Tuesday, February 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LESLIE *v.* LESLIE'S CREDITORS.

Bankruptcy — Sequestration — Conditional Discharge—Minister's Stipend—Assignation to Creditors.

The Court has power, in an application by a parish minister for his discharge in bankruptcy, to make it a condition of the discharge that the bankrupt shall assign a portion of his stipend to his creditors.

Circumstances in which held that £80 was a reasonable sum so to be assigned out of an income, from stipend, manse, and glebe, of about £270.

In 1894 the estates of the Reverend Alexander Leslie, minister of the united parishes of Evie and Rendall, in Orkney, were sequestrated. The claims admitted to rank amounted to £2161, 15s. 3d.

In January 1900 Mr Leslie presented a petition for his discharge, to which certain of his creditors lodged answers.

From the statements made in the petition and answers it appeared that Mr Leslie's estate had paid 5s. 6d. in the £, that the annual emoluments resulting from his stipend, manse, and glebe amounted to about £273, and that from and after January 1895 all these emoluments, with the exception of £106, had gone to the creditors.

The trustee in the sequestration lodged the following report—"The trustee has to report, in terms of the 146th section of the Bankruptcy (Scotland) Act 1856, that the said Reverend Alexander Leslie has complied with all the provisions of the statute; that he has made a satisfactory discovery and surrender of his estates; that he has attended the diets of examination and has not been guilty of any collusion; and that the bankruptcy has arisen from innocent misfortunes, and not from culpable or undue conduct."

On 21st December 1899 the Lord Ordinary (PEARSON) pronounced the following interlocutor—"Finds the petitioner entitled to his discharge under the sequestration, on condition that he assigns to his creditors the sum of one hundred and twenty pounds per annum out of his stipend as minister of the united parishes of Evie and Rendall during his incumbency as minister thereof until the whole debts due by him under the sequestration be paid; and on said assignation being granted, grants commission to J. R. Cosens, Esq., Sheriff-Substitute at Kirkwall, to take the declaration of the bankrupt, and to report."

Mr Leslie reclaimed, and argued—Under section 146 of the Bankruptcy Act 1856, the bankrupt was entitled, provided that his bankruptcy had arisen from innocent causes, and that he had satisfied the statutory rules, to a discharge without conditions. The reasons why a discharge might be refused were enumerated in Goudy on Bankruptcy (1st ed. p. 71), and a refusal by the bankrupt to assign his future income was not among them. The Court could impose conditions, but it could only do so on relevant objections being made, and no objections were relevant which did not ascribe any improper character to the conduct of the bankrupt. Even if a certain amount must be assigned, the amount fixed by the Lord Ordinary was much too large. The bankrupt had to fulfil the duties of a parish minister, was an old man, and might shortly require an assistant. The case of *Learmonth* v. *Paterson*, January 21, 1858, 20 D. 418, was not in point, because there the discharge was refused on an adverse report from the trustee.

Argued for the respondents—The Court had a right to make the discharge conditional on an assignation of future income. This was clear from statute (Bankruptcy Act 1856, section 146), which provided that the Court might grant a discharge, "and may annex such conditions thereto as the justice of the case may require," and had often been exercised in practice, especially in cessio—*Learmonth* v. *Paterson, supra*; *Scott* v. *Macdonald*, March 5, 1823, 1 Sh. App. 363; *A B* v. *Sloan*, June 30, 1824, 3 S. 195; *Harris* v. *His Creditors*, June 11, 1836, 14 S. 964; *Barron* v. *Mitchell*, July 8, 1881, 8 R. 933; *Simpson* v. *Jack*, November 23, 1888, 16 R. 161. 2. If there was power to annex the condition at all, the Lord Ordinary's sum was reasonable. It left more for the minister's support than had been left in the cases above cited.

LORD PRESIDENT—The power which we are now called upon to exercise is a somewhat delicate one, and it is impossible to lay down any absolute rule in regard to it. The amount of debt contracted by the petitioner (upwards of £2000) seems at first sight large, but it is explained in a way not unfavourable to him. It appears that it was not due to extravagance on his part, but to the fact that he was the heir to a small estate on which a good deal of money was expended by his father and himself, and which fell so greatly in value that when sold it fetched less than the amount so expended upon it. Along with this we must take the report of the trustee, which bears that the petitioner "has complied with all the provisions of the statute; that he has made a satisfactory discovery and surrender of his estates; that he has attended the diets of examination and has not been guilty of any collusion; and that the bankruptcy has arisen from innocent misfortunes, and not from culpable or undue conduct." Accordingly, it may be held as established that no personal blame is imputable to the petitioner on account of which he should be visited with harsh treatment in this matter. It further appears that the sequestration has now continued for nearly six years; that from May 1894 to January 1895 the creditors awarded to the petitioner an allowance at the rate of £130 a-year, and for the subsequent period an allowance of £106 a-year.

This seems to me to be too small an allowance to enable a gentleman of the petitioner's position to live and perform the duties of his office, and the question which we have to consider is, what amount is it reasonable that he should pay out of his stipend for the benefit of his creditors so as to leave him an income sufficient to enable him to subsist and discharge these duties. It is not necessary, in my opinion, to consider whether or to what extent the stipend is attached by the sequestration. Lord Mackenzie, in the case of *Learmonth* (20 D. 420) held that the stipend of a minister and his right to the glebe were attached by sequestration, subject to the condition that the minister should receive such an allowance as might be necessary for his subsistence and to enable him to perform his parochial duties. It does not, for the purposes of the present question, make any practical difference whether the stipend is treated as having vested in the trustee, subject to the obligation to allow to the petitioner a *beneficium competentiæ*, or whether it is made a condition of his discharge that he shall assign a portion of his stipend to his creditors. The Court has power to say on what conditions the discharge should be granted, and there may be cases, as, for instance, where the bankrupt possesses a large alimentary allowance or a valuable copartnery, in which it would be reasonable to keep the sequestration open unless the bankrupt would agree to some arrangement which would make at least a part of such beneficial rights available to his creditors. In the present case the Lord Ordinary has found the petitioner entitled to his discharge on condition of his assigning to his creditors £120 per annum out of his stipend during his incumbency until the whole debts due by him under the sequestration are paid, and the important practical question is, whether the discharge should be withheld unless the petitioner agrees to assign this amount. Now, it seems to me that the petitioner should not in the circumstances be required to assign so large a proportion of his stipend as £120. I think that if he assigned that sum he would not be left in possession of such an income as would enable him to subsist and perform the duties of his office. The parties differ slightly as to the amount of the petitioner's emoluments. Mr Crole stated that they amounted, less owner's rates payable in respect of the glebe, and including £15 as the annual value of the manse, to £273, and Mr Cullen made the amount somewhat higher, but not so much higher as to make any material difference. Now, if £120 is deducted from £273, that would leave the petitioner only about £150 a-year—an amount which appears to me to be insufficient to enable the minister of such a parish to live and discharge his duties. I accordingly suggest that the petitioner should receive his discharge on condition that he assigns £80 a-year to his creditors. This would leave him about £200 a-year as the aggregate of his emoluments, and it does not appear to me that this would be too much.

LORD ADAM—I agree. This is an application for discharge in a sequestration which took place six years ago, and it is made under the section (146) of the Bankruptcy Act 1856 which authorises the bankrupt to apply to the Court from time to time for his discharge. It is not disputed that the bankrupt has complied with all the statutory requirements, and therefore if there were nothing in the way he would at once have obtained his discharge. But he is a parish minister, and as such entitled to a stipend, and the trustee says that he must assign a portion of that stipend as a condition of being discharged. It was argued for him that that condition was one which we have no power to impose, and that there were certain conditions in respect of which a discharge might be refused, and this was not one of these. That does not prove more than that this condition has not hitherto been the subject of discussion, and I have no doubt that we have power to impose it. In the case of a *spes successionis* which has not vested in the debtor, and therefore has not fallen under the sequestration, the only way in which the creditors can reach a valuable fund is by withholding a discharge until the debtor consents to assign it. If that condition is competent, why should it not be competent to say to a parish minister that he shall not obtain his discharge except on the condition of assigning so much of his stipend as may be unnecessary for the maintainance of his position. The question therefore comes to be, what amount shall we ask this gentleman to pay? A parish minister is in this respect in the same position as other persons in receipt of salaries for duties performed, and we are not to place him in a position in which he cannot fairly and decently discharge the duties of his position. His creditors are entitled to everything superfluous, but we must keep in view that he must be left in a position to discharge his duties. That is very much a question of discretion in each particular case, and taking the figures of the present case I think that the sum asked by the creditors is too large, and agree with your Lordship that £80 would be the proper amount.

LORD M'LAREN—It has not been argued that the stipend of a parish minister is adjudgeable, and I should think that proposition would be very difficult to maintain, because the stipend is given as subsistence money for the performance of public duties, and we should not allow the creditors to attach the stipend by diligence, leaving the duties of the office unperformed. The creditors can only take benefit from the stipend by keeping up the sequestration and drawing the surplus income, or by making it a condition of the bankrupt obtaining a discharge that he should assign a certain portion of his income to them. I should have thought that it would be for the advantage of the debtor and of the creditors that the debtor should voluntarily offer to give up as much as he could spare, with the assistance of his friends, for a limited number of years, after which the sequestration would

come to an end. But this view does not seem to have found favour with the parties, and although we have an unqualified discretion in the matter of terms and conditions, we should not exercise it by making such an arrangement, because if it is left to the Court to say how much of his stipend a minister ought to assign to his creditors, the stipend must be treated like any other heritable annuity which is subject to an annual burden, and the question for decision is, what part of the annuity the debtor may retain in order that his duties may be properly performed. At the same time we are to consider not only the present but also the future performance of those duties, and that in the case of a man of seventy it may become necessary to have an assistant, who would be required to be paid for his services. I am not sure whether that element was present to the mind of the Lord Ordinary, but looking to the future as well as the present, I agree with your Lordship that £120 is too large a proportion of this gentlemen's stipend to be taken by his creditors.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor [of 21st December 1896]: Find the petitioner entitled to his discharge under the sequestration on condition that he assigns to his creditors the sum of £80 per annum out of his stipend as minister of the united parishes of Evie and Rendall during his incumbency as minister thereof until the whole debts due by him under the sequestration are paid, and on said assignation being granted, Grant commission to J. R. Cosens, Esq., Sheriff-Substitute at Kirkwall, to take the declaration of the bankrupt, and to report to the Lord Ordinary: Find neither party entitled to the expenses of the reclaiming-note," &c.

Counsel for the Reclaimer—Crole. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondent — Cullen. Agent—James Gibson, S.S.C.

Tuesday, February 20.

FIRST DIVISION.

DAVIDSON, PIRIE, & COMPANY *v.* DIHLE.

Process—Transference of Action—Foreign—Transference against Representatives of Deceased Defender.

A foreigner against whom an action of damages, proceeding on arrestments *ad fundandam jurisdictionem*, had been raised died in the course of the procedure, after a reclaiming-note had been presented. The pursuer requested his representatives to sist themselves as parties to the action, and on their failing to do so used further arrestments, and lodged a note craving the Court to transfer the cause against them, but to the extent only of enabling the pursuers to obtain decree *cognitionis causa tantum*. The pursuers failed to call certain of the representatives, whose addresses were unknown both to the pursuers and to the remaining representatives. Objection was taken to the transference by the defender's representatives on the ground of the failure to call the whole class, and also in respect that there was no authority for transforming an action originally instituted against a living person into one of constitution against his representatives. The Court *repelled* the objections and *transferred* the cause as craved.

On November 17th, 1897, Messrs Davidson, Pirie, & Company, fishcurers, Leith, raised an action against Heinr. Herm. Dihle, herring merchant, Stettin, proceeding on arrestments used *ad fundandam jurisdictionem*. The action was one of damages for breach of contract to purchase a consignment of herrings. Defences were lodged, and after certain procedure the Lord Ordinary (LOW) pronounced an interlocutor repelling certain of the defender's pleas-in-law, and before further answer allowing the pursuers a proof of their averments of damage.

On 5th January 1899 the defender reclaimed, and the case was put out for hearing, but the pursuers received intimation that the defender had died on February 14th.

The pursuers presented a note to the Court, in which they made the following averments:—"The representatives of the said Heinr. Herm. Dihle have been requested to sist themselves as parties to the action, but they have not done so, and the pursuers are desirous that the cause should be transferred against the said representatives in order that the same may proceed. The pursuers have ascertained that letters of administration, or the equivalent thereof, were, of this date (April 4, 1899), taken out in the name of the following persons, being nephews and nieces of the deceased, viz.: Ewald Karl Max Freyer, criminal commissioner in Stettin; Max Wilhelm Bernhardt Freyer, veterinary surgeon in Grandenz; Klara Anna Amalie, widow of Farmer Paul Goetzoke, Waldows Hof, Stettin; Agnes Marie Fredericke, wife of Pastor Ludwig Fickert at Friebsess; Ernest Martin August Dihle, headmaster in Pasewalk; Helene Johanna Marie, wife of Siegfried Heinemann, merchant, Stettin; Sophie Fredericke Emilie Dihle, and Ernest Frederick Wilhelm Dihle, teacher, both residing in Berlin; and also in the names of Carl Zimmerman in Pasewalk, and L. Bergemann, cigar manufacturer, Stettin, as trustees of Karl Martin Dihle, Gustav Karl Wilhelm Dihle, Robert Heinrick Dihle, brothers of the deceased, and Auguste Wilhelmine, wife of August England, wheelwright, niece of the deceased, whose addresses are not known. Jurisdiction has been founded against the said representatives for the purpose of transference by arrestments *ad fundandam jurisdictionem* used of this