by a bankrupt cycle manufacturer, out of whose estate no dividend had been paid, the trustee, and on a remit by the Sheriff-Substitute the Accountant of Court, both reported that the bankrupt had not fraudulently concealed any part of his estate or effects, and that he had not wilfully failed to comply with any provision of the Bankruptcy Statutes, and from proof adduced by the bankrupt it appeared that his failure to pay a dividend had been occasioned by reason of depression in the cycle trade, and consequent depression of the bankrupt's assets. The Court (*rev.* the judgment of the Sheriff Substitute) *granted* the application for discharge.

On 15th November 1897 the estates of John M'Gregor Bremner, cycle agent, Aberdeen, were sequestrated by the Lord Ordinary on the Bills. The sequestration was remitted to the Sheriff of Lanarkshire, and William Brodie Galbraith was appointed trustee on the bankrupt's estate.

In February 1900 the bankrupt, whose estate had not realised sufficient to pay any dividend to the creditors, presented a petition in the Sheriff Court at Glasgow for his discharge in terms of the 146th section of the Bankruptcy Act 1856.

A report by the trustee dated 5th December 1839 was produced. In it the trustee stated that after the bankrupt's estates were sequestrated "the bankrupt gave up a state of his affairs which showed—Liabilities, £2392, 11s. 5d.; assets, £1621, 15s., showing a deficiency of £770, 16s. 5d. after deducting preferable claims. In the month of June 1897 the bankrupt converted his business into a limited company, the terms of sale being that he was to receive £3079—£2079 in cash, and the balance of £1000 by an allotment of shares. He received the purchase price in the manner indicated, but he paid away the whole cash received in liquidating his liabilities, and the 1000 shares allotted to the bankrupt as part of the purchase price have realised nothing. Under these circumstances, therefore, the bankrupt's estate has not realised sufficient to meet the expenses of sequestration and the trustee's fee. The trustee has further to report that the bankrupt has attended the diets of examination, and complied with all the provisions of the statute; that he has made a satisfactory discovery and surrender of his estates; that he has not been guilty of any collusion, and that the bankruptcy has arisen from innocent misfortunes or losses in business, and not from culpable or undue conduct.

No creditor appeared to oppose the application.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 146 (which deals with the discharge of a bankrupt without compensation, and provides that a bankrupt may be discharged with consent of his creditors, and after two years without consent), enacts, *inter alia*, as follows:— . . . . "And the bankrupt may also present such petition on the expiration of two years from the date of the deliverance actually awarding sequestration without any consents of creditors; and the Lord Ordinary or the Sheriff, as the case may be, shall in each of the cases aforesaid order the petition to be intimated in the *Gazette* and to each creditor; and if, at the distance of not less than twenty-one days from the publication of such intimation, and on evidence being produced of concurrence as aforesaid, where such concurrence is required, there be no appearance to oppose the same, the Lord Ordinary, or the Sheriff, as the case may be, shall pronounce a deliverance finding the bankrupt entitled to a discharge; but if appearance be made by any of the creditors or by the trustee, the Lord Ordinary or the Sheriff, as the case may be, shall judge of any objections against granting the discharge, and shall either find the bankrupt entitled to his discharge, or refuse the discharge, or defer the consideration of the same for such period as he may think proper, and may annex such conditions thereto as the justice of the case may require: Provided that no discharge shall be granted to the bankrupt where under the provisions of this Act he is only entitled to apply for a decree of cessio; and provided also, that it shall not be competent for the bankrupt to present a petition for his discharge, or to obtain any consent of any creditor to such discharge, until the trustee shall have prepared a report with regard to the conduct of the bankrupt, and to shew how far he has complied with the provisions of this Act, and in particular whether the bankrupt has made a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortunes or losses in business, or from culpable or undue conduct; and such report may be prepared by the trustee, upon the requisition of the bankrupt, at any time after the bankrupt's examination, but shall not be demandable from the trustee till the expiration of five months from the date of the deliverance actually awarding sequestration; and such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by other direct reference, in any consent to his discharge."

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), enacts as follows: — Section 6 — "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. cap. 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 10th February 1900 the Sheriff-Substitute (SPENS) ordered a copy of the petition and the trustee's report to be sent to the Accountant of Court in order that he might have an opportunity of reporting whether the bankrupt had fraudulently concealed any part of his estate or effects, or whether he had wilfully failed to comply with any of the provisions of the Bankruptcy Statutes.

On 27th February the Accountant of Court reported that "in his opinion the trustee's report, so far as regards the two points specified in the Sheriff's interlocutor, is correct, and that there is nothing unfavourable to the bankrupt to report on these two heads. No dividend has been paid to the creditors."

On 14th March the Sheriff-Substitute (GUTHRIE) allowed the petitioner a proof to instruct that the failure to pay 5s. in the £ had arisen from circumstances for which he could not justly be held responsible.

The bankrupt and the trustee were examined at the proof. Their evidence showed that on his appointment the trustee made up a state of affairs showing liabilities £2698, 14s. 2d. and assets £2552, 14s. 2d., estimated to realise £1156, 19s. 2d., and that the failure to pay 5s. in the £ was occasioned by the book-debts of the bankrupt, estimated to realise £457, realising £300 short of the estimate, and 1000 shares of £1 each in a cycle company called Bremner & Company, Limited, which formed part of the bankrupt's estate estimated to realise £400, realising nothing at all.

The trustee deponed that if the bankrupt had stopped payment at the time when his business was turned into a com-

pany he would have paid more than 5s. in the £.

On 24th April the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that it is not proved that the petitioner's failure to pay or secure to his creditors a dividend of 5s. in the £ is due to causes for which he cannot justly be held responsible: Therefore dismisses the petition, and decerns."

Note.—"Reference is made to the note to the interlocutor of yesterday's date in D. G. L.'s Petition for Discharge."

Note referred to:—"It often seems to be forgotten in applications like this that the Act of 1881 contains a very stringent provision with regard to the discharge of bankrupts, and very often a bankrupt appears with a young agent and presents very vague and unsatisfactory evidence in support of his petition for discharge. A heavy onus lies on the bankrupt where he does not pay 5s. in the £, and I am afraid that in many cases the onus is not discharged, and the discharge is granted in direct violation of the statute. I am unwilling to adopt a harsher construction of the statute than has been usual, and in most cases I have adhered as closely as I could to the existing practice. But bankrupt's agents must be warned that the Act has to be enforced, and that a mere good-natured statement by the trustee glossing over a course of reckless trading, or a general statement that the bankrupt has made a full disclosure and has given all assistance in realising, are quite irrelevant and insufficient. At the same time I consider that the Act often presses too hardly, and I have, after some hesitation, come to think that it is one thing to find that the bankrupt can be 'justly held responsible' at the date of the bankruptcy, and another that he can be justly held responsible five or ten or fifteen years afterwards. The words 'at any time' in the beginning of the clause of the Act of 1881 may be thought to exclude this view, and may even have been introduced with that intention. But I think that it is fair to read the Act as meaning that the bankrupt's 'responsibility' is to be estimated at the date of the petition being presented or adjudicated upon, and until better advised I propose to act on that interpretation." . . .

The petitioner appealed, and argued that his inability to pay a dividend had been brought about by the depression in the cycle trade, for which he was not responsible.

LORD JUSTICE-CLERK—It is rather unfortunate that the Sheriff-Substitute has appended no note to his interlocutor beyond a reference to a note by him in another case, which contained nothing bearing on the present case except a general statement to the effect that where a bankrupt has not paid 5s. in the pound his discharge will not be granted as a matter of course. The Bankruptcy and Cessio Act of 1881, section 6, enacts that where a bankrupt has failed to pay 5s. in the pound he is not to be entitled to his discharge unless that failure 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." That leaves it as a matter for the discretion of the Judge, in the circumstances of the particular case, whether the bankrupt is to get his discharge or not. Now, here I am unable to see that the appellant's failure to pay 5s. was due to circumstances for which he ought justly to be held responsible. The cycle trade in which he was engaged was at one time—at the time when he converted his business into a limited company—in a very prosperous condition, although it is now somewhat on the down grade, and I think that the appellant's only error was that he took too sanguine a view of the prospects of the cycle trade. He has made up a statement of affairs to which the trustee takes no exception—indeed, the trustee has himself brought out very much the same results, and it is plain that if the assets had continued to be as valuable when they came to be realised as they were estimated to be by the bankrupt and his trustee, a much larger dividend than 5s. in the pound would have been paid; but mainly on account of the depreciation in the cycle trade the value of the assets fell greatly—the book debts due to the bankrupt in many cases realised little or nothing, probably because these debtors were, like the bankrupt, in the cycle trade, and suffered as he had done. Another item in the assets were his shares in the company which had taken over his business, and these shares, from the same cause, realised nothing. In the whole circumstances I am of opinion that the failure here to pay 5s. in the pound was due to circumstances for which the bankrupt cannot justly be held responsible.

LORD TRAYNER—I think that the Sheriff in his note has called attention to a very important matter, and he has done well to do so. To judge from one or two cases that have recently come before us, it appears to be assumed that a bankrupt who has been sequestrated for a period of two years, although he has not paid a dividend of 5s. in the pound, is entitled *de plano* to his discharge if the trustee reports favourably on his case and his application for discharge is not opposed by his creditors. I think this assumption is quite erroneous. A bankrupt in such circumstances is not entitled to his discharge *de plano;* he must satisfy the Court that his failure to pay a dividend of 5s. has arisen from circumstances for which he cannot justly be held responsible; and while the report by the trustee may go a long way to satisfy the Court in that matter, the trustee's report, however favourable, is not necessarily conclusive.

But in the present case I am of opinion that the bankrupt is entitled to his discharge, and for very much the same reasons as your Lordship has stated. The reason why the bankrupt failed to pay a dividend of 5s. was attributable to no fault of his, but because by reason of the market for cycle shares having fallen certain of these shares which were included among the

assets of the bankrupt became valueless.

It is also important that the Accountant of Court, to whom the Sheriff remitted to report, agrees with the trustee's opinion that the bankrupt's failure arose from innocent misfortunes and losses in business.

LORD MONCREIFF concurred.

LORD JUSTICE-CLERK—With reference to what Lord Trayner has just said, I would like to add that in commenting on the Sheriff-Substitute's note I did not at all mean to imply that I objected to the tenor of what he said, which I thought very proper. I merely meant to say that the Sheriff Substitute did not in his note deal with the special circumstances of the case which is now before us.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, and granted the prayer of the petition.

Counsel for the Petitioner—W. Mitchell. Agents—A. & A. Campbell, W.S.

Wednesday, July 4.

FIRST DIVISION.

[Sheriff Court of Fife.

DOUGALL'S TRUSTEES *v.* LORNIE.

(*Ante*, July 19, 1899, 1 F. 1107, and 36 S.L.R. 927.)

Process — Appeal from Sheriff Court — Printing and Boxing of Record, &c.— Practice where Second Appeal—Reference to Prints Boxed in Former Appeal—A. of S., July 11, 1828, *sec.* 77—*A. of S., March* 10, 1870, *sec.* 3 (1).

An appeal having been taken after proof had been led in an action raised in the Sheriff Court, the case was remitted back to the Sheriff, and thereafter a second appeal was taken. The appellant did not box along with his second note of appeal any prints of the record and proof, but for them merely referred to the print boxed in the former appeal. The defender objected to the competency of the appeal, on the ground that the appellant had not complied with the provisions of the Act of Sederunt of March 10th 1870, section 3 (1). The appellant showed that his procedure was in accordance with the practice followed in recent cases where there was a second appeal, and further maintained that it was justified by the provisions of the Act of Sederunt, March 10th 1870, section 3 (1), read along with the Act of Sederunt, July 11th 1828, section 77. The Court, in respect of the practice in such cases, *repelled* the objection.

Question—Whether the practice was justified by the provisions of the Act of Sederunt?

This case is reported *ante, ut supra.*

Section 77 of the Act of Sederunt, 11th July 1828 enacts "That reclaiming-notes, not being against decrees in absence or upon failure to comply with orders, shall at first be moved merely as single bills and immediately ordered to the roll, and shall then be put out in the short or summar roll as the case may be: Provided always that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record in terms of the statute if the record has been closed, and also copies of the letters of suspension and advocation, and of the summons with amendment, if any, and defences; and provided also that when any of the proceedings or documents in a cause have once been printed and boxed in the appendix to any note or other paper given in to the Inner House, it shall not be necessary at any subsequent stage of the case to box the same again, but only to refer to such former paper by its description and date as containing the same in the appendix thereto."

Section 3 of the Act of Sederunt 10th March 1870 enacts that—"(1) The appellant shall during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the Clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part, . . . and if the appellant shall fail within the said period of fourteen days to print and box, . . . he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided."

An action was raised in the Sheriff Court of Fife by George Dougall, plumber, Kirkcaldy, against John Guthrie Lornie, for payment of the balance of an account. After a proof the Sheriff-Substitute (GILLESPIE) pronounced an interlocutor, against which the defender appealed to the Sheriff (MACKAY). The Sheriff adhered, and the defender appealed to the First Division. On 20th December 1898 the defender and appellant boxed a print containing the record, proof, &c., in the action. On July 19th 1899 the Court recalled the interlocutor appealed against, and remitted to the Sheriff-Substitute to proceed.

After further procedure the Sheriff-Substitute on 7th March 1900 pronounced an interlocutor, against which the defender appealed to the Sheriff.

On 4th June 1900 the Sheriff pronounced an interlocutor, against which the defender appealed to the First Division.

The defender did not of new print and box the record and proof, &c., but he lodged a print entitled "Record, &c., in appeal John Guthrie Lornie against George Dougall and others," which contained (1) the following note:—"Record, proof, &c. (see print in former appeal boxed 20th December