defenders claimed to take credit also for the amount of an account said to have been incurred by W. M'Gaan, which they had guaranteed payment of to a creditor of his, and had ultimately paid. They tendered £18, 2s. 4d. as the balance due to the pursuer, and had tendered payment of it before the action was raised. The pursuer's objection to give credit for this account was, that it had not been constituted as a debt against M'Gaan, that he believed it not to be due, and that the defenders had no authority to pay it. After the action came into Court the debt was constituted by an action in the Debts Recovery Court. The Lord Ordinary decerned for £18, 2s. 4d., the amount tendered, but in "respect that the said sum was tendered by the defenders to the pursuer before the action was raised," found defenders entitled to expenses.

The pursuer reclaimed, and argued that he was not bound to give credit for the sum contained in the account until it had been constituted, because an executor was not bound to pay an alleged debt till it was constituted, and was entitled to require the creditor in it to constitute it at his own expense—Stair, iii. 8, 66; Erskine, iii. 9, 43, and cases there cited; *Carruthers* v. *Hogg*, 7 S. 81.

At advising—

Lord President—In this case the pursuer has not recovered more than was offered him before he came into Court. But whether that offer was a sufficient tender is quite another matter. I think the pursuer's argument sound, that to make a sufficient tender the defenders should have proffered not merely payment of the balance, but also a decree of constitution of the account deducted. Though a decree of constitution is not always necessary, yet where, as here, the executry estate is small, and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution. Therefore I cannot concur with the Lord Ordinary's ground of judgment, and I think that his interlocutor ought to be varied. But I arrive at the same result on other grounds, which I find in the correspondence between the parties—[*His Lordship then referred to the correspondence*].

Lords Deas, Mure, and Shand concurred.

The Court varied the interlocutor of the Lord Ordinary by deleting the words above quoted, and *quoad ultra* adhered to the interlocutor.

Counsel for Pursuer — Kennedy. Agents — Campbell & Somervell, W.S.

Counsel for Defenders—Thorburn. Agent—Andrew Wallace, Solicitor.

Saturday, December 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CLARKE, PETITIONER.

Bankruptcy—Bankruptcy and Cessio (Scotland) Act 1881, *sec.* 6—*Discharge*—Onus.

A bankrupt whose estate had yielded a dividend of less than 5s. per £1, presented a petition after the expiry of two years from the date of sequestration for discharge, without any consent of creditors. It appeared that the bankrupt's liabilities had arisen from reckless trading, and there was no evidence to show that the fact of his estate not yielding a dividend of 5s. per £1 was due to causes for which he could not justly be held responsible. The Court *refused* the petition.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 146, provides—"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, &c. . . . . . 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."

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 6, provides—"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."

This was a petition for discharge presented to the Sheriff Court of Lanarkshire by Patrick Clarke, formerly merchant in Glasgow. The petitioner's estates were sequestrated on 3d December 1866, in terms of the Bankruptcy (Scotland) Act 1856, Mr Mitchell, accountant, being thereafter confirmed as trustee. The trustee was discharged on 21st March 1873. The dividend paid was 2s. 2½d. per £1. The petition was presented without any consents of creditors. Objections were lodged by Crockatt and others, creditors of the petitioner, to the discharge. They were creditors to the amount of £1009.

There were produced in process the following reports by the trustee and by the Accountant in Bankruptcy:—I. Report by the trustee, dated 22d December 1881—"The trustee has to report, in terms of the Bankruptcy (Scotland) Act 1856, that the aforesaid Patrick Clarke has complied with all the provisions of the statute; that he had

doubts that the bankrupt did not make a satisfactory discovery and surrender of his estate; that the bankrupt has attended the diets of examination, and has not, so far as known to the trustee, been guilty of any collusion; but that the trustee is unable to say whether his bankruptcy has arisen from innocent misfortunes or losses in business, or from culpable or undue conduct." II. Report by the Accountant in Bankruptcy —"The Accountant in Bankruptcy acknowledges intimation of the petition, interlocutor, and report by the trustee on the bankrupt's conduct . . . . and he has examined the Sederunt-Book. He now respectfully reports to the Sheriff as follows—(1) As to whether the bankrupt has fraudulently concealed any part of his estate or effects. The Accountant observes that the trustee states in his report upon the conduct of the bankrupt, 'that he had doubts that the bankrupt did not make a satisfactory discovery and surrender of his estate.' The Accountant does not find from the bankrupt's examination any direct evidence of concealment, but he considers the bankrupt's examination unsatisfactory, in so far as he does not properly account for his deficiency (£4927, 9s. 7d.); and the Accountant may note the following statement by the bankrupt—'At that time (July 1866) I think I had about £500 at my credit with the National Bank of Scotland, under the name of Strang & Company. The invoices of Pattons & Company and the Cartsburn Sugar Refining Company were at that time overdue and unpaid.' The balance of this sum was received by the trustee. The examination is also unsatisfactory in so far as the bankrupt declined to answer certain questions put to him on the ground that they were connected with certain criminal charges made against him. It appears from the trustee's letter to the Accountant dated 4th March 1873, that 'the Procurator-Fiscal could not substantiate the the charges of forgery and fraud, and the case was dropped.' In a letter from the trustee to the Accountant the following passage occurs—'Clarke (the bankrupt) did not make a fair surrender of his estate, much of which had to be traced through officers, consequently I was obliged to refuse him a certificate.' (2) There is no evidence before the Accountant that the bankrupt has wilfully failed to comply with any of the provisions of the Bankruptcy (Scotland) Act 1856. This sequestration was awarded so long ago as 18th December 1866, and the trustee was discharged on 21st March 1873. In the absence of objections on the part of creditors, it may be for the consideration of the Sheriff whether after a lapse of 15 years it is now necessary or proper in the ends of justice to withhold the discharge." The assumption in this report that no objection was made by any creditor was erroneous, as will appear from the narrative above given.

On 31st October 1883 the Sheriff-Substitute (Erskine Murray), after a proof, pronounced this interlocutor:—"Finds (1) that the bankrupt Patrick Clarke about 1863 commenced, without any capital, a business, which consists mainly in purchasing sugar and tallow at Greenock, consigning it to Belfast, and drawing on consignees, which business rose to a large amount, his purchases in the last six months before his failure in 1866 amounting to £30,000: Finds (2) that he kept almost no books, at least no books which could be used by anyone but himself: Finds (3) that a year previous to his failure he found he was £2500 short, but still carried on till he got £6000 short, and proceedings were taken against him, and he was apprehended when attempting to evade apprehension in female attire, and being sequestrated, his estates only paid 2s. 2½d. the pound: Finds (4) that he depones that his failure to pay 5s. in the pound arises from his having made, in the last six months previous to his sequestration, losses to extent of £800 through great depreciation in the value of sugar and tallow: Finds (5) that his evidence on this head is uncorroborated, and his trustee reports that he is unable to say whether his bankruptcy has arisen from innocent misfortunes or losses in business, or from culpable and undue conduct: Finds (6) that the bankrupt alleges that if the trustee had looked after and realised a property in Belfast to which he was entitled, he would have paid more than 5s. in the pound, but that the correctness of this statement of the bankrupt is also not sufficiently proved: Finds, on the whole case that, the bankrupt has failed to prove that his failure to pay 5s. in the pound arose from causes for which he cannot justly be held responsible: Therefore refuses the craving of the petition: Finds no expenses due, &c.

"*Note.*—The sole evidence adduced of the bankrupt's non-responsibility for his failure to pay 5s. in the pound is his own unsupported statement. The trustee's report is that he cannot give an opinion one way or the other. This can never be taken as proving what the bankrupt has to prove. No doubt after seventeen years the proof must be difficult, but the delay arises from his own choice. No expenses have been given, because the Sheriff-Substitute has not sustained any objections except the statutory one."

The petitioner appealed to the Court of Session, and argued the case in person.

At advising—

Lord President—This is the first time we have been called upon to consider this clause of the Act of 1881, and it is necessary to ascertain, in the first place, exactly what is the question we have to try in the application. The clause makes it perfectly clear in its opening words that its provisions are to apply to all bankrupts who are undischarged at the commencement of this Act —that is, on 1st January 1882. This bankrupt undoubtedly falls within that description. The clause therefore applies to this case, and the enactment is that he shall not be entitled to a discharge unless one of two things is proved—either that he has paid a dividend of 5s. in the pound, or that his failure to do so has arisen from circumstances over which the bankrupt cannot be justly held responsible; and the statute further lays upon the bankrupt himself the burden of proving that the failure has arisen from such circumstances. The question therefore is, no dividend of 5s. having been paid in the present case, whether the failure so to pay has been proved by the bankrupt to have arisen from circumstances over which he cannot be held to be justly responsible? Now, the Sheriff-Substitute has specified very distinctly the grounds upon which he goes in holding that that had not been proved, but rather that the reverse had been proved. In the first place, he finds that the bankrupt commenced about 1862 a business of a

very peculiar kind without any capital. That business consisted of purchasing sugar to a very large extent upon the Greenock Sugar Exchange, consigning that sugar to parties in Ireland from whom he had no orders, and trusting to their accepting the consignment, drawing upon them to a very large extent for the value. Of course a business of a more precarious and reckless kind could hardly be conceived. A man begins business without a shilling of capital, and incurs large liabilities by the purchase of sugar, and he trusts to be able to pay off these liabilities by forcing consignments upon persons who have not employed him. The natural consequence followed that he found himself behind the world. He was £2500 behind in the year previous to his failure, but he went on notwithstanding until he was £6000 behind, and then proceedings were taken against him, apparently of a criminal character, for it appears from the proof he was apprehended when attempting to abscond. He says that his failure to pay 5s. in the pound arises from his having in the last six months before his sequestration lost £800 though depreciation, but that would not account for his being £6000 behind; and the Sheriff-Substitute finds that the statement of the bankrupt upon this matter is unsupported by any other evidence whatever. In these circumstances it appears to me, while there is evidence of most reckless trading, bringing about the almost inevitable consequence, that there is nothing proved upon the part of the defender which can possibly meet the requirements of the statute that his failure to pay 5s. in the pound arose from circumstances for which he is not justly responsible. He seems to me to be responsible entirely for having incurred debts at all, and not being able to discharge these debts, and it is impossible to disturb the interlocutor of the Sheriff, which is based upon grounds of the strongest possible kind.

Lord Deas—It is abundantly clear that the statute applies to the case of this bankrupt. The only question is, whether he has proved that the reason why he could not pay five shillings in the pound has arisen from causes for which he is not responsible. The Sheriff has found not only that it is not proved that this is the case, but that his bankruptcy arose from causes for which he is responsible, and I am humbly of opinion that the proof satisfactorily makes out what the Sheriff finds—that not only is it not proved that his inability to pay arose from circumstances for which he is not responsible, but that it arose from causes for which he is justly responsible. I am clearly of opinion that what the Sheriff finds is made out, and if so, we have no choice in the matter, but must refuse this petition.

Lord Mure—After all the applicant has stated, I find it impossible to find the Sheriff wrong, but, on the contrary, think he has taken quite a sound view of this case.

Lord Shand—I concur in thinking that the applicant has failed to discharge the *onus* laid upon him of proving that his inability to pay five shillings in the pound was due to causes for which he is not responsible.

The Court refused the petition.

Counsel for Objecting Creditors—R. V. Campbell. Agent—A. Wyllie, W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

WILLIAMS AND OTHERS (VESTRY OF ST JUDE'S) *v.* WAKEFIELD AND OTHERS.

Trust—Liability of Trustees.—Trustees of Voluntary Church.

For some time prior to 1869 an Episcopal school was carried on at the expense and under the management of D, whose property it was, and who carried it on in connection with the congregation of St J., of which he was a vestryman. D having become bankrupt, the work of the school was carried on by the church, and the trustees and vestry of the church acquired the school from D's trustee. The title was taken in names of certain members of the vestry and certain trustees of the church, and interest on the price was annually charged in the church accounts against the school. Thereafter D, who had been discharged from his sequestration, became treasurer of the church. In 1874 the school was sold by the vestry and trustees for a greatly enhanced price, and those vestrymen and trustees in whose names the title stood conveyed it to the purchaser, and D as church treasurer received the price. He applied to the purposes of the church the price paid out of its funds for the school, and another sum which the vestry and trustees had determined to apply out of the price on behalf of the church, but he dealt with the balance as his own, and subsequently again became bankrupt and left the country. The vestry and congregation then sued the vestrymen and trustees in whose name the title to the school had stood, and who had discharged the purchaser, for an accounting for the price of the school and payment of this balance, as being the property of the church. *Held* (*rev.* judgment of Lord Kinnear) that the price of the school having been paid under the defenders' authority to the treasurer of the church, who was the proper person to receive it, the defenders had no duty of supervision over him, and therefore, assuming that the balance sued for ought to have been applied to church purposes, were not liable for its loss.

The congregation of St Jude's Episcopal Church, Glasgow, is a separate and independent one, and the church and grounds connected therewith are vested in certain trustees by disposition granted in 1863. By the constitution of the church, which is set forth in a declaration of trust by the trustees, it is, *inter alia*, declared—"*Fourth*, the vestry shall consist of the incumbent, who shall be *ex officio* chairman of all meetings of the vestry, two vestrymen appointed by him, two by the congregation, and two by the trustees. The vestrymen shall be elected for two years . . . . *Sixth*, the whole temporal affairs of the church shall be under the control and management of the vestry, who shall be bound to appoint a treasurer, and the whole revenues of the church arising from seat rents, collections, or otherwise,