LORD YOUNG was absent.

The Court answered the question in the negative.

Counsel for the Applicant and Respondent—M'Clure—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents and Appellants—Watt, K.C.—W. Thomson. Agents—Connell & Campbell, S.S.C.

Wednesday, November 12.

SECOND DIVISION.

[Sheriff Court at Perth.

CRICHTON BROTHERS *v.* CRICHTON.

Process—Caution for Expenses—Bankrupt Defenders—Process Sisted.

An action was raised against A, B, and C, in which it was sought to have them found jointly and severally or severally liable in a slump sum of damages. The ground of action was the same against all the defenders. Defences were lodged for A and joint defences were lodged for B and C. The defence was the same in each case, except that A pleaded in particular that no damage had been caused or contributed to by her. The defenders all having been rendered bankrupt A's trustee sisted himself as a party to the action, but the trustee on the sequestrated estates of B and C did not do so. On a motion by the pursuers of the action to have B and C ordained to find caution as a condition of their continuing to litigate, the Court in the circumstances *refused* the motion and *sisted* process, *hoc statu*, as against these defenders, leaving the case to proceed as between the pursuers and A's trustee.

This was an appeal from a decree pronounced in the Sheriff Court of Perth against two out of three bankrupt defenders in an action of damages in respect of their failure to obtemper an order of the Court to find caution for expenses.

In 1899 Robert Crichton and David Gentle Crichton, traction-engine and threshing-machine owners, Burrelton, near Coupar-Angus, in an action at their instance in the Court of Session against Mrs Margaret West or Crichton their mother, John Crichton and James Crichton their brothers, and others, obtained decree of declarator that the pursuers were the sole partners of the firm of Crichton Brothers, traction-engine and threshing-machine owners, Burrelton. There was also in that action a conclusion for £1000 damages, which, however, was not insisted in, and was accordingly dismissed.

In November 1901 Robert Crichton and David Gentle Crichton, as sole partners of the firm of Crichton Brothers, raised the present action in the Sheriff Court at Perth against Mrs Crichton, High Street, Burrelton, John Crichton, saw miller, Burrelton, and James Crichton, engineman there, jointly and severally or severally, for a sum of £2000 damages for loss alleged to have been sustained by reason of certain illegal acts and intromissions on the part of the defenders with the machinery and business of the pursuers' firm.

The pursuers averred—"(Cond. 12) Notwithstanding the said action in the Court of Session and protests made by the pursuers prior to the raising thereof, the defenders at and prior to May 1899, and down to the final decision in said action, represented and continued to represent to the public that the pursuers were not the partners of Crichton Brothers. They held themselves out as the sole partners, or as at least in sole right of the business and assets of said firm. They falsely represented to the authorities of the Post Office that all letters addressed to 'Crichton Brothers' ought to be delivered to them. They thus wrongously obtained possession of several such letters. In consequence of a representation by pursuers these authorities ceased to deliver such letters to defenders, but in consequence of defenders' said misrepresentations they also refused to deliver these letters to the pursuers, who thus suffered much damage in the conduct of their business. They also issued circulars throughout the country, and particularly among the customers of Crichton Brothers, purporting to be signed by Crichton Brothers, instructing that all orders should be sent to the defender Mrs Crichton, and intimating that any parties making payments to the pursuer Robert Crichton would be held liable in second payment. A copy of said circular is herewith produced. It was issued without the knowledge or authority of the pursuers or any of them. Authority was not given by the pursuers or any of them to the defenders or to any of them to append the firm name of Crichton Brothers to said circular, which was altogether false and calculated and intended to mislead the public. It is believed and averred that the defenders offered for and obtained contracts and took on orders in the name of and as representing themselves to be Crichton Brothers. In consequence of the said misrepresentations by the defenders the pursuers' business has suffered and will suffer great loss and damage, for which the defenders are responsible."

Defences were lodged in this action for Mrs Crichton, and joint defences were lodged for John Crichton and James Crichton.

The pursuers pleaded—"The pursuers having suffered damage to at least the extent sued for through the illegal acts and conduct of the defenders, decree as craved ought to be granted, with expenses."

The defender Mrs Crichton pleaded—"(1) The pursuers' averments are irrelevant to support the conclusions of the action. (2) The pursuers' averments, so far as material, being unfounded in fact, the defender is

entitled to absolvitor, with expenses. (3) Any loss or damage suffered by the pursuers not having been caused or contributed to by this defender, she is entitled to absolvitor. (4) The present action is barred by the proceedings in the Court of Session action. (5) In any event the sum sued for is excessive."

The pleas-in-law for the defenders John Crichton and James Crichton were in exactly similar terms, except that they omitted the third plea, quoted above, this plea being stated by Mrs Crichton only.

While the action was pending the defender Mrs Crichton became bankrupt, and a trustee was appointed on her sequestrated estate. The defenders John Crichton and James Crichton were also sequestrated, and a trustee was appointed on their estates.

After intimation of the action to him Mrs Crichton's trustee sisted himself as a party thereto.

The action was intimated to the trustee on the estates of John Crichton and James Crichton, but in respect that he failed to sist himself as a party to the cause the Sheriff-Substitute (SYM) on 6th May 1902 ordained these defenders to find caution for the expenses of process.

Note.—"Though the matter of ordaining a party to find caution for expenses be a question of discretion, there is a general rule that a defender ought not to be ordained to find caution for expenses. In this case it is thought that the discretion ought to be exercised to the effect of finding the defenders bound to find caution. The pleadings and the documents to which reference is therein made show that the defenders have been found in the Court of Session to have wrongly maintained that they were the partners of a certain firm, and that to the total exclusion of the persons who were truly the partners and the owners of the firm's assets, and that in maintaining this position they interfered with the assets. This action is to recover the loss which the true partners so suffered. The defenders' trustee has considered the matter and seen no reason for defending, and the Sheriff-Substitute thinks that there is no real legitimate interest in the bankrupts to insist in the defence."

On 30th May 1902 the Sheriff-Substitute pronounced an interlocutor in the following terms:—"The Sheriff-Substitute, on the motion of the pursuers, and in respect the defenders John Crichton and James Crichton have failed to obtemper the order of Court to find caution for expenses of date 6th May current: Decerns against them conjunctly and severally in terms of the prayer of the petition," &c.

On appeal the Sheriff (JAMESON) on 4th August 1902 affirmed the Sheriff-Substitute's interlocutors of 6th and 30th May.

Note. — "I agree with the observations in the Sheriff-Substitute's note to the interlocutor of 6th May. So far as the pecuniary interest in this action is concerned the bankrupts are represented by their trustee, but he has not taken the opportunity afforded him of sisting himself as a party to the cause. The bankrupts John and James Crichton have no interest to serve in the way of clearing their characters or otherwise, by continuing to defend the present action, and in the circumstances it seems to be of very little moment whether the sum decerned for is for a greater or lesser amount. It was urged that it might affect their discharge, but I cannot believe that this will be so, as it will be brought before the Judge who has to discuss the question of discharge, that the sum for which decree has passed against them in this action was a slump sum of damages, and in a different position from an ordinary trading debt incurred by them."

The defenders John Crichton and James Crichton appealed to the Second Division of the Court of Session, and argued—If the conclusion for damages in the Court of Session action had been insisted in, these defenders would then have been able to resist it without finding caution, and it would be unjust that they should suffer any disadvantage by the pursuers' delay in pressing their claim. The bankrupts were especially interested to resist the placing of a liability for £2000 over their heads, as such a liability would seriously affect their prospects of discharge. The Sheriff was therefore wrong in supposing that they had no interest to defend the action. Mrs Crichton's trustee having sisted himself the defence would be maintained, and no additional expense would be incurred if the appellants were allowed to remain in the action, as no separate representation was necessary on their behalf. If the pursuers were unsuccessful, they could only be found liable in the expenses of one defence.

Argued for the respondents—It could not be said that there was only one defence. The defender Mrs Crichton did not identify herself with the appellants; against her the respondents might fail while they succeeded against the other defenders, who therefore were not entitled to continue their defence without finding caution for expenses.

LORD TRAYNER—The general rule with regard to a litigant finding caution for expenses as a condition of his being allowed to continue the litigation is that a bankrupt defender is not called on to find caution, whereas a bankrupt pursuer is. This general rule is, of course, open to exception.

In the present case I think the appellants (defenders in the action) should not be ordained to find caution. In their admitted circumstances it may fairly be presumed that they cannot do so. If the Sheriff's order stands and caution is not found decree will go against the appellants for a sum of £2000, a claim which to almost the whole amount of it consists of random sums of damages. The defenders have undoubtedly an interest to prevent this, as obviously it would or might have a serious effect on their application for discharge under their sequestration when that application comes to be made. To order the appellants to find caution would, I

think, or very probably might, result in great injustice to them. On the other hand, to recal the Sheriff's order will do no injustice to the pursuers. The trustee of the third defender (the appellant's mother) has appeared to defend on her behalf. If the pursuers succeed in establishing their claim, they will get decree against all the defenders, and Mrs Crichton's trustee will be personally liable to the pursuers in the expenses of process. If the pursuers fail, they will not have to pay expenses to the defenders except as for one appearance. No doubt separate defences have been lodged for the appellants and Mrs Crichton, but the defences for all are practically the same. To save possible expenses, however, I would suggest to your Lordships that we should recal the interlocutors appealed against, and remit to the Sheriff to sist process, *hoc statu*, against the appellants, leaving the question to be determined to be taken as between the pursuers and Mrs Crichton's trustee, with power to the Sheriff to decide the question of the expenses of this appeal as expenses in the cause.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor:—

"The Lords having heard Counsel for the parties on the appeal, Sustain the same, and recal the interlocutors of the Sheriff-Substitute and the Sheriff of Perth, dated respectively 6th and 30th May and 4th August 1902: Remit to the Sheriff to sist, *in hoc statu*, the action in so far as laid against the defenders John and James Crichton, and *quoad ultra* to proceed therein, and with power to him to dispose of the question of the expenses in this and the Inferior Court as expenses in the cause."

Counsel for the Pursuers and Respondents—Campbell, K.C.—Dewar. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Appellants—Clyde, K.C.—Chree. Agents—Gill & Pringle, S.S.C.

Friday, November 14.

SECOND DIVISION.

BROWN'S TRUSTEES *v.* GOW.

Succession—Legacy — Free of Government Duty — Provision in Codicil that Foregoing Bequests and those in Foregoing Settlement and Codicil to be Free of all Government Duty — Bequests in Subsequent Codicils—Codicils directed to be Taken "as Part and Parcel of" Settlement.

A testator by his trust-disposition and settlement left certain legacies, including one which his trustees were directed to pay "free from legacy-duty." He left the residue of his estate to certain nephews and nieces. By a codicil the testator bequeathed to each of his trustees a sum of £100 "free of legacy-duty," and left certain other legacies. By a second codicil he bequeathed certain further legacies, and provided and declared "that the foregoing bequests, and also those contained in the foregoing trust-disposition and settlement, are to be satisfied and paid free of all Government duty." By third and fourth codicils the testator made certain other bequests without reference to Government duties. In his settlement he had directed his trustees to pay all such legacies as should be contained in any codicil or memorandum or writing by him, "declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents." *Held* that the declaration in the second codicil as to freedom from Government duties was to be strictly read as applying only to foregoing bequests, and did not apply to those contained in the later codicils.

Alexander Brown, merchant, residing at 8 Pitt Street, Edinburgh, died on 5th April 1900, leaving a trust-disposition and settlement dated 11th January 1865 and various codicils thereto. In the settlement the testator directed his trustees as follows:—"And I direct them to pay out of my said estate all such legacies gifts or provisions and implement all such instructions as shall be contained in any codicil or any memorandum or writing by me clearly expressive of my will, though not formally executed, declaring that the same, whether formal or informal, shall be held and taken to be part and parcel of these presents."

Among the legacies, gifts, &c., contained in the testator's settlement was a legacy of £200, "free from legacy-duty."

The trustees were directed to pay the residue of the testator's estate to and among certain nephews and nieces *nominatim*.

In 1894 the testator executed a codicil whereby he left to each of his trustees a sum of £100 "free of legacy-duty," and made certain other bequests.

In 1897 the testator executed a second codicil making certain further bequests, and containing the following provision, viz.:—"I provide and declare that the foregoing bequests, and also those contained in the foregoing trust-disposition and settlement and codicil, are to be satisfied and paid free of all Government duty."

Thereafter, in 1898, the testator executed a third and a fourth codicil, in each of which he made certain further bequests of heritage and moveables, without any direction as to freedom from Government duties.

In these circumstances this special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the testator's trustees, and (2) the beneficiaries under the testator's third and fourth codicils.