Tuesday, June 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CALDWELL *v.* HAMILTON.

Bankruptcy—Sequestration—Discharge—Condition—Assignation of Part of Personal Earnings under Contract of Service—Beneficium competentiæ—Bankruptcy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 20), *sec.* 143.

In an application presented by a bankrupt for his discharge, two years after the date of his sequestration, after a dividend of 5s. had been paid to his creditors, and after a report had been prepared in terms of section 143 of the Bankruptcy (Scotland) Act 1913, one of his creditors objected to his discharge being granted except on condition of his assigning part of his personal earnings under contract of service for behoof of his creditors. The applicant had been at the date of the bankruptcy, and was, in receipt of a salary of £500 a-year. The Sheriff-Substitute repelled the objection on the grounds (1) that he had no sympathy with creditors going back on a man, (2) that there was only one objector, and (3) that the objector had been a secured creditor. The Court *made it a condition* of the discharge that the bankrupt should undertake to pay £100 a-year out of his salary, or such sum as his salary exceeded £400, toward satisfaction of his creditors' claims, the amount being agreed upon.

The Right Hon. James Caldwell, *objector*, appealed from a deliverance of the Sheriff-Substitute at Glasgow (Fyfe) in an application by John Hamilton, sometime shipbuilder and residing at 22 Athole Gardens, Glasgow, *applicant*, for his discharge.

Mr Hamilton's estate had paid 5s. per pound; two years had elapsed since the date of sequestration; the bankrupt was in receipt of a salary of £500 per annum, which he received from a large firm of shipbuilders, his duties being to organise social functions and to take important personages about; and the trustee in the sequestration had lodged the following report—"The reporter is of opinion that the bankrupt has made a fair discovery and surrender of his estates. With regard to the examination of the bankrupt a diet of examination was fixed for 2nd December 1913 within the Sheriff Court-House, Glasgow, at which the bankrupt appeared and answered all the questions which were put to him. So far as the reporter has been able to ascertain the bankrupt has not been guilty of any collusion. The reporter is of opinion that the bankruptcy has arisen owing to the depreciation in the value of the bankrupt's house, 22 Athole Gardens, Glasgow, on which a bond for £1300 existed."

The Sheriff-Substitute, on 22nd March 1916, issued the following interlocutor—"... Repels the objections: Finds the bankrupt John Hamilton entitled to his discharge, but before granting the same appoints him to appear and emit the statutory declaration: Finds the objector liable in expenses," &c.

Note.—"This is an application for the discharge of a bankrupt who was sequestrated on 3rd November 1913, and whose creditors have received a dividend in excess of 5s. per pound. I think the policy of the Bankruptcy Statute is that after the lapse of two years from the date of his sequestration a bankrupt who pays 5s. per pound is to be discharged, unless some substantial reason is adduced why the Court should exercise the discretion with which it is invested, to refuse or postpone the discharge, or to attach conditions to the granting of it.

"In the present case I do not think that the note of objections sets forth any relevant consideration which would induce me to exercise my discretion in this way.

"Only one creditor opposed the discharge, and he was a secured creditor. His claim is based upon the personal obligation in a bond and disposition in security over a heritable property which the bankrupt possessed.

"Unfortunately at the date of sequestration the value of that heritable property had greatly depreciated since the objector lent his money upon the security of it in 1893, and the objector's claim in the sequestration was for the amount of his bond (£1300) less the then value of the heritable property, which the objector put at only £500.

"I am afraid that the objector's position was simply that of all bondholders who twenty years ago had lent money upon residential and heritable property in the West End of Glasgow. It cannot be suggested that the bankrupt is in any way responsible for the depreciation in the value of the heritable property, for it is notorious that in the district where the property is situated depreciation has been universal....

"The last contention of the objector is that the discharge should be refused unless the bankrupt gives up a portion of his present earnings, to be applied in ultimately paying his creditors of 1913 in full. This is the only apparently relevant element in the objections, but this is just the element which is peculiarly a matter for the discretion of the Court.

"Even assuming that the objector can prove all that he states, that would not induce me to exercise my discretion to the effect of refusing discharge or attaching conditions to it.

"In exercising that discretion I always take into consideration the whole circumstances, one of the most important of which is that there is no body of creditors supporting the objector. He alone held a security for his debt, and he alone objects to the discharge. When he lent his money the Athole Gardens house was presumably regarded as a heritable security with a sufficient margin of safety. He has unfortunately been disappointed with it owing to a universal fall in the value of property. But whilst sympathising with

any creditor who has made a bad investment, I do not think that his having done so is a sufficient reason for my requiring a bankrupt to make a payment out of his present earnings as a condition of being discharged. I have no great sympathy at any time with creditors going back on a man years after his sequestration when he has worked himself back into earning a livelihood, and asking him to give up his present earnings for his old debts. Where a large body of creditors are pressing for a bankrupt's present earnings being thus appropriated there may be something to be said for its being considered, but the theory of the Bankruptcy Act is that a bankrupt's creditors take his estate as it stands at the date of sequestration, and the bankrupt is discharged of his debts as at that date. No doubt the actual declaration of discharge is not immediately made, but when it is made it harks back to the date of the sequestration. What the bankrupt may do after the date of his sequestration is his affair. If he goes under his creditors have no responsibility. If he is fortunate enough to relieve himself and get into the way of earning an income I do not as a rule interfere with it, certainly not at the instance of one creditor. As no other creditor supports the objector I infer that no other creditor wants to interfere with the bankrupt's present earnings, and I am not going to exercise any discretion I may have in this matter on the motion of a solitary creditor, especially one who belonged to the class known as secured creditors. I do not therefore think that even if the last objection is relevant there is in the circumstances any need to incur the expense of a proof.

"I therefore repel the objections and find the bankrupt entitled to his discharge."

The objector appealed, and argued—The Court had the right to make a discharge conditional on an assignation of part of future income. This was clear from statute —*e.g.*, Bankruptcy Act 1856 (19 and 20 Vict, cap. 79), sec. 146; and 1913 (3 and 4 Geo. V, cap. 20), secs. 146 and 148—and the right had often been exercised in practice—*Leslie* v. *Cumming & Spence*, 1900, 2 F. 643, 37 S.L.R. 444; *Hurst* v. *Beveridge*, 1900, 2 F. 702, 37 S.L.R. 501; *Learmonth* v. *Paterson*, 1858, 20 D. 418; *Scott* v. *Macdonald*, 1823, 1 Sh. App. 363; *A B* v. *Sloan*, June 30, 1824, 3 S. 195. There was no difference between a person drawing a stipend or emolument from holding an office and a person receiving a fixed salary under a contract of service.

Argued for the applicant—The bankrupt was entitled to his discharge without conditions as long as he had paid 5s. per pound and had complied with the statutory rules. The Court had never before made it a condition of discharge that the bankrupt should assign part of his income. It was admitted the Court could impose conditions, but only on relevant objections being made. The objection made here by one only of the bankrupt's creditors was not relevant—*Barron* v. *Mitchell*, 1881, 8 R. 933, 18 S.L.R. 668. The matter was in any event a matter of discretion, and the Sheriff had rightly used his discretion here—*Barron* v. *Mitchell* (*supra*). If the Court decided to impose conditions the amount to be assigned should be small —*Scott* v. *Macdonald* (*supra*); *Simpson* v. *Jack*, 1888, 16 R. 131, 26 S.L.R. 76; *Learmonth* v. *Paterson* (*supra*); Bankruptcy Act 1883 (46 and 47 Vict. cap. 52), sec. 53, sub.-secs. 1 and 2; *ex parte Benwell* (1884), L.R., 14 Q.B.D. 301; *Bell* v. *Bell's Trustee*, 1908 S.C. 853, 45 S.L.R. 699.

LORD JUSTICE-CLERK—I am sorry I am not able to agree with the result reached by the Sheriff-Substitute, who has a great deal of experience in these matters.

Mr Wark has argued in the first instance that this is a question of discretion, but the Sheriff-Substitute has given the grounds upon which he proceeded in the exercise of his discretion, and I cannot accept them as satisfactory. I treat the case as turning entirely upon the only point which has been seriously debated before us, namely, whether as a condition of his discharge Mr Hamilton should be required to make a certain allowance for the benefit of his creditors out of the salary of £500 which he now enjoys.

There are three points on which the Sheriff-Substitute has proceeded. In the first place he says—"I have no great sympathy at any time with creditors going back on a man years after his sequestration, when he has worked himself back into earning a livelihood, and asking him to give up his present earnings for his old debts." Then he refers, in the second place, to the fact that there is only one creditor here objecting to the discharge, and in the third place he refers to the further fact that this creditor was originally partially secured.

With regard to the first point, I do not think it can be said here that the creditor is going back very long on the bankrupt, for the sequestration was granted only in November 1913 and the application for the discharge was made in December 1915. Then as to there being only one creditor objecting it is explained, and appears from the documents in the case, that the claims of the other creditors, apart from Dr Inglis, amount in whole only to £120 odds. Dr Inglis is a relative of the bankrupt by marriage, and I can quite understand his desire not to take action in the matter. Therefore Mr Caldwell is the only creditor, as it happens, who has a substantial and independent interest to make the objection. The third ground of the Sheriff-Substitute is that Mr Caldwell was originally a secured creditor. I cannot see how that makes any difference. What he is claiming is the balance which remains after making full allowance for the value of the security held.

Accordingly the grounds which the Sheriff-Substitute advances as the reasons for exercising his discretion in the way he has done do not commend themselves to my judgment. It is quite certain that the Court is entitled to impose such conditions in granting a discharge to a bankrupt as are asked here if it thinks proper to do so. Mr Wark did not dispute that, and Lord

Salvesen pointed out that in the case of *Leslie* v. *Cumming & Spence*, 2 F. 643, the First Division interfered with the discretion of a Lord Ordinary in reducing the amount to be allowed out of a parish minister's stipend. Therefore both on principle and authority we are entitled to exercise our discretion in this matter if the circumstances warrant that course being followed. In my judgment the circumstances here do warrant the exercise of our discretion in imposing conditions. The sum of £100 mentioned by the appellant is a very moderate one, and accordingly I move your Lordships that as a condition of the bankrupt obtaining his discharge he should make provisions for paying during the occupancy of the office he now holds the sum of £100 out of his present salary until his debts are paid, with suitable adjustments for changes in the present position.

LORD DUNDAS—I agree. I think this appeal should be allowed to the extent and effect your Lordship proposes. It might, no doubt, have been difficult for us to arrive, apart from agreement, at any definite figure to be allowed out of the salary, but the appellant has suggested £100, which seems reasonable, and the respondent's counsel agrees that if any payment is to be made that amount is not unreasonable, and therefore I think the course your Lordship proposes is right.

LORD SALVESEN—I concur. I think the bankrupt here is in no better position than a parish minister in regard to the question whether he shall assign a portion of his salary as a condition of getting his discharge. This is the first occasion—so far as reported cases go—on which the Courts have applied the rule applicable to stipends, pensions, or alimentary allowances, to personal earnings derived from a salary paid under a contract of service. But I am unable to see any distinction between the case of a parish minister or other person holding an office from which they derive emoluments and the case of a gentleman who at the date of his bankruptcy had a salaried position and continued to draw the same salary after his bankruptcy.

As regards the amount to be assigned I think the sum asked is very moderate. In fixing the amount to be assigned the Court must first ascertain how much is necessary to maintain the bankrupt in the position in life which he holds, and only require him to assign the surplus to his creditors. The proportion which the amount ordered to be assigned bears to the total income will vary according to whether the surplus is large or small, but the leading consideration is that a reasonable maintenance to the bankrupt in the position of life to which he belongs must first be provided and only the surplus given to his creditors. We are not deciding that the income which this bankrupt will still have available for the support of himself, his wife and family, is required for their reasonable maintenance. The appellant has perhaps wisely, in view of the source of the bankrupt's income, restricted his demand to an annual sum of £100, and we cannot therefore give more.

LORD GUTHRIE—I agree. In view of the bankrupt's circumstances, proved by documents by the bankrupt or admitted, I think the appellant's demand as now stated is a moderate one, and should be made a condition of discharge. Special circumstances have been hinted at with the view of showing that the bankrupt's income is subject to serious deductions, but these are too vague to be made the subject of inquiry either here or in the Sheriff Court.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute dated 22nd May 1916, in so far as it repels the objections stated for the appellant, and in so far as it finds him liable in expenses: Find that as a condition of the bankrupt being granted his discharge he shall undertake in such manner as to the Sheriff-Substitute shall seem sufficient to secure payment for behoof of his creditors in satisfaction of their claims the sum of £100 per annum out of his salary or emoluments so long as the same amounts to not less than £500 per annum, and in the event of said salary or emoluments falling short of £500 per annum, the excess, if any, above £400 shall be secured in lieu of said sum of £100: *Quoad ultra* affirm the said interlocutor of the Sheriff-Substitute and remit to him to proceed with the application for discharge: Find the appellant entitled to the expenses of the appeal against the respondent, and remit the account to the Auditor to tax and to report: *Quoad ultra* find no expenses due to or by either party."

Counsel for the Objector (Appellant)—Watson, K.C.—Hamilton. Agents—Weir & Macgregor, S.S.C.

Counsel for the Applicant (Respondent)—Moncrieff, K.C.—Wark. Agent—Robert Miller, S.S.C.

Wednesday, July 5.

FIRST DIVISION.

CALEDONIAN RAILWAY COMPANY AND NORTH BRITISH RAILWAY COMPANY *v.* LANARK COUNTY COUNCIL.

Water — Railway — Rates — Lanarkshire (Middle Ward District) Water Order 1913 *(Confirmed by* 3 *and* 4 *Geo. V, cap. clx), sec.* 44*—Option to Charge for Water Supply by Rate or by Measure as Applied to the Various Different Parts of Railway Undertaking.*

The Lanarkshire (Middle Ward District) Water Order 1913, section 44, authorised the County Council to charge in respect of buildings or premises supplied with water for non-domestic purposes either the domestic rate applicable