tion to repay it, the defender was not entitled to a proof of the averment, for if the agreement meant that the defender was not bound to pay the principal sum but an annuity, it contradicted the written obligation; but, on the other hand, it was held in *Drybrough's* case that if the defender averred that the bill was to be renewable for a definite time, it was a relevant defence under the 100th section of the Bills of Exchange Act. In the present case it is not averred that the bill was to be renewed for any definite time." . . .

On appeal the Sheriff (GUTHRIE) adhered on 28th March 1905.

The defenders appealed to the Court of Session, and argued—The intention of parties to the agreement condescended on was that liability should emerge only if no working capital was ever raised. The defenders were entitled to an opportunity of proving their averments—Bills of Exchange Act 1882, section 100; *Drybrough & Company, Limited* v. *Roy*, March 17, 1903, 5 F. 665, 40 S.L.R. 594; *Viani & Company* v. *Gunn & Company*, July 14, 1904, 6 F. 989, 41 S.L.R. 822. The case of *Gibson's Trustees* v. *Galloway*, January 22, 1896, 23 R. 414, 33 S.L.R. 322, did not affect the present question. Even an averment that there was to be no liability might be proved —*National Bank of Australasia* v. *Turnbull & Company*, March 5, 1891, 18 R. 629, 28 S.L.R. 500.

Argued for the respondents—The defenders' averments were irrelevant; they could not have been proved by writ or oath prior to the passing of the Act of 1882, and they could not be proved by parole evidence under section 100 of that Act—*Gibson's Trustees* v. *Galloway, cit. sup.*

LORD KYLLACHY—Some of the cases on this subject have gone very far, but in this case we are asked to go further than has ever yet been proposed. We are asked to send to proof an averment of a mere verbal agreement to the effect that the sum in a certain bill should not be demandable and that no liability of any kind should arise on the bill until "sufficient" working capital should have been raised by certain limited companies; it is not said what was the amount of the working capital which was to be raised or to be held sufficient. Nor, as regards the time within which it was to be raised, is there any mention of any time. For all that appears it might be the Greek Kalends. Now, these are not in my opinion averments which could have been remitted to probation by writ or oath under the old law, or which in any view of the meaning of the 100th section of the Bill of Exchange Act can, in my opinion, be remitted to proof now.

LORD JUSTICE-CLERK, LORD KINCAIRNEY, and LORD STORMONTH DARLING concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuers and Respondents — Cullen — MacRobert. Agents — F. J. Martin W.S.

Counsel for the Defenders and Appellants — A. J. L. Laing. Agent — R. Ainslie Brown, S.S.C.

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*Wednesday, June 28.*

## FIRST DIVISION.

## HEDDLE *v.* MELROSE-DROVER, LIMITED.

*Bankruptcy — Process — Appeal — Petition for Discharge—Printing—Caution.*

A bankrupt, whose petition for discharge had been refused by the Sheriff, which refusal was affirmed on appeal, presented, not quite a year later, a new application which the Sheriff refused as incompetent. The bankrupt appealed, and presented his appeal in April 1905, but took no steps to prosecute it, although requested by the respondents in the appeal on two different occasions to do so. On 28th June 1905 the respondents lodged a note to have the appellant ordained (1) to print and box the appeal and other documents, and (2) to find caution for expenses.

The Court *ordained* the appellant to print and box the appeal, but *refused* the prayer of the note *quoad* finding caution for expenses.

This was a note to the Lord President for Melrose-Drover, Limited, incorporated under the Companies Acts 1862 to 1898, and having their registered office at 17 Mitchell Street, Leith; James Heddle & Company, wholesale wine and spirit merchants, Mitchell Street, Leith; and George Bird, C.A., Edinburgh, trustee on the sequestrated estate of James Heddle, residing at 1 James Place, Leith, the respondents in the appeal at the instance of Mr Heddle referred to below.

On 12th April 1905 the Sheriff-Substitute of the Lothians (GUY) pronounced the following interlocutor in a petition by Mr Heddle for his discharge in his sequestration — "The Sheriff-Substitute . . . Finds that it is admitted by the petitioner (1) that he presented a petition for his discharge to this Court on 24th March 1904, averring that no dividend had been paid to his creditors, but that his failure to pay five shillings in the pound had arisen from circumstances for which he could not justly be held responsible; (2) that in that petition the Sheriff-Substitute by interlocutor dated 4th May 1904, and after having heard the petitioner and the agent for the said Melrose Drover, Limited, James Heddle & Company, and the trustee . . . found that the petitioner had failed to prove that the failure to pay a dividend of five shillings per pound out of his estate had arisen from circumstances for which he could not be justly held responsible, and therefore refused the petition and dismissed the

same; (3) that the petitioner appealed against said interlocutor to the First Division of the Court of Session; (4) that by interlocutor dated 21st June 1904 the Lords, after having considered the appeal and whole process and heard the appellant personally, refused the appeal; and (5) that the petitioner's estates have yielded no dividend and the creditors have received nothing: Therefore finds that in respect of the provisions contained in section 6 of the Bankruptcy and Cessio (Scotland) Act 1881, the present petition is incompetent; refuses the petitioner's motion for leave to amend the petition or to sist same; refuses the petition, and decerns."

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. c. 22), sec. 6, enacts:—"Notwithstanding anything contained in the Bankruptcy Acts, the following provisions shall have effect with respect to bankrupts undischarged at the commencement of this Act and to bankrupts whose estates may be thereafter sequestrated, 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 Sheriff . . . that one of the following conditions have 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 Sheriff . . . arisen from circumstances for which the bankrupt cannot justly be held responsible. . . . (4) In the event of a discharge being refused under the provisions of this section, the bankrupt shall at any time, if his estate shall yield, or he shall pay to his creditors, such additional sum as will, with the dividend or composition previously paid out of his estate during the sequestration, make up five shillings in the pound, be entitled to apply for and obtain his discharge in the same manner as if a dividend of five shillings in the pound had originally been paid out of his estate."

Against this interlocutor Mr Heddle, on 20th April 1905, appealed to the First Division, and on 28th June 1905 the present note was presented by the respondents in that appeal

The prayer of the note was as follows—"May it therefore please your Lordship to move the Court to ordain the appellant, the said James Heddle, to print and box to the Court within ten days the note of appeal, petition, interlocutors, and such productions as he intends to found upon in support of the appeal; and further to ordain the appellant to find caution for the expenses of the appeal, and that within ten days, or to do otherwise in the premises as your Lordship shall seem proper."

At the hearing counsel for Melrose-Drover, Limited, stated that although Mr Heddle's appeal was presented in April 1905 he had taken no steps to prosecute it; that he had neither boxed nor printed the appeal; that on 2nd and 12th June the respondents' agents had written him requesting him to print the necessary documents, but that he had failed to do so. In these circumstances he craved the Court to grant the prayer of the note. The question of printing lay in the discretion of the Court, seeing that the provisions of the Court of Session Act 1868 did not apply to appeals like the present which arose out of the Bankruptcy Acts. There was no Act of Sederunt dealing with the present class of appeals—*Lamont* v. *Lamont's Trustee*, Jan. 29, 1904, 6 F. 336, 41 S.L.R. 253; Bankruptcy (Scotland) Act 1856, sec. 170; Bankruptcy and Cessio Act, 1881, sec. 6. (3). *As to Caution.*—The appellant here was an undischarged bankrupt and should be ordained to find caution.

Mr Heddle appealed, and argued that he should in the circumstances be allowed to proceed with his appeal without finding caution, and that printing should be dispensed with. He referred to the following authorities — Mackay's Manual, p. 635; *Ballinten* v. *Connon*, July 19, 1851, 13 D. 1399; *Heggie* v. *Heggie*, June 6, 1855, 17 D. 802.

LORD PRESIDENT—This is a note by the respondents in an appeal taken by Mr Heddle in a petition at his instance for discharge. The process is not before your Lordships, but the note brings the facts sufficiently to your Lordships' cognisance.

It appears that, roughly speaking, more than a year ago Mr Heddle petitioned for his discharge. This discharge was refused and an appeal was taken by him to this Division of the Court. By interlocutor dated 21st June 1904 your Lordships adhered to the judgment of the Sheriff-Substitute, and confirmed the finding that Mr Heddle was not entitled to his discharge.

After a lapse of nearly a year Mr Heddle presented a new application for discharge. That petition was dismissed by the Sheriff-Substitute as incompetent. Against that decision Mr Heddle took an appeal, and in that he has not moved up till now.

Such appeals do not fall within the Act of Sederent relative to the Court of Session Act 1868, so that this application is made to your Lordships' common law right to direct the procedure in your own Court in order that the appeal may be in some way disposed of.

The prayer of the note is "to ordain the appellant, the said James Heddle, to print and box to the Court within ten days the note of appeal, petition, interlocutors, and such productions as he intends to found upon in support of the appeal; and further, to ordain the appellants to find caution for the expenses of the appeal and that within ten days."

Mr Heddle resists the application so far as printing and finding caution are concerned. He is prepared to box.

I am of opinion that so far as the first point goes the prayer of the note should be granted. I think a person who presents a petition under the circumstances stated in the note, and having that petition dismissed, and not having moved in the matter for a considerable time, ought to be subject

to the usual orders for expediting procedure. I would propose, therefore, that Mr Heddle should be ordained to print and box within ten days, under certification that if he fails to do so the appeal will be dismissed. I see no reason for dispensing with the ordinary rules of this Court that appeals should be printed.

I am not prepared to grant the prayer of the note *quoad* finding caution, for I suspend my views on that matter till the process is before me. This is a petition by a bankrupt for his own discharge, and that is in a different position from a litigation by him about other matters. I do not think that a bankrupt applying for his discharge should be hampered by being ordered by the Court to find caution.

I am therefore for refusing the second part of the prayer of the note.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"The Lords . . . ordain the appellant to print and box to the Court within ten days from this date the note of appeal, petition, interlocutors, and such productions as he intends to found upon in support of the appeal, under certification that if the above order is not obtempered the appeal will be dismissed: *Quoad ultra* refuse the prayer of the said note."

Counsel for Melrose-Drover, Limited—Munro. Agents—Snody & Asher, S.S.C.—James Heddle, Appellant.

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*Wednesday, June 28.*

## SECOND DIVISION.

## MARTIN AND OTHERS (BLYTH'S TRUSTEES) *v.* UNIVERSITY OF ST ANDREWS.

*Charitable Trust—University—Bursary—Bursary to Colleges Named—Subsequent Affiliation of Another College—Extension—Truster's Intention.*

A testatrix, who died in 1880, by a trust-disposition and settlement, made in 1878, left property "for the purpose of establishing one or more bursaries in either one or other of the colleges of St Andrews" as her trustees might determine. In 1880 there were two colleges in St Andrews. In 1897 the University College of Dundee was affiliated to and became part of the University of St Andrews.

*Held* that, on a just construction of the settlement, the testatrix's bequest was conceived in favour only of the colleges of St Andrews existing at the date of her death, and could not be extended by the trustees to the University College of Dundee.

*Charitable Trust—University—Bursary—Female Students.*

A testatrix by her trust-disposition and settlement conveyed property to trustees for the establishment of bursaries in certain colleges. At the date of her death the only students to whom the colleges were open were male students. Subsequently the colleges were opened to females.

*Held* that the trustees were entitled to admit females to the benefits of the bursaries, there being nothing in the trust-deed to indicate the testatrix's intention to confine them to males.

On 9th February 1880 Mrs Agnes Carmichael or Blyth, residing at Castle Garden, Crail, died leaving a trust-disposition and settlement dated 14th June 1878, by which she conveyed her whole estate to her brother David Carmichael, engineer, Dundee, and appointed him, subject to the legacies and provisions therein made, to be her sole and universal legatory.

By the third purpose of her settlement she gave the following directions—"Thirdly: For the purpose of establishing one or more bursaries in either one or other of the colleges of Saint Andrews as the trustees after named may determine, I direct the said David Carmichael as soon as conveniently may be after my death to sell, either by public roup or private bargain as he may think proper, the villa and grounds at Crail known by the name of Castle Garden, as the same are presently occupied by me, and to lay out and invest the proceeds, after deducting therefrom all expenses which may be incurred in connection with the realisation and division of my said means and estate, in name of himself and William Scott, solicitor, Dundee, and the survivor of them, as trustees or trustee, for the purposes after mentioned, and that on such heritable security as they or he may think proper, and I appoint the said trustees or trustee, and such other trustee or trustees as may be assumed to continue said trust as after mentioned, to be the patrons or patron of said bursary or bursaries, and that the said David Carmichael and William Scott or survivor of them shall, as soon as conveniently may be after ascertaining the clear capital sum so to be laid out and invested, fix and determine the number of bursaries so to be established; and I further appoint that the said patrons or patron shall, so soon as convenient after determining the number of bursaries, and thereafter from time to time as often as a vacancy or vacancies may occur, nominate and present to the said bursaries a student for each qualified in manner after mentioned, which students so nominated and presented shall be entitled to the yearly produce of said sum so invested equally among them (under deduction of the expenses after mentioned), and that for such number of years, not exceeding four years, as the said David Carmichael and William Scott or the survivor of them may determine; and in nominating and presenting students as aforesaid I appoint