*Friday, November 2.*

## FIRST DIVISION.

[Bill Chamber, Lord Adam.

## RAE AND OTHERS *v.* WALKER AND OTHERS.

*Bankrupt—Discharge—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 79). *sec.* 151—*Annulling of Discharge after death of Bankrupt.*

*Held* that a petition to annul the discharge of a bankrupt, presented under the 151st section of the Bankruptcy (Scotland) Act 1856, is a penal prosecution, and cannot competently be brought against the bankrupt's representatives.

John Walker jun., who was a bleacher at Partick, was sequestrated on 24th August 1871, and a trustee appointed. He thereafter offered a composition of 2s. 6d. in the pound, and that having been accepted at a meeting of creditors, he was discharged on 12th April 1872. He had previously made the usual declaration on oath that "he had made a full and fair surrender and disclosure of his estate, and had not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to such offer of composition and security." On 18th February 1876 he died. On 17th July 1877 this petition was presented by two of his creditors (one of whom afterwards put in a minute of disclaimer) to the Lord Ordinary on the Bills, praying his Lordship, under the 151st section of the Bankruptcy Act of 1856, "to find that the said bankrupt has forfeited all right to a discharge and all benefit under the Bankrupt Act, and to annul the discharge already granted to the said bankrupt." The 151st section provides—"If the bankrupt shall have been personally concerned in or cognisant of the granting, giving, or promising any preference, gratuity, security, payment, or other consideration, or in any secret or collusive agreement or transaction as aforesaid, he shall forfeit all right to a discharge, and all benefits under this Act; and such discharge, if granted, either on or without an offer of composition, shall be annulled, and the trustee or any one or more of the creditors may apply by petition to the Lord Ordinary to have such discharge annulled accordingly."

The petitioners averred that the bankrupt had been personally concerned in, or cognisant of, the payment to one of his creditors of a composition of 10s. in the pound, and of the payment of another in full, these payments having been made for the purpose of facilitating the bankrupt's discharge; and further, that the state of affairs handed by the bankrupt to his trustee showed his assets to be less by £3000 than they really were. The petitioners called as respondents the trustee nominated under the trust-disposition and settlement of the bankrupt, the creditors who had, as they averred, obtained the payments mentioned above, and the former trustee in the sequestration.

The Lord Ordinary (ADAM) dismissed the petition as incompetent, adding the following note:—

"*Note.*—The Lord Ordinary is of opinion that the petition is incompetent. He thinks that the language of the 151st section of the Bankruptcy Act, under which it is presented, indicates that it was intended to apply to the case of a living bankrupt, and not, as here, to the case of a deceased bankrupt. He does not see how he can find, as craved in this petition, that the deceased bankrupt has forfeited all right to a discharge and all benefit under the Bankrupt Act. The remedy against creditors who have been parties to preferences or payments not sanctioned by the Act, or to secret or collusive agreements, is to be found in the 150th section; and if it be desired to annul the bankrupt's discharge, the section founded on is not necessary for that purpose, as that can be done at common law if necessary.

"It appears to the Lord Ordinary that there are good reasons for authorising summary proceedings to annul a discharge in the case of a living bankrupt who is necessarily cognisant of the facts, but that these reasons do not apply to a case like the present, brought against his representatives long after his decease, and who are necessarily ignorant of the facts.

"The Lord Ordinary was not referred to any case in which the 151st section was held to apply to the case of a deceased bankrupt.

"But the Lord Ordinary would have doubted the relevancy of the averments if the petition had been competent. The bankrupt was discharged on a composition of 2s. 6d. per pound. It is averred that he paid the respondents James Laing & Company a composition of 10s. per pound on their claim of £180, 3s. 9d., and that he paid the claim of Messrs William Hill & Son of £62, 9s. 6d. in full. But there is no specification of any illegal or collusive agreement or transaction in respect of which the payments are alleged to have been made. . . . .

The petitioner (there was now only one) reclaimed, and argued—This was not a penal proceeding, but a method of recovering assets for behoof of creditors. That such a proceeding was competent against the representatives of a bankrupt was indicated by the course followed by the Court in the cases of *Robertson's Trustee*, February 9, 1842, 4 D. 627, and *Walker*, February 14, 1842, 4 D. 742, where discharges were granted after the death of the bankrupts on declarations being made by their representatives that there had been a full disclosure of the estate by the bankrupts. By the 29th section of the Bankruptcy Act a discharge after the death of the bankrupt was contemplated, and it followed therefore that proceedings to annul a discharge were likewise competent. Cf. also Bell's Comm., 5th edition, 448-50. The competency of such a proceeding was indicated by the Statute 54 Geo. III. c. 137, sec. 68. The quasi-penal character of the application did not render it incompetent. In *M'Lachlan* v. *Likly*, November 23, 1830, 9 S. 57, penal interest was exacted after twenty years of acquiescence. The cases quoted on the other side, of *M'Turk* v. *Greig*, July 2, 1830, 8 S. 995; *Graham*, M. 5599; and *Mollison* v. *Murray*, December 19, 1833, 12 S. 237, were cases where penalties due by tutors and curators under the Act 1672, c. 2, were held not to transmit against their representatives, but the difference between these cases and the present was, that the effect of recalling the discharge of the bankrupt here would give his creditors the means of recovering a larger composition, whereas there the result was purely penal. Then, in the case of *Gibson* v. *Barbour's Representatives*, January 31, 1846, 8 D.

427, there was a charge of malversation against a trustee, a personal complaint very different from the charge here, which was one of conduct that very materially affected the estate. Cf. also *Davidson* v. *Tulloch*, February 23, 1860, 3 Macq. App. Ca. 783.

The respondent answered—This was a penal proceeding, and could not therefore transmit against representatives—Erskine, iv. 1, 14. The cases of *M'Turk*, *Graham*, and *Mollison* were analogous to the present, and in them liability attaching to tutors and curators was held not to transmit against their representatives. In the case of *Cooper* v. *Fraser*, November 5, 1872, 11 Macph. 38, it was held a highly penal proceeding to refuse a discharge. The very terms of the section here founded on showed that it was penal.

At advising—

Lord President—This petition was presented to annul the discharge of a bankrupt under the authority of the 151st section of the Bankruptcy Act of 1856. The Lord Ordinary has dismissed the petition as incompetent. The facts of the case, so far as necessary for the disposal of this question of competency, are these—The bankrupt was sequestrated on 24th August 1871; some months thereafter he offered a composition of 2s. 6d. in the pound to his creditors, which was accepted, and on that composition the bankrupt was discharged on 12th April 1872. He died on 18th February 1876, nearly four years after his discharge had been granted. This petition was presented in July last. The question that arises therefore is—whether such a petition is competent when it is directed against a bankrupt's representatives after his decease, and not against the bankrupt himself?

The answer to that question depends on the terms of the 151st section of the Act, and on the nature and effect of the remedy given therein. The 150th section must also be kept in view. The two sections deal with the nature of the remedy provided where an illegal preference has been given or a collusive agreement has been entered into, by the bankrupt in order to obtain his discharge. It is not necessary to allude to the 150th section further than to say, that it provides a very stringent remedy against a creditor who has been engaged in such an illegal transaction. The 151st section gives a remedy of the same nature against a bankrupt if he "shall have been personally concerned in or cognisant of the granting, giving, or promising any preference, gratuity, security, payment, or other consideration, or in any secret or collusive agreement or transaction as aforesaid." The reference here is to the 140th and 147th sections, where the bankrupt is required to make oath "that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, or made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to his discharge." The reference has no concern with the failure to make a full and fair disclosure of his estate. It has only to do with the case, where the bankrupt has been engaged in such a secret or collusive agreement, or has created an illegal preference, and in that case the 151st section provides that the bankrupt "shall forfeit all right to a discharge and all benefits under this Act; and such discharge, if granted, either on or without an offer of composition, shall be annulled."

The object of that provision is not that any part of the bankrupt's estate may be recovered for his creditors. The granting of the prayer of such a petition as this will have no such effect. It will merely condemn the bankrupt to remain an undischarged bankrupt, and the 151st section can, directly at least, have no further effect. That is, it appears to me a penalty as much as anything can be; it is a penalty for having been concerned in an illegal transaction. Now, in that point of view, this petition is in every sense a penal prosecution, and therefore I am clearly of opinion that such a penalty will not transmit against a bankrupt's representatives. This is a much stronger case than the cases of penalties against tutors and curators quoted to us; the penalty provided by the Acts under which these proceedings were brought is much less than this. It is a mere precuniary loss. No doubt a tutor who failed in the duties imposed upon him by these Acts might be removed as suspect, but that is not to be compared with the personal disqualification and disgrace which is to be endured under this enactment for a man's whole life.

I think, therefore, that this petition, as it is clearly of a penal nature, is incompetent, and therefore I think the judgment of the Lord Ordinary ought to be affirmed. I do not say I adopt all his views as he has expressed them in his note. The simple ground on which I think our judgment should proceed is, that this is a penal prosecution, which cannot follow a man after his death.

Lords Deas and Mure concurred.

Lord Shand—I concur with your Lordships in thinking that this petition should be dismissed as incompetent. If the effect of this application had been merely to set aside the discharge of the bankrupt, with the result which that would have at common law, my opinion would have been different. But the 151st section of the statute, besides cutting down the discharge, goes on to provide that the bankrupt "shall forfeit all benefits under this Act." The result of that is, that this penal consequence, follows, viz., that neither he nor his representatives could ever propose a new composition, or get a new discharge, or any other benefit which the Act affords. This clause therefore introduces a highly penal consequence, and that it does so appears by the prayer of this petition. It asks us to "find that the said bankrupt has forfeited all right to a discharge, and all benefit under the Bankrupt Act." That being so, we have clearly to deal with this as a penal proceeding, since it destroys all future claim to a discharge, and leaves the bankrupt liable to pay twenty shillings in the pound, a result which would not follow at common law; for if there were no such provision his representatives would be left at liberty to come forward again and propose a new composition and get a new discharge. It is because of these penal consequences that I think this petition is incompetent.

The Court adhered.

Counsel for Petitioner (Reclaimer) — Brand. Agent—J. Watson Johns, L.A.

Counsel for the Trustee — Guthrie Smith — M'Kechnie. Agent—John Ronald, S.S.C.

Counsel for concurring Creditors — Scott — R. V. Campbell. Agents — A. Kelly Morison, S.S.C., and A. Kirk Mackie, S.S.C.

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*Friday, November 2.*

## FIRST DIVISION.

### VINCENT, PETITIONER, *v.* LINDSAY (CHALMERS & CO.'S TRUSTEE).

*Process—Petition for Recall of Arrestments—Competency of Proof.*

A petition prayed for the recall of arrestments used by the respondent on the goods of a third party, the petitioner stating that the goods had become his property before the execution of the arrestment. It was averred by the respondent that there had been no real *bona fide* transaction between the parties, and that the alleged sale was a pretence to avoid the diligence. On a motion by the petitioner to allow the respondent a proof of his averments, the Court *held* that these being statements respecting the validity of the arrestments, must be tried in the action of furthcoming, and that no proof on such questions could be allowed in the petition.

*Observed* (*per* the Lord President) that under such a petition the Court must be able to say "either (1) that arrestments should never have been used at all, or (2) that they should be recalled upon caution being found."

Counsel for Petitioner—Trayner. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondent—A. J. Young. Agents—Wallace & Foster, solicitors.

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*Friday, November 2.*

## FIRST DIVISION.

[Lord Young.

### CRAWFURD'S TRUSTEES *v.* BROWN AND OTHERS.

*Succession—Residue—General and Special Bequest of Residue.*

A truster in a settlement containing a destination of the residue of the estate, directed the trustees to make payment of a sum of £10,000 to an individual, and in a codicil recalled that direction and substituted for it a direction to pay out of that sum various legacies to the amount of £6700 to certain charitable institutions, and "the balance of the fee of the said principal sum of £10,000, being £3300," to A and B. One of the charitable bequests having failed, *Held* (*revg.* the Lord Ordinary, Young) that the sum thereby set free fell into the general residue dealt with by the original deed; *diss* Lord Deas, who held that it fell to A and B as being part of the balance of the fee of the £10,000.

*Observed* (*per* Lord President) that "where there is a general residuary legatee there is a presumption against the creation of a special residue."

This was a question arising out of the terms of a trust-disposition and settlement dated 12th January 1839, executed by Miss Janet Crawfurd, and a codicil thereto annexed, of date 3d February 1841. The trustees appointed under Miss Crawfurd's settlement raised an action of multiplepoinding against the Glasgow Emancipation Society, Alexander James Dennistoun Brown, and the trustees of the late Mrs Maclae, each of which three parties claimed a sum of £1000 under Miss Crawfurd's settlement and the relative codicil, under the following circumstances:—

Miss Crawfurd in her original settlement, amongst other legacies, directed her trustees to pay "to Mrs Jean Brown, otherwise Ewing Maclae, in liferent for her liferent use allenarly, and the foresaid Major James Dennistoun Brown in fee, the sum of £10,000 sterling; Declaring that in case the said Mrs Jean Brown shall die survived by the said Humphrey Ewing Maclae, her said husband, he shall be entitled to the liferent of one half of said sum during the period of his survivance."

The provisions of this deed as to the residue of her estate were these—"*Fifth*, In the event of the free residue of my estate, after paying or providing for the whole legacies and provisions hereinbefore mentioned, amounting to the sum of £5000, I direct my said trustees to lay out, mortify, and invest the said sum of £5000; and in case the residue of my estate shall not be sufficient to yield that sum, then the amount of said residue, whatever it may be, in the purchase of heritable property in Scotland, in one or more lots, as they may find necessary or judge most advisable and beneficial, and to take the titles thereof in manner and for behoof as aftermentioned; and in case the residue of my estate, after paying and providing as aforesaid, shall amount to more than the foresaid sum of £5000, to be mortified and invested as before and after mentioned, then I direct my said trustees, after mortifying and investing said sum, or providing for such investment, to pay over the whole of the remainder of such residue to the foresaid Mrs Jean Brown, otherwise Ewing Maclae, her heirs or assignees."

In the codicil Miss Crawfurd made this alteration on her settlement—"In exercise of my reserved powers, I do hereby recall the appointment upon my trustees therein named, and the survivors of them, to pay to the said Major James Dennistoun Brown and his heirs the sum of £10,000 sterling, by said settlement provided to Mrs Jean Brown, otherwise Ewing Maclae, in liferent, and the said Major James Dennistoun Brown and his foresaids in fee;" and "in regard to the said sum of £10,000, I direct my said trustees to hold the same in trust for the ends, uses, and purposes following: viz., in the first, place, for behoof of the foresaid Mrs Jean Brown, otherwise Ewing Maclae, in liferent, for her liferent use allenarly, whom failing, survived by the