tioner. But, in these circumstances, I think we should adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The Court adhered.

Agents for Petitioners—Tods, Murray & Jamieson, W.S.

Agents for Respondent—Dundas & Wilson, C.S.

Saturday, June 3.

SECOND DIVISION.

GRAHAM *v.* MACKENZIE.

Bankrupt—Discharge—Re-investment—Title to Sue—Retrocession. Held that a bankrupt who had been discharged without being re-invested in his estate was not entitled to pursue an action concerning a claim falling under the sequestration. Circumstances in which the procedure in such an action was delayed to enable the pursuer to obtain a retrocession.

In February 1849 Graham and Mackenzie were concerned in a joint adventure in potatoes; and in May 1849 Mackenzie paid to Graham £165, 11s. 6d. as his share of the profits. Graham was sequestrated in March 1851; and on 31st May 1854 he obtained his discharge on payment of a dividend of 5s. 4d. in the £1. Graham had, pending the sequestration, tried to prevail upon his trustee to sue Mackenzie for a sum of £125, 4s. 0½d., due to him under the joint adventure; and accordingly, after his discharge, he brought an action for said sum in the Sheriff-court of Ross-shire.

The Sheriff-Substitute (TAYLOR) pronounced this interlocutor:—

"*Tain, 13th June* 1853.—The Sheriff-Substitute having considered the preliminary defence of want of title in the pursuer, with the answers thereto, and heard parties thereon, sustains the defence: Finds that the pursuer has produced no title or authority to sue for the debt libelled, and no evidence that he has been re-invested by his creditors in his estate: Therefore dismisses the action: Finds the pursuer liable in the expenses of process, and allows an account thereof to be given in for taxation in common form, and decerns."

Against this interlocutor the pursuer reclaimed, and thereafter the Sheriff-Substitute pronounced the following interlocutor and note:—

"*Tain, 1st July* 1853.—The Sheriff-Substitute having considered the Reclaiming Petition for the pursuer, refuses the desire thereof, and adheres to the interlocutor complained of, reserving to the pursuer to bring a new action in the character of assignee to the debt libelled, or otherwise in proper form, if so advised.

"*Note.*—The pursuer admits that his estates were judicially sequestrated on 14th March 1851, which is subsequent to the date of the account sued for, and that the assets have yielded a dividend of only 5s. 4d. per pound to his creditors. In these circumstances, although he might obtain a discharge, the pursuer could not under the statute have been re-invested in his estate, and if the trustee, with the sanction of the creditors, made over the debt in question to the pursuer, he should have sued in the character of assignee, and produced proper evidence of his title."

The Sheriff-Depute (MACKENZIE) adhered.

In 1870 Graham raised the present action against Mackenzie for the sum alleged to be due to him under the joint adventure. He met with the pleas of want of title and of *res judicata*, in respect of the interlocutor in the Sheriff-court above narrated.

To obviate the latter plea, on the suggestion of the Lord Ordinary, the pursuer brought an action of reduction of said decrees, and the two actions were conjoined.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 16th May* 1871.—The Lord Ordinary having considered the conjoined processes, repels the first plea in law stated for the pursuer in the second action at his instance: Repels also the second and fourth pleas in law stated for the defender in the said second action; and, before further answer, appoints the pursuer to call a meeting of the creditors in his sequestration to determine whether a new trustee should be appointed in room of Mr James Christie the last trustee in the said sequestration, who is now dead; or whether any other, and if so what, proceedings should be adopted with reference to the present conjoined actions at the pursuer's instance against the defender, and the claim therein insisted in against the defender.

"*Note.*—The pursuer pleads that, by the interlocutor granting him his discharge his sequestration was declared to be at an end, and that therefore the interlocutors or decrees complained of, which were pronounced in the Sheriff-court, ought to be reduced. The pursuer was not discharged on composition, but without composition, and he was not re-invested in his estate. That discharge was granted on his own petition, no appearance or opposition having been made by the trustee or the creditors; and the mistake of the Sheriff-Substitute in declaring, at the close of the interlocutor granting the pursuer his discharge, 'the sequestration to be at an end,' can have no effect, the Lord Ordinary considers, upon the dependence of the sequestration. In one sense the sequestration was at an end by the granting of the discharge, inasmuch as no future acquisitions of the pursuer fell under the sequestration, and to that extent the said declaration may have a meaning. But to all other intents and purposes it was ineffectual, and the sequestration subsists for behoof of the pursuer's creditors.

"The defender objects that, as the pursuer's sequestration is thus subsisting, the trustee or creditors in his sequestration have the only right and title to insist in any claim which the pursuer may have against the defender. But although their right is preferable to that of the pursuer, they have not the only right. The radical right and interest in that claim are in the pursuer, and he may insist in it if the trustee or creditors will not do so, or interfere in the action. Mr Christie, the last trustee in the sequestration, has been dead some years. Intimation must therefore be made to the creditors, in order that they may determine whether a new trustee should be elected, or whether any other, and if so what, proceedings should be adopted with reference to the pursuer's claim. Should they decline or fail to interfere after due intimation, any objection to the pursuer's title to sue will be obviated; *Gavin* v. *Greig*, 10th June 1843, 5 D. 1191.

"The defender also pleads that reduction of the Sheriff-court interlocutors is barred by *mora*, and he refers to the case of *Mackenzie* v. *Smith*, 23 D. 1201, in support of his plea; but the present case

is very different from that of *Mackenzie*, where the decree sought to be reduced was pronounced in the Court of Session, and where there had occurred a most material change of circumstances between the date of the decree by default complained of and the action of reduction. The interlocutors or decrees complained of by the pursuer were pronounced in the Sheriff-court, and have been extracted, so that reduction is a competent mode of reviewing them. There has been no change of circumstances since the date of these interlocutors or decrees, and the object of the reduction is to set aside these interlocutors or decrees, on the ground that they are erroneous and contrary to law, so as to enable the pursuer, on the ground of fraud, to challenge a pretended settlement of a trading adventure between him and the defender, and to obtain a true count and reckoning of the profits of the joint adventure.

"As the pursuer has obtained a discharge in his sequestration, the Lord Ordinary considers that he is not bound to find caution for expenses."

The defender reclaimed.

TRAYNER for him.

BUNTINE in answer.

Their Lordships were of opinion that the interlocutor of the Sheriff-Substitute was correct in law, and also that it was not *res judicata* of the present action; and accordingly they dismissed the action of reduction as unnecessary. They considered that in the circumstances the Lord Ordinary had taken the proper course in calling a meeting of the creditors of the estate—and they sustained that part of his interlocutor. Their Lordships held that a bankrupt who had not been re-invested in his estate had no title to pursue claims falling under the sequestration until he had obtained a retrocession from his creditors; but that in the present case, from the time which had elapsed (nineteen years), the creditors might be presumed to have abandoned the claim.

Agent for Pursuer—James Barclay, S.S.C.
Agent for Defender—W. R. Skinner, S.S.C.

Tuesday, June 6.

EVANS *v.* CRAIG.

Trust, Declarator of—Proof—Writ or Oath—Delivery. A having disponed of his whole property to B, his nephew, and C and D, his nieces, including a bond and disposition in security over certain house property, the house property was afterwards sold in virtue of the powers contained in the bond, and purchased by B. B afterwards granted duplicate holograph documents to C and D in the following terms:—"This is to certify that I do hereby renounce all claim upon that property . . . which formerly belonged to my uncle, . . . and which was bought in my name." He, however, continued in possession of the property. *Held*, in an action of declarator of trust at the instance of C after A's death, that said writ was not sufficient to instruct a trust over said property in the person of B for the benefit of A.

By a disposition and settlement executed in 1835, the late David Miller conveyed to his nephew, Mr Alexander Craig, and to his two nieces, Mrs Patrick and Mrs Evans, equally between them, and the survivor of them, his whole estate, heritable and moveable, and in particular a sum of £340 secured over certain house property in the New Wynd of Hamilton, by bond and disposition in security; and for the more sure payment of this sum to the testator's said nephew and nieces, the settlement contained a conveyance of the subjects themselves over which it was secured. In 1837 Miller, in virtue of the powers contained in the bond, exposed the subjects to sale, and they were bought at the price of £180 by his nephew Craig, who obtained a disposition from Miller, on which he was infeft. In 1839 Craig granted to Mrs Patrick and Mrs Evans documents in these terms:—"*Hamilton, March* 12, 1839.—This is to certify that I do hereby renounce all claim upon that property in New Wynd of Hamilton, which formerly belonged to my uncle, David Miller, and which was bought in my name upon May 5, 1837. (Signed) ALEX. CRAIG." Thereafter, on 24th December 1839, Miller executed a codicil to his settlement, which he so far altered as to give his niece, Mrs Patrick, a liferent of his whole estate, but on the expiry of her liferent the fee was to go to Mrs Patrick, Mr Craig, and Mrs Evans, and the survivors of them equally.

In 1842 Mr Miller died, having remained in possession of the subjects in the New Wynd of Hamilton down to his death, when Mrs Patrick took possession, and continued to uplift the rents until she died in 1854. At that time Mrs Evans was in America, but she returned to this country in 1859. Mr Craig, after Mrs Patrick's death, took possession, and drew the rents of the New Wynd property until his death in 1869. Mrs Evans then raised the present action against Mr Craig's representatives, to have it declared that the disposition to him by Miller in 1837 was a conveyance in trust only, and that, under Miller's settlement she (Mrs Evans) was entitled to one-half of the subjects and the rents thereof from Mrs Patrick's death in 1854.

The Lord Ordinary (JERVISWOODE) having allowed a proof at large, thereafter pronounced this interlocutor:—"*Edinburgh, 28th March* 1871.—The Lord Ordinary having heard counsel, and made avizandum, and considered the debate, with the proof, productions, and whole process—Finds that the writing, No. 6 of process, and which is set forth in article 3 of the condescendence for the pursuer, is holograph of the deceased Alexander Craig, and that the same has relation to the heritable subjects to which the conclusions of the summons refer; finds that the true intent and meaning of the said writing is, that the granter thereof thereby renounced all claim upon the property of the said subjects, to the same extent and effect as if he had purchased the same for the direct behoof of his uncle, David Miller, named in the said writing; and finds as a consequence that the succession to the said subjects is regulated by the disposition and settlement executed by the said David Miller on 29th June 1835, and codicil thereto, dated 24th December 1839, both of which are set forth on the record; therefore sustains the pleas in law stated on the pursuer's behalf, and finds, declares, decerns, and ordains in terms of the conclusions of the summons; but as respects the conclusions for accounting, finds that the defenders are not liable to account for any sum or sums of interest under the same prior to the date of citation in the present action, and supersedes in the meantime consideration of the alternative conclusion in the event of the failure of the defenders to produce an account