LORD M'LAREN—I concur. The difficulty in dealing with these cases arises from the Act of Parliament limiting our jurisdiction. The Act is 50 Geo. III., c. 112, and clause 28 enacts that "all causes not exceeding the value of £25, shall from and after the passing of the Act be carried on in the first instance before the inferior judges in the manner directed, and with the exceptions specified in the Act passed in the third session of the second Parliament of His Majesty King Charles the Second, entitled "Act concerning the Regulations of the Judicatories."

These relate to actions which but for those provisions could not have been instituted except in this Court.

Now, this is a cause not exceeding £25, and while there is no express restriction of jurisdiction in the clause quoted in the form of procedure by way of special case, I concur in the opinions which have been expressed in previous cases, and in the present case by your Lordships, that it must be dealt with under the same limitation as all other causes.

LORD SHAND was absent.

The Court dismissed the special case as incompetent.

Counsel for the First Party—Salvesen. Agent—S. Greig, W.S.

Counsel for the Second Parties — C. N. Johnston. Agent — William Balfour, Solicitor.

Saturday, December 21.

FIRST DIVISION.

[Lord Trayner, Ordinary.

GEDDES *v.* QUISTORP.

Bankruptcy—Trustee—Discharge—Radical Right of Bankrupt in Estate after Discharge without Composition—Claim not Inserted in State of Affairs—Title to Sue.

A bankrupt, after he had been discharged but not re-invested in his estates, and after the trustee in his sequestration had been discharged, raised an action for a debt which had existed prior to his sequestration, but which he had not mentioned in the state of affairs made up by him in the sequestration. *Held* (following *Whyte* v. *Murray*, November 16, 1888, 16 R. 95) that he had a good title to sue.

This was an action at the instance of Robert Geddes against Mrs Emma Lumb or Quistorp for payment of a sum of £300 alleged to have been lent by the pursuer to the defender on 9th March 1878. The record contained, *inter alia*, the following averments—"(Cond. 3) For some years subsequent to the said loan having been made the defender was not in a position to repay the same, and the pursuer did not press her for repayment. She has latterly, however, succeeded to considerable means, and the pursuer has repeatedly requested her to repay the said loan, but she refuses or delays to do so, and the present action has become necessary. Explained that both the pursuer and the trustee in his sequestration have been discharged. (Ans. 3) Admitted that the pursuer did not press the defender for payment of the said sum, and that she refuses to pay it. *Quoad ultra* denied. Although the defender lived in the pursuer's house for nearly two years from June 1887, he never even suggested until she had given him notice that she was leaving that said sum was a loan to her. The defender on two occasions advanced considerable sums to the pursuer, and he repaid both loans to her without making any demand whatever for payment of the sum now sued for. Explained further that the pursuer's estates were sequestrated under the Bankruptcy Statutes on 1st December 1886. In the state of affairs made up by him no mention whatever is made of the present claim. The pursuer was discharged without composition on 18th August 1887. In these circumstances he is now in any event precluded from maintaining the present action."

The defender pleaded, *inter alia*—"(1) No title to sue. (2) The pursuer's statements are irrelevant and insufficient to support his pleas."

The Lord Ordinary (TRAYNER) on 6th December 1889 pronounced the following interlocutor—"Repels the first and second pleas-in-law for the defender, and before further answer allows the parties a proof *habili modo* of their respective averments on a day to be afterwards fixed: Finds the defender liable in expenses, &c.

"*Opinion.* — The pursuer was sequestrated in 1886, at which time the debt now sued for was due to him if due at all. He did not state his present claim as one of his assets in the state of affairs given up by him in the sequestration. He has been discharged, and so was his trustee. In these circumstances the defender pleads that the pursuer has no title to sue the present action. On the authority of the case of *Whyte* v. *Murray*, 16 R. 95, I think the defender's plea must be repelled. Assuming that the sum sued for is a debt due to the pursuer or to his sequestrated estate, there must be a title in someone to recover it. The trustee having been discharged no one has such a title but the pursuer. The mere fact of his having failed to state this claim as an asset or his having concealed it from his creditors is no reason why it should not now be recovered. His failure to state or his concealing the debt does not discharge the debtor, and the creditors of the pursuer will have their remedy if decree should be pronounced by reviving the sequestration and claiming the fund recovered. I was referred to the case of *Kerr* v. *Moody*, 13 S.L.R. 480, as an authority for the proposition that when a bankrupt under sequestration conceals or fails to disclose to his creditors an asset due to him, and is thereafter discharged, he cannot sue for that asset. But *Kerr* v. *Moody* is not an authority for such a proposition. In that case

the question of title was not raised, but the fact that the bankrupt had not disclosed the asset was (taken along with the other proof in the case) regarded as raising a presumption that no such debt had ever been incurred. The defender will get the full benefit of what was said in *Kerr* v. *Moody* if on inquiry it turns out that the observations there made are applicable to the present case.

The defender reclaimed, and argued—The case differed from the case of *Whyte* v. *Murray*. In that case the claim sought to be enforced was a claim arising under the marriage-contract of the bankrupt's parents, and the provisions of that contract, and the circumstances under which the claim arose were known to the trustee. Here the claim was not known to the trustee, and was not disclosed by the bankrupt. The circumstances were precisely similar to those in *Kerr* v. *Moody*. No doubt the plea of "no title to sue" had not been stated in that case, but the opinions of the Judges in the Inner House proceeded on the view that the pursuer had no title. In the case of *Baillie* v. *Young*, 13 S. 472, a discharged bankrupt was held to have a title to sue for a debt which he had not disclosed in his sequestration, but that was expressly on the ground that he had been discharged under a composition contract and re-invested in his estates. In *Galbraith* v. *Whitehead*, May 17, 1863, 1 Macph. 644, it was held that a discharged bankrupt who had not been re-invested had no title to sue unless there had been abandonment of the claims on the part of the trustee.

The pursuer argued—The case was ruled by the case of *Whyte*. The fact that the pursuer had not mentioned the present claim in his state of affairs did not affect the question of title. His reason for not mentioning it was stated on record, but that concerned himself and his creditors alone. There was no title to sue in anyone else, and if the plea were sustained the defender would escape. But on the authority of the case of *Whyte* the pursuer's radical right to his estate had revived, and he had therefore a good title to sue. The case of *Baillie* was an authority against the defender. In that case there were averments of fraudulent concealment, but these were not considered in dealing with the question of title; whereas in the sequel to that case —*Baillie* v. *Young*, 15 S. 893—the composition contract was reduced on the ground of fraud. *Kerr* v. *Moody* was decided upon the merits, the omission of the claim on the state of affairs being one of the considerations which led the Court to hold that there was no debt due. In *Galbraith* v. *Whitehead* the trustee in the sequestration had not been discharged.

At advising—

Lord President—The Lord Ordinary has repelled the first and second pleas stated for the defender. These are—"(1) No title to sue. (2) The pursuer's statements are irrelevant." We have not had any argument against the interlocutor in so far as it repels the second plea, and therefore that may be passed over. The only question is whether there is any foundation for the plea of no title to sue. The state of the facts is that the action is raised for repayment of a loan made some years ago by the pursuer to the defender, and in dealing with the question before us we must of course assume that the claim is well founded. But then subsequent to the loan being made the pursuer was sequestrated, and the sequestration has since been brought to a close, the trustee discharged, and the bankrupt discharged. The plea of no title to sue is supported upon this ground that the pursuer did not include the claim he now makes against the defender in his statement of affairs as he was bound to do. There is no allegation of fraud against the bankrupt. The statement made is that no mention was made of the claim in the state of affairs. The explanation which the pursuer gives of that is that for some years subsequent to the loan the defender was not in a position to repay, and the pursuer did not press her, but that she is now able to pay. The matter therefore amounts simply to this—that this claim was not included in the state of affairs. It is not said there was undue concealment or fraudulent concealment, or that the bankrupt in omitting this claim was guilty of any fault, but still it must be admitted that he was in law bound to have included the claim in his state of affairs. The question comes to be, how does that support the plea of no title to sue? The bankrupt being discharged, and the trustee being discharged, where is the title to sue? It cannot be in the discharged trustee, but it may very well be in the bankrupt, for this simple reason, that when the trustee's discharge is completed, he ceases to be the owner of the bankrupt estate. The adjudication in his favour comes to an end, and he has no more title to sue for any asset of the bankrupt's estate than any other indifferent person. But the bankrupt's radical title revives whether he be discharged upon a composition or not. That was decided in the case of *Whyte* v. *Murray*, if indeed it required any decision. Now, the defender had certainly no interest that this claim against her should enter the state of affairs, and therefore she was subjected to no disadvantage or injury by its omission. But apart from that altogether, how this omission could affect the bankrupt's title to sue I cannot see. It might affect his right to retain it after receiving payment, because it is open to the creditors to revive the sequestration and have a new trustee appointed, who would be *in titulo* to demand from the bankrupt the money recovered. If the creditors were alive to their own interest they would take means to ensure that the money is made available for their debts. But all this does not affect the title to sue. The only person who can sue is the bankrupt himself.

The case of *Baillie* v. *Young* is a very good illustration of the principle. In that case the bankrupt was discharged upon a composition, and retrocessed in his estates. It was alleged that he had omitted the debt

for which he was suing from his state of affairs, and concealed it from his creditors fraudulently, and that was proved in a subsequent action in which the discharge was reduced on the ground of fraud. But the allegation of that fraud was not held to affect his title to sue in the first branch of the case (13 S. 472). If that be so, what is the difference between that case and the present? This only—that in that case the bankrupt was discharged upon a composition, and in this case without. But then there comes in the authority of the case of *Whyte*, which establishes that although the bankrupt is discharged without composition his radical title revives, and there being no trustee, the bankrupt has the sole title.

The only other case referred to as bearing on the case was the case of *Kerr* v. *Moody*. As I understand that case there was no defence of no title to sue, but a defence upon the merits only. That defence was sustained by the Lord Ordinary, and his interlocutor was affirmed in the Inner House. So that so far as the judgment was concerned it dealt with no question of this kind at all. It is said some observations were made by the Judges which lend countenance to the doctrine that where the bankrupt omits to set forth a debt in the state of affairs in his sequestration he is barred from recovering it afterwards. I do not so understand these observations. If they have such a meaning they are *obiter*, and not from the whole Judges, but I think it would be doing injustice both to the Lord Justice-Clerk and to Lord Neaves to attribute such a meaning to them. As I heard their opinions read they did not import such a meaning at all, but, on the contrary, they just set forth the considerations which led them to confirm the judgment of the Lord Ordinary on the merits as they tended to show that no debt was due.

That being so, I can see no authority against the Lord Ordinary's interlocutor, and I am of opinion that if you combine the authority of the cases of *Baillie* and *Whyte* there is ample authority for it.

LORD ADAM—I agree with the Lord Ordinary both in his judgment and in his reasons. We must assume that the debt is due. Now, if we were to sustain this plea it would come to this, that there is no person in existence who would have a title to sue, which would be a very comfortable position for the defender. There is no trustee. The creditors cannot sue directly, and if, as we are asked to say, the discharged bankrupt has no title, then nobody has a title. I think that is a proposition quite contrary to the decision in *Whyte*, which I think rules this case. The principle of that case was that where a trustee has been discharged, and the bankrupt has been discharged, the effect is that the radical right of the bankrupt to his estate revives. That is exactly the position here.

As to the case of *Kerr*, I agree that there may have been observations on the effect of such an omission as in this case by the Lord Justice-Clerk, but in making these observations he had not the principle of the case of *Whyte* in view. That was not a decision on title. The question of title was not raised, and the case was decided on the merits. Whether the pursuer will find these averments equally formidable in this case I do not know. But it is upon the merits he must meet them.

LORD M'LAREN—This is an action by a discharged but not re-invested bankrupt for the recovery of a debt due prior to sequestration. The defence is no title to sue. That is partly rested on the ground that the debt in question had not been given up by the bankrupt in his state of affairs, and consequently that the trustee had not been in a position to sue for it, and could not be held to have abandoned it. When the case was opened I was rather impressed with this view, that a bankrupt who had not given up a claim in his state of affairs could not afterwards lay claim to it, but that his duty was to give intimation to his creditors. But on consideration of the case of *Whyte* I am satisfied that the principle I have endeavoured to state is one which can only be asserted with respect to the beneficial interest in the estate, and which does not affect the title to sue, and I think this follows from the consideration that the creditors have no direct action against the insolvent's debtors. In the present case the trustee has been discharged. There is no longer any representative of creditors *in titulo* to sue, and therefore the insolvent is in the same position as before sequestration—that is to say, he has not paid his creditors in full, and any property may be made available by the appointment of a trustee. The creditors, however, have no direct right of action. The legal title, however, must be somewhere, and I agree that from the moment the trustee is discharged the title passes to the bankrupt. In such a case as the present he is only a constructive trustee for his creditors, but as such he is entitled to sue debtors. There might be cases where it would be proper that intimation should be made to the creditors. In the present case it does not seem to be necessary, and has not been suggested.

The Court adhered.

Counsel for the Defender—Asher, Q.C.—Ure. Agents—M'Gregor & Cochrane, S.S.C.

Counsel for the Pursuer — Jameson — Younger. Agents—Tait & Johnstone, S.S.C.