

ance of the trust may not have occurred—may have been precluded by accidental circumstances, or prevented by the hand of death. But every case of the kind must depend on a special (and it may often be a delicate) inquiry into its own details; and, if nothing had appeared in the present case except the transmission of the deed to the trustees for their acceptance of the trust, I would have had more difficulty in reaching my conclusion. It is obvious, however, to remark that, exactly as in the case of the registration, this transmission to the trustees was a part of one general design in the mind of the grantor, of giving the deed complete efficacy; and the law will readily presume the accomplishment of his purpose from anything to which the legal character of delivery can be fairly attributed. And, on this point, it must be always remembered that delivery and acceptance are two entirely different things. There may be delivery full and complete, so far as the grantor is concerned; leaving the acceptance still in the option of the grantee. Delivery and contract are essentially different matters. The transmission to the trustees does not, to say the least, derogate from, on the contrary confirms, the legal inference, otherwise deducible from the registration.

I entertain, on the whole matter, no doubt in point of law, that the grantor's purpose to render this a delivered and effectual deed was fully accomplished; and that the deed had passed beyond his power of revocation before his change of view on the subject of the arrangement took place.

Agent for Pursuer—A. Morrison, S.S.C.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Tuesday, July 6.

LANG V. HALLY.

Bankruptcy—Trustee—Removal. In an application for removal of a trustee, the competency of which was objected to, the Court, without deciding the question of competency, directed the proceedings to be laid before the Accountant in Bankruptcy.

This was a petition and complaint against George Hally, Glasgow, trustee on the sequestrated estate of the late George Lang. The petitioner was the bankrupt's son, whose interest consisted in the fact that, after paying all his father's debts there would be a reversion to which he had right. The application was made under section 64 of the Bankruptcy Act, 2 and 3 Vict., c. 41, and section 86 of the Bankruptcy Act 1856, and it was rested on the following pleas in law:

"1. The petitioner being a party interested, in the sense of the sections of the Bankruptcy Statutes founded on, had a title to present this petition, and has likewise a title at common law.

"2. The respondent ought to be removed from office as trustee, because—(1) He is an undischarged bankrupt. (2) The caution found by him is inadequate. (3) He has failed for years to comply with the requirements of the Bankruptcy Statute, in regard to reports to the Accountant in Bankruptcy, and annual returns. (4) He is a mere tool in the hands of his employer, Mr Charles Reddie, who is his cautioner, as well as a commissioner and law-agent in the sequestration, and who, as his employer, is in a position to control him, and involve the estate for his own benefit, in

useless and extravagant law expenses. (5) There is danger, from the subordinate position which he occupies, that effect will be given to unfounded claims made by creditors who have influence over him. (6) He has mismanaged the estate, and the manner in which he proposes to realise it is certain to injure the reversionary rights of the petitioner.

"3. The petitioner, as eldest son and heir-at-law of his father, is entitled to his father's estate on paying, or finding caution for payment of, his father's debts and expenses.

"4. The petitioner is entitled to have the management of the respondent as trustee controlled by the Court in such a way as will prevent injustice being done to him."

The respondent pleaded *inter alia* that the petition was incompetent. He founded on *Bell v. Gow*, 28th Nov. 1862, 1 Macph. 84.

The Lord Ordinary (MANOR) repelled this plea, and remitted to the Accountant in Bankruptcy to inquire into the allegations in the petition, and to report.

The respondent reclaimed.

MACLEAN for the respondent.

SCOTT and BURNET for the petitioner.

The Court, without deciding the question of competency, directed the proceedings to be laid before the Accountant in Bankruptcy, that he might, if he found cause for doing so, bring the trustor's conduct under the notice of the Court.

Agent for Petitioner—John Walls, S.S.C.

Agents for Respondent—Lindsay & Paterson, W.S.

Wednesday, July 7.

CRAIG V. SIMPSON.

Husband and Wife—Cohabitation, habit and repute—Poor. In a question of settlement, held, on a proof, that a marriage by cohabitation, habit and repute, had not been proved.

This was a question as to the liability for relieving a pauper, Jane Duncan, between the parishes of St Cuthberts, represented by Craig, and South Leith, represented by Simpson. The question depended on whether the pauper was married to a man named Whitelaw. After a proof, in the course of which the pauper herself and sundry relatives were examined, the Lord Ordinary (BARCAPLE) pronounced this interlocutor:—"The Lord Ordinary finds it is not proved that the pauper Jane Duncan was ever married to John Whitelaw, as averred by the defender: Finds that the settlement of the said Jane Duncan as a single woman, and of her illegitimate children, is in the parish of South Leith: Therefore repels the defences, and finds, declares, and decerns in terms of the conclusions of the libel: Finds the defender liable in expenses, &c.

"*Note.*—The conduct of Whitelaw and Jane Duncan was calculated to create, and did create, a general understanding among their friends and neighbours that they were married. But the Lord Ordinary thinks it is proved that they did not consider themselves to be married, and did not uniformly hold themselves out to others to be so; and also that some of their relatives and others were expressly told by one or other of themselves that they were not married, and in consequence believed them to be living in concubinage. In this view of

the evidence, the defender has failed to make out a marriage by habit and repute, which is his sole case." Simpson, for South Leith, reclaimed.

TRAYNER (MONRO with him) for reclamer.

JOHN MARSHALL, for respondent, was not called on.

At advising—

LORD PRESIDENT—I don't think I ever saw so weak an attempt to make out a marriage by cohabitation, habit and repute. The repute is of the most divided and ambiguous kind, and it is most natural that it should be so, because it arises from a cohabitation which plainly was not in the estimation of the man or woman a cohabitation as man and wife. They did not intend—I think that is the plain inference from the proof—to cohabit as man and wife, but only as man and woman, under a disguise for the purpose of misleading their landlady and neighbours. For the purpose of showing how divided the repute is—in itself a fatal objection to such a marriage—it is only necessary to attend to one or two points. In the first place, in 1866 the supposed wife makes that statement on being admitted to the poor-house of St Cuthberts, that she is a single woman and had been cohabiting with Whitelaw for three years. It was argued to us that if there has been cohabitation for three years sufficient to make a marriage, the denial of it will not unmake it, and that is true. But then, one would expect that for the three years there would be no doubt as to the facts. Now the first two witnesses called after the woman herself are Mrs Whitelaw and Jessie Whitelaw, the mother and sister of the alleged husband. The mother makes it clear that so early as 1863, that is just three years before the statement to St Cuthberts, she was satisfied that they were not married persons, and Jessie Whitelaw says she never from the beginning to the end thought them married. Really after that to talk of the constitution of marriage by cohabitation of these persons, and undivided repute, is out of the question, and it would be a waste of time to analyse the evidence farther. The Lord Ordinary has well expressed the result of the proof, and I entirely agree with him.

LORD DEAS—It would be a great error to think that anything said as to the import of the proof in this case is to be taken as the entire substance of the proof, which extends to 50 pages, but I am perfectly satisfied that the result is as your Lordship has stated. There is nothing like a proof of habit and repute for any lengthened period. It can only be called a divided repute, because there are various persons to whom they thought it convenient to say they were man and wife, and who knew nothing to the contrary. But anything like undivided habit and repute is matter of which there is no shadow of evidence. If there had been good proof of that, I should not have been disposed to hold what passed with the registrar as conclusive, for under that Act these parties were obliged to get their child registered in some way, otherwise they would be subject to a penalty, and if it was not registered as legitimate they had scarcely any choice but to get it registered as illegitimate. Looking at the erratic life these persons led, no one can doubt that the most important witnesses are their own relations, and it is plain that neither on one side nor the other has there been brought a single witness who thought them married. They may have at one time thought they were, but it is plain that the mother and sister of the supposed husband, and the three brothers of the woman, thought they were not married, and

plainly that was the opinion of the woman herself. To go over their evidence would merely be to weaken it. I see no ground for altering. It is unnecessary to consider what might be an important question,—whether the same amount of proof would be necessary for such a purpose as this, to prove a marriage incidentally, as to prove it in a regular declarator? But it is unnecessary to go into that, the proof in this case being so clear.

LORD ARDMILLAN—In this case the repute is divided, and it is not caused by that conjugal cohabitation which is required, but is caused, in the first place, by the false statements that there had been a marriage; and, in the second place, by statements made by persons who did not believe them when they made them, for they say they were made to get into houses and then they apologised for deceiving the landladies; and besides, the parties did not believe themselves married.

LORD KINLOCH—I have come very clearly to the same opinion. Habit and repute is by our law good evidence of marriage; but it never can amount to proof where the repute is divided. But independently of this objection, I consider it clearly proved in this case, that the parties never were married by any of the modes of constituting marriage known to the law of Scotland, and never thought themselves married; and, where that is clear, no amount of apparent conjugal cohabitation, and no amount of repute will render them married persons.

Agent for Pursuer—E. Mill, S.S.C.

Agent for Defender—J. C. Irons, S.S.C.

Thursday, July 8.

MEEK'S TRUSTEE v. RUSSEL'S TRUSTEES.

Jury—Cancelling of Proof—Sheriff—Judicature Act, 6 Geo. IV, c. 120. Where, in an action of damages for breach of contract, the evidence led in the Sheriff-court was unsatisfactory, the Court, under the Judicature Act, section 40, cancelled the evidence and ordered issues with a view to jury trial.

Russel's trustees brought an action in the Sheriff-court of Linlithgowshire against James Meek, concluding for £5000 of damages for breach of a contract, under which they alleged Meek had agreed to purchase from them the whole of their stock of a certain mineral which they might put out of two specified pits, on certain conditions. After a proof the Sheriff-substitute (HOME) decerned against the defender for £100 damages. The Sheriff (MONRO) altered as to the sum of damages, and gave decree for the whole £5000. The trustee on Meek's sequestrated estate appealed.

FRASER and SCOTT for appellant.

CLARK and GLOAG for respondents.

The Court held that it was clear there had been a breach of contract; but the question of real importance in the case was anything but clear, there being no proper or satisfactory evidence on either side as to the amount of damages. In these circumstances the only course was to cancel the proof, and order an issue with the view of having the damages awarded by a jury in common form, Lord DEAS observing, that the best illustration of the difficulty of assessing the damages was that the Sheriff-substitute had given £100 and the Sheriff £5000.

Agent for Appellant—T. Maclaren, S.S.C.

Agents for Respondent—Wilson, Burn, & Gloag, W.S.