Thursday, July 14.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MOUAT *v* SMITH.

Ship—Managing Owner—Carpenter's Repairs.

Laurence Mouat, a carpenter in Lerwick, raised this action against Andrew Smith, merchant, Lerwick, to recover payment of the sum of £76, 9s. 9d. as the price of certain furnishings and repairs made on the schooner "Krydseren" by the order of the latter, who was the managing owner. The defender, while admitting that the debt was justly due, pleaded in defence—(1) That the pursuer was a joint owner with him in the vessel, which had been chartered by the parties as a speculation for the fishing season; (2) That the season having proved a failure, an accounting had to be entered into between the parties, in the result of which it appeared that the pursuer's shares of the losses incurred counterbalanced his charges for the repairs and furnishings rendered to the ship.

The Lord Ordinary (RUTHERFURD CLARK) decerned against the defender. The defender having reclaimed, the Court adhered, being of opinion that the pursuer was entitled to recover payment for the repairs admittedly made on the ship from the defender as managing owner, and that it was incompetent under the conclusions of the present action to enter upon the questions of accounting between the parties.

Counsel for Reclaimer—M'Kechnie—Galloway. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondent—Johnstone—Young. Agent—George M. Wood, S.S.C.

Thursday, July 14.

FIRST DIVISION.

[Sheriff of Renfrewshire.

MATHER *v.* M'KITTRICK (MATHER'S TRUSTEE).

Bankruptcy—Right of Trustee to Refuse to give his Report under Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 146.

Held (*diss.* Lord Deas) that the trustee in a sequestration has no discretion to refuse to deliver his report on the bankrupt's conduct under sec. 146 of the Bankruptcy Act, when demanded by the bankrupt five months after the date of the deliverance awarding sequestration, with a view to obtaining a discharge, the proper course for the trustee being, if he thinks fit, to oppose the bankrupt's petition for discharge.

The defender in this case was the trustee on the sequestrated estate of the pursuer. The object of the action was to have the defender ordained to prepare and deliver to the pursuer a report on the pursuer's conduct, in terms of the 146th section of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79). That section, after setting forth various conditions necessary to the bankrupt's discharge without a composition, continues as follows:—"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 as to 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."

In reply the defender averred—"The application for pursuer's sequestration was made by the pursuer himself with concurrence of a creditor to the statutory amount, and was made for pursuer's own benefit. Nothing has been realised from the estate by the creditors, and the bankrupt alone has derived any advantage from the sequestration. The defender's remuneration as trustee has been paid, with the exception of a small balance of 10s. 9d., but there remains unpaid a balance of £32, 5s. 1d. of a law account incurred by the defender, as trustee foresaid, to Messrs W. E. & A. J. Annan, writers in Glasgow, for the necessary expenses of pursuer's sequestration. The said law account amounts altogether, as taxed, to £52, 5s. 1d., a considerable portion of which is outlay. The pursuer in his business of builder has recently had some good contracts, for the profits of which he has not accounted. The defender believes and avers that from the profits of these contracts the pursuer is able, or ought to have been able, to pay the balance of the expenses of his sequestration."

The pursuer pleaded—"The defender having, in breach of his duty as trustee foresaid, failed and refused, or at least delayed, to furnish a report in terms of the 146th section of the Bankruptcy (Scotland) Act 1856, decree as craved should be pronounced."

The defender pleaded—"(1) The creditors of pursuer having realised nothing from pursuer's sequestration, and the pursuer alone having derived any advantage from it, it is but reasonable that he should pay the expense of the sequestration. (2) The pursuer being able to pay the balance of the expenses of his sequestration, is not entitled to his discharge nor to the report asked for, except on condition of his paying the said balance. (3) *Separatim*—The pursuer having failed to make a fair discovery and surrender of his estate, the defender is not bound to furnish the report craved."

The Sheriff-Substitute (COWAN) sustained the

defences, and *in hoc statu* refused the prayer of the petition, adding this note:—"The statute makes it an essential of the bankrupt obtaining his discharge that there shall be produced a report by the trustee. By necessary implication this contemplates the possibility of there being cases in which the trustee may withhold his report, and while under the authority of *Whyte* v. *Robertson* (1879), 6 R. 854, the action of a trustee in withholding a report is reviewable by the Court, so that upon frivolous grounds he cannot be permitted to do so, yet where good and sufficient reasons for that action on his part are disclosed, the Court will not compel him to furnish it. In the present case the bankrupt himself applied for sequestration, which has been carried through for his benefit. It is most unreasonable that he should not pay the expenses incurred. The case referred to at the debate—*Napier* v. *Paterson* (1850), 13 D. 222—is quite in point, and indeed leaves hardly room for argument."

The pursuer appealed, and argued—The trustee had a statutory duty to perform, viz., to prepare the report, and after the lapse of five months from the date of the deliverance awarding sequestration to deliver it on the requisition of the bankrupt. It might be that he could successfully oppose the bankrupt's discharge, but he was not entitled to take the matter into his own hands and prevent the bankrupt from even moving for his discharge.

Replied for the trustee—*Whyte* v. *Robertson* showed that the trustee was entitled to refuse to give his report, for there the Court considered the ground of the trustee's refusal. Here the trustee's allegations showed that the bankrupt was not entitled to obtain his discharge—*Napier* v. *Paterson*—consequently the trustee was right in refusing to give the report.

Authorities—*Napier* v. *Paterson*, 3d Dec. 1850, 13 D. 222; *Whyte* v. *Robertson*, Mar. 19, 1879, 6 R. 854.

At advising—

Lord Mure—In this case the bankrupt has presented a petition founded on the 146th section of the Bankruptcy Act, in which he craves the Sheriff to ordain the respondent to prepare and deliver a report in terms of that section. He asks for that and that alone. This is opposed by the trustee on his sequestrated estate, on the ground that the bankrupt is due certain accounts incurred in the sequestration, and that until they are paid he is not entitled to have what he asks for. The Sheriff-Substitute has given effect to these defences, and has refused the petition, finding the defender entitled to expenses, and in his note he indicates an opinion that the trustee's objection is, on the merits, a good objection.

Under this application it is maintained that the bankrupt is entitled of right to get what he asks for, and I am unable to read the section founded on without coming to the conclusion that this is the just construction of the statute. That section, after general provisions relating to the bankrupt's discharge, enacts "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 as to 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." The matters therefore on which the trustee is to report are certain points connected with the bankrupt's condition which are peculiarly within the cognisance of the trustee. Now, it is made a condition precedent of the bankrupt moving for his discharge that he shall obtain this report, and I can see nothing in the statute which puts it into the power of the trustee to refuse to deliver the report after the lapse of five months. I think he is bound to give it.

In the present case the trustee has refused to deliver the report because he thinks that certain accounts should first be paid, and the Sheriff thinks that the trustee is right, on the authority of the case of *Napier* v. *Paterson*. Now, the non-payment of these accounts may be a sufficient ground for refusing to grant the bankrupt his discharge. If the matter comes up in the proper way the Sheriff may be quite right. But, on the other hand, in the present proceeding I think he is wrong. I think the bankrupt is entitled to demand this report as a matter of right. I have a strong impression that when I was in the Outer House—and I was Junior Lord Ordinary for a considerable period—I have on several occasions ordered trustees to produce their reports, leaving all questions as to the bankrupt's discharge to be settled afterwards.

Lord Deas—In the case of *Whyte* v. *Robertson* the trustee declined to make a report, and that refusal was brought under our cognisance on its merits—that is to say, the question was raised and duly argued whether this refusal was reviewable by the Court. We held that it was, and that without having any report, and precisely in the shape in which the question is raised here, by discussion at the bar. The Sheriff-Substitute infers, and I think rightly infers, from that decision that as we reviewed that case on the merits, the present case is also reviewable to the effect of finding whether the trustee is right or wrong in his refusal. If the question on the merits had, in the opinion of your Lordships, been before us, I do not understand that any of your Lordships dispute that the trustee's refusal was justifiable, or that the Sheriff-Substitute is right when he says that "it is most unreasonable that the bankrupt should not pay the expenses incurred." I think, therefore, that it is not only in accordance with the statute, but most expedient in itself, that the trustee, if he thinks fit, should have the power of refusing to make this report, otherwise the whole expense of preparing the report will, it may be unnecessarily, be incurred. I cannot doubt that the Sheriff-Substitute has come to the right conclusion in his interpretation of

the case of *Whyte* v. *Robertson* which we had so recently before us. I think the first thing to be done is to discover whether the trustee is right or wrong in his refusal.

Lord Shand—I concur with my brother Lord Mure. The 146th section of the Act provides that "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." Now, this provision of the statute, I think, states distinctly the mode in which a trustee having an objection to the bankrupt's discharge is to assert that objection. This was the course which was followed in *Napier* v. *Paterson*, and I do not doubt on the authority of that case that the trustee has only to appear and state that the bankrupt has not paid these expenses and the discharge will not be granted. But the question is, whether the trustee has not put the matter out of proper shape by refusing to give this report, in which he has a personal interest and the bankrupt has a contrary interest? The bankrupt as a preliminary even to moving for his discharge must get the report, for it is provided "that it shall not be competent for the bankrupt to present a petition for his discharge or to obtain the consent of any creditor to such discharge until the trustee shall have prepared a report." And it is further provided "that such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by any other direct reference, in any consent to his discharge." There is in the statute no indication of any possible ground on which the trustee may refuse to give this report. I take it that it is a statutory duty incumbent on the trustee to deliver the report on the requisition of the bankrupt. The bankrupt may be unable to pay this money now, but he may undertake and be able to pay it before his discharge. The trustee says, "No, You must pay now, and until you pay I will not give you the report." That appears to me to be an unreasonable position. I think it would be unfortunate for us to hold that the trustee has it in his power to put a compulsitor on the bankrupt to oblige him to yield to his demands. The report must be given in, and if the trustee has any objections he may state them when the bankrupt applies for his discharge.

As to *Whyte* v. *Robertson*, the first remark I have to make is that the point here raised was not under discussion there; and secondly, there is no real conflict between the two cases. There was a fair ground for arguing, as was done in *Whyte* v. *Robertson*, that as a condition of obtaining the report the bankrupt must give a fee for the report. This position we found to be an unsound one, although fairly maintainable, but it has really nothing to do with the general question whether the trustee may withhold his report whenever he thinks fit.

Lord President—In this case the trustee states—"The application for the pursuer's sequestration was made by the pursuer himself with the concurrence of a creditor to the statutory amount, and was made for the pursuer's own benefit. Nothing has been realised from the estate by the creditors, and the bankrupt alone has derived any advantage from the sequestration." The trustee further states—"The defender's remuneration as trustee has been paid, with the exception of a small balance of 10s. 9d., but there remained unpaid a balance of £35, 5s. 1d. of a law account incurred by the defender, as trustee foresaid, for the necessary expenses of the pursuer's sequestration." Now, if the facts are as here stated, no one has suggested that there is any doubt that the bankrupt will not get his discharge till these accounts are paid. But undoubtedly there is a question of some importance in practice here raised, namely, whether the non-payment of these expenses is a sufficient reason entitling the trustee to refuse to give his report, or whether the proper course for the trustee is not rather to give his report, and, if he thinks fit, appear and oppose the bankrupt's application for discharge. I have had considerable difficulty on this point, but after full consideration I have come to agree with the majority of your Lordships.

I quite see with Lord Deas that some difficulty arises from the case of *Whyte*. But, in the first place, the present question, as Lord Shand has pointed out, was not raised in that case. A more important consideration however is, that it might be a very good reason for the trustee refusing to give the report if he was entitled to charge a special fee for preparing that report. Because it is quite consistent with practice in other cases that it should be a condition of the delivery of any special report that the person who has prepared the report should be entitled to demand payment of his fee and of the expenses he has incurred, as, for instance, in the case of a decree-arbitral, or where a law-agent has prepared a report for a person who is not his ordinary client. In the case of *Whyte* we held that the trustee was not entitled to make such a demand. It was quite possible therefore to consider that case on the merits without considering whether in other circumstances and for other expenses the trustee was entitled to refuse to give his report. In this view I do not think that we are precluded by the case of *Whyte* from considering whether the trustee may refuse to deliver his report on such grounds as he has at present taken up; and on the whole question I think that the trustee has mistaken his remedy, and that he must wait till the bankrupt's petition for discharge is presented, if it ever is presented, and then oppose the granting of the discharge.

The Court recalled the interlocutor of the Sheriff-Substitute, and appointed the trustee to prepare and deliver the report, as prayed for, to the pursuer in terms of section 146 of the Bankruptcy (Scotland) Act 1856.

Counsel for Appellant — Strachan — Rhind. Agent—William Officer, S.S.C.

Counsel for Respondent—Jameson. Agents—Henry & Scott, S.S.C.