

LORD PRESIDENT—I am of opinion with the majority of your Lordships that the complainers here are entitled to have the prayer of their petition granted, and I am not disposed to deal with this as a possessory question merely. I go on the words of the statute, and I consider that our judgment will be an authoritative exposition of its taxing clauses. Now, no person, either as an individual or a corporation, and no body of statutory trustees, can be allowed to levy tolls unless he has an unequivocal warrant for doing so, and we are bound to construe the words of the statute when we are inquiring whether they constitute such a warrant or not according to their ordinary meaning and use.

Now, it must be always kept in view that previous to 1858 no such dues as are now demanded were leviable, and the practice of towing this timber was perfectly well known then. The question is, how far the Legislature intended to subject timber hitherto exempted from duty to duties, and the answer I am compelled to give is, that no dues are to be levied upon it unless it is "shipped or unshipped" in the river. Now, it has been said that it is unshipped in the river. There is a place where this timber was unshipped, but that was the harbour of Port-Glasgow or the harbour of Greenock—the unshipment there was a perfectly distinct act, and it could not be unshipped again till it was shipped again. I looked with some curiosity for an explanation from Lord Gifford or Lord Shand of the precise place or time at which it could be said to be shipped again and unshipped, but I was disappointed. I suppose that the attachment of two floating logs by a chain is "shipping," and I suppose that when that chain is removed they are "unshipped," but that is a forced and unnatural construction of these words, and I cannot therefore see how it is possible to say that the timber in question satisfies the conditions under which alone dues are leviable.

It seems, however, to be thought that by the judgment proposed some facilities will be given for this timber evading duty altogether; if that could be shown to be so, I can only say it would not make any difference in my opinion; but I think Lord Gifford and Lord Shand are under some misapprehension as to the fact here, because from the 11th article of the minute of admissions the Clyde Trustees admit that "dues have not hitherto been charged in respect of timber stored in the ponds in question until floated up to Glasgow or any of the building-yards on the river, when it is charged according to its destination—that is, if taken to Dumbarton, it is charged for the lowest or third stage only; if to Renfrew, it is charged for the third and second stages, and if taken above that, it is charged for all the three stages." If that be so, the difficulty is at an end.

Another disturbing element in the case is, that the principle we here affirm is said to be applicable to the rafts that are taken up the river, and that they will escape payment of dues. On that question I reserve my opinion. I can see that there is a good deal to be said on that question. I can see, for example, that a large raft of that kind may be described as being "unshipped" when the timber is landed, without disturbing the principle on which we are now to pronounce our judgment.

The Court therefore recalled the Lord Ordinary's interlocutor, and granted interdict as craved.

Counsel for the Complainers—Trayner—M'Laren—Burnet. Agent—William Archibald, S.S.C.

Counsel for the Respondents—Balfour—Asher—Guthrie. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, March 5.\*

FIRST DIVISION.

[Sheriff of Lanarkshire.

DUNCAN (KELLY'S TRUSTEE) v. AITCHISON AND COMPANY.

*Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 97), sec. 52—Bankrupt Estates (Scotland) Act 1839 (2 and 3 Vict. c. 41), sec. 32—Deduction of Discount from Claim where there is Usage of Trade.*

The Bankruptcy (Scotland) Act of 1856, sec. 52, enacts that "A creditor who has a claim or a debt due shall be entitled to vote and rank for the accumulated sum of principal and interest to the date of the sequestration, but not for any interest accruing after the date of the sequestration, and if the debt is not payable till after the date of the sequestration he shall be entitled to vote and rank for it only after deduction of the interest from that date, and he shall also be liable to deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it." Held that under this section a claim by a creditor was liable to deduction of discount in respect of usage of trade only when it was for a debt not payable till after the date of sequestration, but that at common law such a deduction was to be made whether the debt was payable before or after sequestration if a usage of trade was proved to exist.

Circumstances in which it was held that no usage of trade existed sufficient to entitle the trustee to make a deduction at common law.

The estates of Edwin Kelly, spirit-dealer, Glasgow, were sequestrated on the 19th December 1876, and the respondent W. T. Duncan, C.A., Glasgow, was elected trustee. The appellants John Aitchison & Company, brewers, Edinburgh, lodged a claim for £224, 6s., being the alleged balance of an account for ale and beer sold by them to the bankrupt. The trustee pronounced the following deliverance—"The trustee admits the claim, subject to deduction of the customary trade discount, in terms of section 52 of the Bankruptcy (Scotland) Act 1856." The rate of the deduction was afterwards stated to be 30 per cent.

The 52d section of the Bankruptcy Act 1856 was as follows (*reads as in rubric*).

The corresponding section of the Act of 1839 (2 and 3 Vict. c. 41), viz. sec. 32, is—"If a creditor claim for a debt with bygone interest, he may in his oath accumulate the interest as at the date of the sequestration, and he shall specify the amount of the interest, and also of the accumulated sum, but he shall not be entitled to claim

Decided January 28, 1879.

on the estate for interest either on the principal debt or on such accumulated sum after the date of the sequestration; and if a creditor claim for a debt which is not payable till after the date of the sequestration, he shall in his oath deduct the legal interest thereon from the date of the sequestration to the time of payment, and specify the balance, and if he claim for a debt which by usage of trade is liable to a discount of more than legal interest, he shall in his oath state the amount of such discount, and deduct it from the debt and specify the balance," &c.

Messrs Aitchison appealed.

The Sheriff-Substitute (ERSKINE MURRAY), after a proof, recalled the deliverance of the trustee, and ranked the appellants to the full amount of their claim. The nature of the proof appears sufficiently from the following note which the Sheriff added to his interlocutor, and also from the opinion of the Lord President *infra*.

"*Note*.—The appellants John Aitchison & Company, brewers, Edinburgh, for several years sold goods to the bankrupt Edwin Hugh Kelly on the footing of 30 per cent. discount on payment in three or four months. From the previous dealings the practice appears to have sometimes varied by a longer period of payment in regard to earlier items being balanced by a shorter in regard to later items, which is usually called a six months' (or four or three months, as the case may be) running account. Several accounts were paid by Kelly to appellants. Ultimately Kelly became bankrupt, and appellants claim on his estate for a balance of £224, 6s. 1d. on an account beginning in June 1875 and ending in October 1876. The respondent W. T. Duncan, the trustee, has refused to rank the appellants in full, and only consented to admit the claim 'subject to the usual trade discount.'

"Two questions arise under the appeal—first, the relations of parties irrespective of section 52 of the Bankruptcy Act; and, secondly, whether the result is modified by the provision contained in that clause. It is impossible to separate entirely the consideration of these two points.

"It is clear from the evidence that the discount between the parties was not, properly speaking, an ordinary discount at all. It was not a concession given in respect of money being paid at an earlier date than it would otherwise have been paid. But neither, on the other hand, was it an absolute fixing of the real price at a lower rate than the apparent price, which is the meaning of a trade discount, as in the case of wholesale buyers. It was a bargain between seller and buyer, by which the seller, in order to secure the buyer's custom, agreed that if the buyer paid the price within a stipulated time he should have the right of demanding that a certain deduction should be made. Besides, while the amount of the deduction in this case was 30 per cent., the evidence shows that different brewers vary greatly in their terms, and each brewer varies the terms given by him to different customers, according to their position, circumstances, and characters. Thus there is no fixed rate of such discount, the amount of deduction varying with the eligibility of the customer, and the profitableness of his custom to the seller. The bargain goes no further; it does not bind the seller to make the deduction although the stipulated time be past. The buyer's absolute right to the deduction ceases

at the expiration of the term fixed. No doubt the seller may, and as a matter of fact generally does, still make the deduction after the stipulated time is past, if there is anything to be gained by it, but he is under no obligations to do so. He does so for his own advantage, with a view to further orders, for the same reason that he gave the original concession. But after the expiry of the term bargained for he is free to act as his own interests may suggest, and if further business is hopeless or unlikely he refuses to allow some or all of the lapsed discount. Such circumstances arise in other cases besides those of bankruptcy, and therefore it cannot be said that this is simply an attempt to rear up an unlawful preference by making that due in case of bankruptcy which would otherwise not be due at all.

"As regards the second question, section 52 of the Bankruptcy Act provides that every claim shall 'be liable to deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it.' Now, as has been noticed above, there is here no special trade discount—one brewer gives 30, another 15, and so on, and the dates of payment within which the discount is demandable are as various as the amount per cent. Instead of a regular trade discount all is a matter of separate arrangement between individual sellers and individual buyers. And further, as also above seen, the contract is distinguishable from a trade discount exigible in all circumstances by being subject to the condition that after the expiration of a fixed period the buyer loses entirely his right to demand the reduction, and the seller is entitled to act as his interests direct. The Sheriff-Substitute cannot hold that a contract of such a nature, where the terms are entirely variable and matters of individual discretion, and where such a condition forms part of the contract, falls under the 52d section of the Act. To bring it under that section different and much more stringent and special words would have been required."

The trustee appealed, and argued—A usage of trade had been proved to exist, and the case was therefore within section 52 of the Act. [LORD PRESIDENT—Does section 52 apply to debts payable before the date of sequestration? Look also at the Act of 1839.] It might be that the Act did not apply, but at common law the result was the same—*Pigou*, 3 Maddock's Cases in Chancery, 139.

Argued for the respondents—*Pigou* was overruled by *Worthington*, L.R., 3 Chanc. Div. 803; and the Bankruptcy Act did not apply. In any case, no usage of trade had been proved to exist. There was no fixed usage, one brewer having one practice and another following a different practice.

At advising—

LORD PRESIDENT—This demand to deduct as discount from a claim is founded partly on the common law of bankruptcy and partly on section 52 of the Bankruptcy Act of 1856. Now, with regard to the 52d section it appears to me that the Sheriff-Substitute has in some degree misread the provision. It draws a clear distinction between debts due at the date of sequestration and debts which are to become due after that date, and the same distinction runs through the Act of 1839—I mean in section 32. The

present Act is more clearly expressed with reference to the point I am now considering. It provides that "A creditor who has a claim or a debt due shall be entitled to vote and rank for the accumulated sum of principal and interest to the date of the sequestration, but not for any interest accruing after the date of the sequestration." That is one case, and that is disposed of by the words I have just read. No more is necessary, for this Act does not require that the creditor should specify separately on oath the amount of the accumulated sum and of the interest, which was found to be inconvenient, as claims were frequently rejected on the technical ground that the authorised process had not been gone through; so that this provision is more simple than the corresponding one of 1839. But then the section goes on—"and if the debt is not payable till after the date of the sequestration, he shall be entitled to vote and rank for it only after deduction of the interest from that date, and he shall also be liable to deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it." Now, that is the whole section, except what follows dispensing with the need for calculating separately the amount of the interest and of the duration. And I have come to the conclusion that the deduction of discount is applicable to the latter of the two heads only, namely, where the debt is not payable till after the date of the sequestration. The Act speaks of deducting "discount beyond legal interest," which is a perfectly intelligible expression as applied to debts coming due after sequestration, for the creditor is bound to deduct interest from these; but he cannot deduct interest from debts due before sequestration, because in that case interest is to be added up to the date of sequestration, and the Act would have required to specify whether the deduction is to be from the accumulated sum or from the principal only. I therefore read the provision as applying only to debts due after sequestration.

But I have been anxious to explain the construction only for the purpose of making clear the true grounds of judgment. I am of opinion that if a debt is due which by usage of trade is liable to a discount, that discount must be deducted for the plain reason that the true debt is the sum minus the discount. The parties contracted on that footing if there was a usage of trade; but this depends upon whether the discount is payable to the bankrupt. Is there a usage of trade? Now, looking to the evidence in this case I cannot say that there is. The custom is a very loose custom. It does not seem to be a usage which gives the debtor a right to a certain definite amount of discount within a certain time or whenever he paid. I cannot find any specification of time, or whether the discount is at the rate of 20 per cent. or 30 per cent. The true construction seems to be this. The brewer keeps the matter in his own hands, and says to his debtor—"If you pay promptly I will take so much off your account; if you pay less promptly I will take less off; but I am to be sole judge. I shall be a very favourable judge, especially if you are a good customer; and how good a customer you are I shall judge only when I come to each particular case." This does not appear to me to be a discount to which the creditor is

liable, or a right to which the debtor is entitled at common law. I am therefore of opinion that this appeal ought to be refused.

LORD DEAS and LORD SHAND concurred.

The Court adhered.

Counsel for Trustee (Appellant)—Kinnear—Campbell. Agents—Campbell & Smith, W.S.

Counsel for Respondents—M'Laren. Agent—P. Morison, S.S.C.

Friday, March 7.

## FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—  
(TOCHETTI'S CASE)—CHARLES TOCHETTI  
V. THE LIQUIDATORS.

*Public Company—Partnership—Executor—Resignation—Intimation—Trusts (Scotland) Act 1867 (31 and 32 Vict. c. 97), sec. 18—Intimation of Resignation by an Executor to a Bank where Shares held by Estate.*

One of three executors executed a minute of resignation, which was duly recorded in terms of the Trust Act of 1867, and was also intimated to his co-executors. Part of the executry estate consisted of shares in a banking company of unlimited liability, in the register of which the name of the executor was with his authority entered as member. No formal intimation of his resignation was ever made to the bank; but he ceased to sign the dividend warrants, and in a book called the dividend register, which contained memoranda regarding the payment of dividends, there was down to the resignation the 'remark' 'p. C. T. and W. M.,' but after that date it became 'p. W. M. Exr.,' C. T. being the resigning executor. The third executor never signed any dividend warrants. At the proof C. T. did not examine his co-executor W. M., who throughout took the most active part in the management of the estate.

In a petition for rectification of the register of members and of the list of contributories—*held*, assuming that executors were entitled to resign under the Trusts Act 1867, that as no intimation was proved to have been made to the bank the petition must be *refused*.

The petitioner in this case was one of the executors of the late Hugh Loag, draper, Wick, who died in April 1875. The other accepting executors were Dr Bernard, then Roman Catholic clergyman in Wick, and afterwards residing in Copenhagen, and William Miller, writer, Wick.

Mr Loag was survived by a widow and three children—one son and two daughters. By the provisions of his testament his executors were, after providing an annuity of £40 to his widow, and fulfilling certain other purposes, to hold his estate for behoof of his three children, and divide it equally among them, payment to be made to his son upon attaining the age of twenty-one, and to his daughters upon their marriage. A