Saturday, January 18.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

GEMMELL, PETITIONER.

Bankruptcy — Sequestration — Discharge— Failure to Pay Five Shillings in the Pound —Circumstances for which Bankrupt not Responsible — Unsuccessful Litigation — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 146 — *Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap,* 22), *sec.* 6 (1).

A bankrupt more than two years after the date of his sequestration applied for his discharge. No dividend had been paid to the creditors. The trustee in the sequestration reported favourably and no creditors opposed. The petitioner's whole assets amounted to £25, and his liabilities to £657, of which sum £634 were the expenses incurred by him in unsuccessfully defending an action of right-of-way raised by a proprietor against the petitioner and others as representing the public. The petitioner maintained that, as he had defended the action in the public interest and upon the advice of counsel, his failure to pay five shillings in the pound had arisen from circumstances for which he could not justly be held responsible.

Held that the petitioner was not entitled to his discharge.

On 17th June 1899 the estates of James Gemmell were sequestrated under the Bankruptcy Act, and the sequestration was remitted to the Sheriff of the Lothians and Peebles at Edinburgh. George Lisle, C.A.. Edinburgh, was appointed trustee in the sequestration. No dividend was paid out of the estate.

On 1st October 1901 the bankrupt presented a petition in the Sheriff Court at Edinburgh for his discharge. The state of affairs lodged by the petitioner showed the value of his assets as £25, and his liabilities as £657, 13s. 9d., of which sum £634 consisted of the expenses of an action in the Court of Session regarding a right-of-way, for which he had been found liable as aftermentioned.

The report by the trustee under section 146 of the Bankruptcy Act 1856, produced with the petition, set forth that "the said James Gemmell has complied with all the provisions of the statute, with the exception that he has not 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. The trustee explains that the bankrupt valued his furniture at £25, which he declared to be his whole estate. He offered to pay the trustee the sum of £22, 10s., which the trustee agreed to accept; but this sum has not been paid."

A supplementary report by the trustee subsequently produced was in these terms —"The trustee has to report that since his last report the bankrupt has paid the price of the furniture therein referred to. The trustee has therefore to report that the bankrupt has made a fair discovery and surrender of his estate."

On 1st October 1901 the Sheriff-Substitute appointed intimation to be made to the creditors. None of the creditors lodged objections.

The petitioner thereafter lodged in process a statement of the grounds on which he maintained that he was entitled to his discharge, the substance of which will be found in the note appended to the interlocutor of the Sheriff-Substitute (ORPHOOT).

The Bankruptcy and Cessio (Scotland) Act 1881, sec. 6, enacts:—"Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect . . . that is to say, (1) A bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved to the Lord Ordinary or the Sheriff, as the case may be, that one of the following conditions has been fulfilled: (*a*) That a dividend or composition of not less than five shillings in the pound has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors: or (*b*) that the failure to pay five shillings in the pound as aforesaid has, in the opinion of the Lord Ordinary or the Sheriff, as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible."

On 2nd December 1901 the Sheriff-Substitute pronounced the following interlocutor:—"The Sheriff-Substitute having considered the foregoing petition, with the trustee's reports on the bankrupt's conduct and other productions, and having made inquiry and heard the petitioner's agent—no appearance having been made to oppose the application—Finds that the petitioner has not proved that his failure to pay out of his estate a dividend of 5s. in the pound has arisen from circumstances for which he cannot justly be held responsible: Therefore refuses the petition, and decerns.

Note.—"In this case no dividend has been paid out of the estate of the bankrupt. It is therefore obligatory upon the bankrupt to prove that the failure to pay out of his estate a dividend of 5s. in the £ has arisen from circumstances for which he cannot justly be held responsible. The grounds in point of fact upon which the bankrupt maintains that he has discharged that onus are these:—That he has been resident for ten years in Inveresk, and has taken considerable interest in public affairs. That in 1897-98 he was chairman of Inveresk Parish Council Landward Committee, and he was also a member of the Midlothian County Council. That early in 1897 a question arose which excited considerable local discussion as to a right-of-way near the burgh of Musselburgh. The right was claimed by the bankrupt and others, and that claim was disputed by the proprietor of the

ground. The proprietor raised against the bankrupt and others an action to have it declared that there was no right-of-way, and the bankrupt and others under the advice of counsel defended the case. In doing so he was acting solely in the public interest. That after a trial lasting five days the jury found for the pursuer. Thereafter, under the advice of counsel, the bankrupt moved for a new trial, but after a hearing upon a rule that motion was refused. The bankrupt was thereupon found liable to the pursuer in the expenses of process, and these expenses form a large portion of his indebtedness. Upon these averments the bankrupt contends that for his failure to pay a dividend of 5s. in the £ he cannot justly be held responsible. Now, in dealing with these averments I assume them to be proved. The question then is, the bankrupt's failure to pay a dividend of 5s. in the £ having arisen from these circumstances, are these circumstances for which he cannot justly be held responsible?

"It is not very easy to extract from the above averments the precise legal grounds upon which the bankrupt claims to be not responsible for failing to pay a dividend of 5s. in the £, but these grounds seem to be (first) that in defending the right-of-way case he acted solely from a sense of public duty; and (second) that the defenders had a *prima facie* case. (First) As to acting from a sense of public duty, that was a voluntary proceeding, and it is one which does not absolve a person from acting with common prudence and forethought. Acting from a sense of public duty does not entitle a person unnecessarily to enter upon a litigation and to shut his eyes to the risk of losing his case and of becoming liable for expenses. To a person who has only the public interest and not his own in view such a risk would be particularly obvious. But that risk and its consequences the bankrupt ignored. Is his so acting a circumstance for which he cannot justly be held responsible?

"(Second) As to the defenders having a *prima facie* case. After a trial lasting for five days the jury found that there was no right-of-way. A new trial was then moved for, not on the ground that the verdict was contrary to evidence, but on a purely technical ground, turning upon the actings of one of the jury. The defender could not allege that the verdict was contrary to evidence. The fact is significant. It does not look as if the defender's case had been a strong one. Yet in the face of such a verdict a new trial is moved for. The motion is rested upon a technical ground and it is refused by a unanimous judgment of the Court. The motion for a new trial in the face of a verdict supported by the evidence shows that the litigation was determinedly conducted. Is the bankrupt's share in a litigation so conducted a circumstance for which he cannot justly be held responsible?

"When a bankrupt endeavours to escape responsibility for failing to pay 5s. in the £ he usually states what means he had and how he lost them. Here the bankrupt does not state that he had any means, and that such was his condition is corroborated by his state of affairs, wherein his whole assets are stated to be £25, the value of his household furniture. Yet he has contracted debts amounting to £657, 13s. 9d., to such an amount that his estate cannot pay any dividend. Is that a circumstance for which he cannot justly be held responsible?

"At the discussion it was pressed upon me that for two years the bankrupt had been undischarged and that this should tell in his favour. But the question which I must decide is, Has the bankrupt proved that his failure to pay 5s. in the £ has arisen from circumstances for which he cannot justly be held responsible? and I do not see that the fact of the bankrupt being undischarged for two years has any bearing upon that question. An appeal *ad misericordiam* is irrelevant. This application is unopposed, but in the circumstances set forth by the petitioner that fact does not assist me to pronounce the specific finding required by the Bankruptcy and Cessio (Scotland) Act 1881, section 6.

"Upon the foregoing grounds I am unable to find that the bankrupt has proved that his failure to pay a dividend of 5s. in the £ out of his estate has arisen from circumstances for which he cannot justly be held responsible."

The petitioner appealed to the Court of Session, and cited *Bremner*, June 30, 1900, 2 F. 1114, 37 S.L.R. 852.

LORD JUSTICE-CLERK—I have no doubt that this appeal ought to be refused. It is clear upon the appellant's own statement that he entered upon this litigation with absolute recklessness, having no means with which to carry it on or to meet his opponent's claim for expenses if he should be found liable for these. It is therefore out of the question to maintain that his failure to pay five shillings in the pound has arisen from circumstances for which he cannot justly be held responsible.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal, and of new refused the petition.

Counsel for the Petitioner and Appellant—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.