Tuesday, May 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

ROBERTS, PETITIONER.

Bankruptcy—Sequestration—Discharge—Declaration by Bankrupt—Bankrupt Insane—Nobile Officium—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 147.

By section 147 of the Bankruptcy Act 1856 it is enacted that after a bankrupt has been found entitled to his discharge he "shall make a declaration, or if required by the trustee or any creditor, an oath" to the effect that "he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, nor 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." Circumstances in which, the bankrupt having become insane, the Court, on the application of his *curator bonis, dispensed* with the declaration required by the section.

The estates of Henry Albert Edward Roberts, yarnspinner, Galashiels, were sequestrated on 8th October 1894. In 1897 he presented a petition for his discharge. In this petition the Lord Ordinary (PEARSON), on 26th January 1898, pronounced an interlocutor, whereby, in respect of no further appearance on behalf of the trustee, and that none of the creditors had appeared to state objections, he found the bankrupt entitled to his discharge as craved, and appointed him to appear and make a declaration in terms of the statute, and in respect of his state of health granted a commission to take the declaration.

In November 1900, Stanley Roberts, Inverleith Terrace, Edinburgh, was appointed *curator bonis* to the bankrupt Henry A. E. Roberts, who had become insane, and on 22nd December 1900 he was sisted as a party to the petition.

The curator then stated that the bankrupt was not in a condition to make a declaration under section 147 of the Bankruptcy Act 1856 (quoted in rubric), and moved that a declaration by himself be substituted. A medical certificate was obtained at the instance of the Lord Ordinary.

The Lord Ordinary (PEARSON) reported the case to the First Division, with the following opinion:—"This petition for the discharge of a bankrupt was presented on 9th July 1897, and on 26th February 1898 the bankrupt was found entitled to his discharge.

"Thereafter the bankrupt became of unsound mind, and a *curator bonis* was appointed to him on 6th November 1900. But for this circumstance the next step would be for the bankrupt to make a declaration or oath in terms of section 147 of the statute, that he 'has made a full and fair surrender of his estate, and has not granted or promised any preference or security, nor 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.'

"There is no provision in the statute for the case of the bankrupt not being of capacity to make the declaration.

"The *curator bonis* moved that I should appoint him to do so to the best of his knowledge and belief, and should thereupon pronounce the final deliverance of discharge. I thought it right to obtain a certificate as to the bankrupt's capacity, as the fact of his being under curatory did not necessarily negative his capacity to make such a declaration. The certificate now lodged bears (1) that it would be injurious to his health to make such a declaration, and (2) that he is quite incapable of understanding the nature or effect of it.

"In the event of the death of a bankrupt without emitting a declaration, it has been held that it may be taken by his representative 'to the best of his knowledge and belief'—*Robertson's Trustees*, 1842, 4 D. 627; *Keiller*, 1842, 4 D. 742. The present case seems to fall within the same principle, and it would be unfortunate if when all else is regular it were impossible to authorise a step so obviously for the benefit of the estate. But as it is a *casus improvisus* under the statute, and may be regarded as an exercise of the *nobile officium*, I have thought it proper to report the case."

In addition to the authorities mentioned in the Lord Ordinary's opinion, counsel for the petitioner cited 2 Bell's Comm. (M'Laren's ed.), p. 372; and suggested that the Court might dispense with the declaration under section 147.

LORD PRESIDENT—This case is attended with some nicety, because it appears that the bankrupt has satisfied all the requirements of the statute in so far as it is possible for a man mentally afflicted to do so. Sequestration was awarded as far back as July 1897, and all the known estate has been got in and divided among the creditors, including certain estate which accrued to the bankrupt after the sequestration. In these circumstances the alternatives are either that the bankrupt shall never get his discharge, or that some-one else shall make the declaration or oath required by section 147 of the Bankruptcy Act of 1856 in place of him, or that the Court shall, in the very special circumstances of the case, dispense with that declaration or oath. It appears to me that the last-mentioned course is the proper one to follow, seeing that the declaration or oath required by section 147 relates to *facta propria* of the bankrupt—to things which he alone could know, or at all events, to things as to which a *curator bonis* could not be expected to have any knowledge. The hypothesis of the section is that all known estate has been got in, but that in case the bankrupt should have concealed some part of his property, or done

some other illegal act, he should be required to swear that he has made a full disclosure, and has not granted or promised any preference or security, nor made or promised any payment, nor entered into any secret or collusive agreement to obtain the concurrence of any creditor to his discharge. That is an appeal to the bankrupt's individual knowledge and his conscience, and I think that we cannot well substitute a declaration by a *curator bonis*, or by any person in a similar capacity, seeing that such a person would not naturally know anything about the matters to which the declaration would relate. But it appears to me that the bankrupt should not be deprived of the benefit of his discharge when he has fulfilled all the requisites of the statute in so far as it is possible for a man in his position to do so, and if we have to exercise the *nobile officium* of the Court to enable him to obtain that discharge, I think the preferable course is to dispense with the declaration or oath required by section 147.

LORD ADAM—I am of the same opinion. The bankrupt here has, so far as any third party can find out, made a full and fair disclosure of his estate, and all that the Act still requires is a declaration or oath by the bankrupt that he has made a full and fair disclosure, and has not made any secret arrangements with his creditors. Now, the bankrupt here is in a state of mind which makes it impossible for him to make such a declaration, and the question is, whether we should in these circumstances dispense with the declaration required by the statute, or whether some-one else should make the declaration for him. It seems to me preferable that the declaration should be dispensed with rather than that it should be made by a person not specified by the Act, and who, in a hundred cases out of a hundred and one, would know nothing about it. I think that would be a greater and unnecessary exercise of the *nobile officium*, and I agree that we ought in the present circumstances to dispense with the declaration.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the petition by the bankrupt Henry Albert Edward Roberts on the report of Lord Pearson, Ordinary, with the medical certificate of A. E. Henderson, M.B., C.M., and the motion of Stanley Roberts, *curator bonis* to the bankrupt petitioner: Dispense with the declaration or oath required by section 147 of the Bankruptcy (Scotland) Act 1856, and Acts amending and explaining the same: Remit to the Lord Ordinary to discharge the petitioner of all debts and obligations contracted by him for which he was liable at the date of his sequestration in terms of the prayer of the petition."

Counsel for the Petitioner—Cunningham. Agents—Gillespie & Paterson, W.S.

Thursday, May 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

JACKSON'S TRUSTEE *v.* WILLIAM DIXON, LIMITED.

Mines and Minerals—Lease—Working—Breach of Conditions of Working—Obligation "Fairly and Properly to Work"—Liberty to Work in Mode Tenant Might Deem most Advantageous—Damages.

A tenant in a lease of minerals bound himself "fairly and properly to work the said minerals," with liberty to adopt such mode of working the same as he might deem most advantageous for the complete excavation thereof. After the expiry of the lease the landlord brought an action of damages against the tenant, on the ground that the latter had not worked the minerals fairly and properly. He averred that the defender, having adopted the long-wall method of excavation, had improperly worked the upper portion first instead of the bottom portion, with the result that the latter was left covered with debris and broken strata, and thus rendered unworkable, and a large quantity of coal was lost to the landlord. The pursuer averred further that the defender had improperly left two ranges of pillars in a certain seam unworked, and had left these workings in such a condition that the coal therein could not be extracted. *Held* (*rev.* Lord Kyllachy, Ordinary) that the action was relevant.

By lease dated 22nd June and 20th July 1870, John Jackson, proprietor of Little Udston, Lanarkshire, let to William Smith Dixon, Govan Colliery, Glasgow, and his heirs, assignees, and sub-tenants, the whole coal, ironstone, limestone, fireclay, and all other mines, metals, and minerals in the lands of Little Udston for the period of thirty-one years from and after the term of Martinmas 1867. In 1873 a limited company under the name of William Dixon, Limited, was formed for the purpose of acquiring the whole business and undertakings of William Smith Dixon, including the said lease, which was duly assigned to the company. The company worked the coal, &c., in said lands until Martinmas 1898, when the lease came to an end and notice to remove was given. By the lease it was provided, *inter alia*, "With reference to the working of the said minerals, the second party [the lessee] hereby binds and obliges himself and his foresaids fairly and properly to work the said minerals, with liberty to him or them to adopt the long-wall, stoop-and-room, or any other mode of working the same, as he or they may deem most advantageous for the complete excavation of said minerals, and also at the expiry or other termination of this lease to leave the workings of such pits as are then in operation in good order and condition; declaring further, that the said