

that under his father's will he had no power to make such a conveyance. *Held* that he was entitled to sue the action without finding caution for expenses.

On 27th July 1864, John Rogerson, who possessed considerable landed property in Wamphray, Dumfriesshire, died leaving a trust-disposition and settlement dated 7th December 1859. By this trust-disposition and settlement he left certain lands to his trustees, for the purpose of receiving the rents thereof and dividing them equally between two of his sons. He also declared that neither of his sons should have power to sell the lands or to burden them with debt, nor should the lands or rents be attachable by creditors, nor should his sons have power to assign the rents or produce of the lands except by way of provision in a marriage-contract. In 1878 the affairs of John Kirkpatrick Rogerson, second son of the trustee, and one of the sons between whom the said rents were to be divided, became embarrassed and his estates were sequestered. John Rorrison was appointed trustee in the sequestration. Shortly after the sequestration—a difference having arisen as to whether the interest of Rogerson in his father's estate fell under the sequestration—Rogerson executed an assignation in favour of Rorrison as trustee, whereby he assigned to him all the rents and sums of money that might become payable to him out of the lands left for that purpose by his father's trust-disposition. The trustee allowed the bankrupt an alimentary provision, and applied the surplus income to the reduction of his debts.

Rogerson and his wife and children raised this action for reduction of the assignation to his trustee, on the ground that it was *ultra vires* of him to grant such an assignation, and in contravention of the trust-disposition and settlement under which he had acquired right to the rents as an alimentary provision.

The trustee on the sequestration lodged defences and pleaded—“(2) The pursuer Joseph Kirkpatrick Rogerson being an undischarged bankrupt, ought to be ordained to find caution for expenses.”

Argued for pursuer—The question of caution is one within the discretion of the Court. In the case of an undischarged bankrupt caution is not always necessary, and the circumstances of this case were exceptional. The action was against the trustee, to reduce the conveyance to the pursuers' funds—*Ritchie v. M'Intosh*, June 2, 1881, 8 R. 747.

The Lord Ordinary refused to order the pursuer to find caution.

“*Note.*—If this had been the case of an undischarged bankrupt suing the trustee in his sequestration, on the ground that a surplus remained out of his estate after his debts had been paid, I should have ordered him to find caution, because I could not give any sanction to a custom which would enable any bankrupt to put pressure on his trustee. But here although the pursuer has been sequestered, that does not seem to have been considered enough to put the trustee in possession of his estate, and the trustee has accordingly come into possession of the bankrupt's property by a voluntary assignation. I think that I have sufficient authority to enable me to dispense with caution, and I do so the more readily on the ground that

there is here at least one other pursuer who might be made liable in expenses.”

Counsel for Pursuer—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—T. Rutherford Clark. Agent—Robert Broatch, L.A.

Tuesday, June 2.

## FIRST DIVISION.

[Court of Exchequer.]

### MACLEOD v. INLAND REVENUE.

*Revenue—Stamp Act 1870 (33 and 34 Vict. cap. 97), secs. 70, 71—Conveyance or Transfer other than a Conveyance or Transfer on Sale—Dissolution of Partnership—Conveyance of Partnership Estate.*

On a dissolution of partnership an instrument was executed by the two partners whereby, after narrating the agreement for dissolution, the whole assets of the company were assigned to the continuing partner, with one exception, in consideration of the payment to the retiring partner of the sum of £8931, 10s. 5d., being his full share and interest as a partner in the assets of the company. The exception from the conveyance to the continuing partner was a bond and disposition in security for £8000 granted in favour of the firm, which was of even date assigned to the retiring partner, and, together with a payment in cash of £931, 10s. 5d., made up the fore-said sum of £8931, 10s. 5d. *Held* that the instrument was liable to the stamp-duty chargeable on a conveyance or transfer other than a conveyance or transfer on sale, and was not liable to the *ad valorem* stamp-duty chargeable on a conveyance or transfer on sale.

This was a Case stated by the Commissioners of Inland Revenue under the Stamp Act 1870 (33 and 34 Vict. cap. 97) at the request of William MacLeod to enable him to appeal to the Court of Exchequer.

The facts out of which the present question arose were as follows:—William MacLeod and John Wilson were the individual partners of the firm of William MacLeod & Company, metal merchants, Glasgow, and had carried on business for some time in partnership. In March 1884 they came to an agreement, which was embodied in an instrument titled an assignation dated 14th October 1884. This instrument was granted by William MacLeod & Company, metal merchants, founders' factors, and contractors in Glasgow, and William MacLeod, metal merchant, founders' factor, and contractor in Glasgow, and John Wilson, malleable iron tube manufacturer, Glasgow, the individual partners of the said company of William MacLeod & Company, not only as partners, but as trustees for their company, at the request and with the special advice and consent of the said John Wilson, as a partner and as an individual, and the said John Wilson for his own whole right and interest as partner, trustee, and as an individual, and they all of joint consent and assent.

The consideration upon which the instrument was granted was that “the said William MacLeod

and John Wilson have agreed to dissolve their said company as upon the 31st day of March 1884, and also arranged that the said William MacLeod should acquire the whole property and assets of the company (except as after mentioned) upon payment to the said John Wilson of the sum of £8931, 10s. 5d., being his full share and interest as a partner in the whole property and assets of the company, and that William MacLeod has made payment to the said John Wilson of the said sum of £8931, 10s. 5d., in manner set forth in the minute of agreement and dissolution to be executed after delivery, but of same date."

The instrument then went on to assign and make over to and in favour of William MacLeod as an individual, and his heirs, executors, and successors, the whole estate, property, and assets of the firm of William MacLeod & Company.

The property excepted from the assignation and conveyance was (1) The sum of £8000, and the real lien and burden for payment thereof, interest and penalties, constituted by disposition of said William MacLeod and John Wilson, as trustees of their said company, in favour of Francis Spite and Thomas Speirs, as trustees for their company of Francis Spite & Company, of certain heritable subjects. (2) Bond and disposition in security over said heritable subjects for said sum of £8000 granted by Francis Spite & Company, and Francis Spite and Thomas Speirs as partners of and trustees for the said Francis Spite & Company, and as individuals, in favour of the said William MacLeod and John Wilson, as trustees for their said company, sums of money and subjects therein contained, and which real lien and burden, and bond and disposition in security were, of the date of said assignation (by a formal assignation which has been adjudged duly stamped), assigned to the said John Wilson as part payment of the foresaid sum of £8931, 10s. 5d.

This instrument was presented by the agents of William MacLeod to the Commissioners of Inland Revenue, with the request to have the opinion of the Commissioners as to the stamp-duty with which it was chargeable. The Commissioners were of opinion that the transference of the said John Wilson's interest in the assets and business of the firm of William MacLeod and Company was of the nature of a sale, and that such interest was by the said assignation legally or equitably transferred to or vested in the said William MacLeod, in consideration of the said sum of £8931, 10s. 5d., paid or to be paid or accounted for to him the said John Wilson. The Commissioners accordingly assessed the *ad valorem* conveyance on sale duty of £44, 15s. upon the assignation, in respect of this sum, and the instrument being already stamped with the duty of 10s., they required payment of the further sum of £44, 5s.

William MacLeod thereupon paid the further sum of £44, 5s., but declared himself dissatisfied with the determination of the Commissioners, on the ground that the transaction in question was not of the nature of a sale, but a partition or division of company property, on a dissolution of the company, between the partners therein, and that the deed was already sufficiently stamped, and required the Commissioners to state a Case.

The questions for the opinion of the Court were—"Whether the said instrument was liable

to be assessed and charged with the said *ad valorem* conveyance on sale stamp-duty in terms of the Act 33 and 34 Vict. cap. 57? Or, if not, What other stamp-duty it was liable to be assessed and charged with?"

The provisions of the Stamp Act which bear on the case are the schedule and sections 70 and 71.

Argued for MacLeod—This was a case of "partition" not of "conveyance on sale." The two cases relied on by the other side, of *Christie* and *Phillips*, were not in point, and were decided with reference to a different statute, 13 and 14 Vict. cap. 97; *Henniker v. Henniker*, 22 L.J., Q.B. 94; *Anderson v. Inland Revenue*, Oct. 19, 1878, 6 R. 56.

Argued for the Commissioners of Inland Revenue—This was a sale of assets to the remaining partner, not a winding-up. The remaining partner had simply bought out the other in consideration of the sum stated. The present case was the same as *Christie v. Inland Revenue*, L.R., 2 Exchec. 46; and *Phillips v. Inland Revenue*, L.R., 2 Exchec. 399; *Potter v. Inland Revenue*, 10 H & G. 147, 23 L.J., Exchec. 345.

At advising—

LOD PRESIDENT—The question for the determination of the Court in this case is, whether the conveyance of which we have an abstract in the Case itself is a conveyance upon a sale? and it certainly would seem natural when such a question is put to the Court that the antecedent contract in pursuance of which this conveyance is granted should be laid before the Court either in full or in abstract. But although that has not been done, I think we may sufficiently gather from the terms of the conveyance itself what that antecedent contract was in all essentials. It appears that two persons of the name of MacLeod and Wilson had carried on business in partnership for some time under the firm of MacLeod & Co., metal merchants, founders, factors, and contractors in Glasgow, and that they had come to an agreement in March 1884 to dissolve the partnership; and following up that resolution to dissolve, an arrangement was made for disposing of the property and assets of the firm. The one partner, MacLeod, apparently intended to carry on the business, while the other partner, Wilson, was minded to retire. And accordingly a portion of the company property which was necessary for the carrying on of the trade was to be left in the hands of MacLeod, but another portion of the property which was not of that description was to be assigned to the retiring partner, Wilson. In short, the company property was to be divided into two parts. What may be called the trade property—that which was necessary for the carrying on of the business—was to be left in the hands of the continuing trader, and that portion of it which was an investment in security was to be handed over to the retiring partner. That seems to me to be the substance of the transaction. Now these two portions were not equal in amount. The total value of the property estate was £17,863; for although these figures are not given in the Case, we see that that must have been the amount, because the sum of £8931, 10s. 5d. is declared to be the full share and interest of one of the partners of the company, and it is not suggested that the interests of the two partners of the company were anything else but equal. So that the total value

of the company property must have been £17,868, 0s. 10d. The portion of the property given to the retiring partner consisted in the main of an heritable security—a bond and disposition in security for £8000; and if the total value of the company property had been £16,000, that would have afforded a very easy and simple mode of dividing the estate between the two partners. One would have taken £8000 in value, in the form of a heritable security, and the other partner would have taken all that remained, being of the same value of £8000. But as the value of the company property was somewhere about £1800 more than £16,000, it became necessary to provide for the division of that sum also. And accordingly the consideration of this deed of conveyance is in the first place the bond for £8000, which has been by a separate deed of even date with this conveyed to Wilson, and the equalising balance of £900 odds which is paid in cash by the company or MacLeod. Now, that being the nature of the transaction, in execution of which this conveyance was granted, the question to be decided is, whether that transaction is a sale; and it appears to me that it is not a sale, but that it is a division of the company's assets, and nothing else. It is almost impossible to divide a company's assets—without realising them and converting them into money—in perfectly equal shares by mere conveyance, and therefore in such a division there probably always will be some balance to be paid on one side or the other in the shape of money, and it happens here that the bulk of the share which goes to Wilson is in the form of the heritable security which I have mentioned, and the balance in both happens to be £900. Now, I cannot liken that to a sale. The two partners were joint proprietors of the stock and assets of the company; and when one portion of that property is taken *in forma specifica*, and assigned to the one partner, with the addition of £900 in cash, and the remainder is left in the hands of the other partner to carry on the business with, that seems to me to answer all the description and all the requisites of a partition or division. And therefore I come to the conclusion that this is not a conveyance upon a sale, because by a conveyance upon a sale I understand of course a conveyance which requires to be executed in order to carry into execution an antecedent contract of sale. I should have thought this all clear enough; but some doubt was thrown upon it by a citation of two cases which were decided in the Exchequer Court of England in the year 1866—the case of *Christie v. The Commissioners of Inland Revenue*, and a subsequent case of *Phillips*, both contained in 2 Exchequer Reports for that year. The second case does not require any particular consideration, because it follows as a matter of course upon the first; but the first case certainly requires some attention, and it appears to me that it differs from the present in a very essential respect. In that case there were three partners carrying on business, and one of them desired to acquire the whole company property in order that he might carry on the business alone, the other two being minded to retire. And he agreed accordingly with his copartners that he was to retain the whole company estate, and that he was to pay for that estate a sum of £110,000, paying down £10,000

in cash and granting a security over a portion of the company property for the remaining £100,000. Now, that is as different as can be from the present case, just in the important particular in which a division is distinguished from a sale. The retiring partners in that case got no portion of the company estate whatever, whereas here Mr Wilson obtains a subject—one-half of the company estate, of the value of £8000. No part of the company estate in *Christie's* case was retained or given to either of the retiring partners. What they got was cash and nothing else—cash or its equivalent in a security for money. And therefore I do not think we are at all embarrassed by the decision of the Exchequer Court in England in the case of *Christie*. I think the case of *Christie* perhaps raised a question of some little nicety in itself, and I do not desire to give any opinion upon it or to intimate the slightest reason to differ from the view which the English Exchequer Court took in that case. Indeed, I think, the general principle upon which the Chief-Baron proceeds there is just that which I am proposing to adopt in the present case. He says:—"In all these cases it appears to me that the substance of the transaction is alone to be considered upon the question whether the instrument is liable to the stamp-duty under the statute, and the substance of this transaction collected from the pleas certainly seems to me to be a sale by Mr Black to Mr Christie of Mr Black's interest in the partnership property for the sum of £110,000." That is exactly the view I take of the present case also, and the present, I think, differs from it just in that very respect which constitutes the distinction between a sale and a division. And therefore I am of opinion that this deed does not require to be stamped with an *ad valorem* stamp, as upon a conveyance of sale, but that it falls under the ordinary stamp-duty of ten shillings for a conveyance or transfer of a kind different from a conveyance on sale.

LORD MURE—I have come to the same conclusion. What we have to consider is, what is a conveyance on sale? Now, it appears to me from the information laid before us in this case that what took place between these two partners was not a conveyance on sale, in substance or even in form. It was a division of a copartnership estate between the two partners of a firm upon the dissolution of that firm, and the arrangement was that each partner should get one-half of the property belonging to the firm, and which at that time as a partner of the firm, in one sense of the word, belonged partly to himself. Now, that of course required the transfer to the respective partners of the share of the company's estate which was to belong to him as an individual after the dissolution of the company, and in the present case what actually took place was this, that Mr Wilson, one of the partners who was no longer to go on with the business under that arrangement, had transferred to him an £8000 bond, mentioned in the case as part of his share of the property, and that the difference between that £8000 and the £8931, which was the half of the value of the company's estate, was paid over to him in cash. He having thus got his share, one-half of the company's estate, Mr MacLeod, the party to this case, on the other

hand, retained the whole of the rest of the copartnership property, and as matter of form, to make it complete, got it transferred to him by the deed mentioned in the case. Now, that, I agree with your Lordship, is not a conveyance on sale, but is a transfer of a different kind altogether from a conveyance on sale, and in that view I think the duty payable must be fixed accordingly.

LORD SHAND—I am of the same opinion as your Lordships. The deed in question narrates that the parties have agreed to a dissolution of the firm. If it had further gone on to say that in view of that dissolution it had been arranged between the parties that the partnership property should be divided, and if I may further suppose that the amount of the estate was precisely £16,000, and it was also so stated, and that £8000 of the partnership property consisted of a sum lent upon a heritable property, for which a bond and disposition in security had been granted, and it had been arranged that that bond should be given to one of the partners, while the remaining estates of the firm should go to the other—I cannot doubt that in that state of circumstances the case would obviously have been one of partition or division of the company's estates, and not a sale by one partner to another of his share of the company's property. Now, although this case is not precisely what I have figured, it is certainly so in substance. The company's property does not happen to amount precisely to the double of the heritable estate, £16,000; it amounts to about £17,800; but the difference which requires that one partner shall, besides the bond over a heritable estate for £8000, receive £931 in cash, does not appear to me to make any difference on the result. As your Lordship has observed, it is scarcely conceivable that in the division of company assets there will not be a money payment to some extent by one partner to another. And accordingly it appears that besides the heritable property amounting to £8000, £931 is paid in cash out of the company's assets to one of the partners, the other partner remaining in possession of the other half. It appears to me that that is in substance nothing else but a division of partnership property, and I think it may be tested in this way quite distinctly, that there is a clear withdrawal from the partnership of that which was partnership property. The company while it was going on was possessed of the bond for £8000, and a number of other assets, but the bond which was company property no longer remains so in the person of the remaining partner. It is taken out of the assets by a division of the copartnership property. And so I have no difficulty in holding this to be a case of division of partnership property, and not a case in which one partner is purchasing the other partner's interest in the concern. The English cases to which reference has been made are clearly distinguishable in that respect. In these cases the remaining partner who continued to carry on the business practically retained the whole assets of the company, and if you have a case in which a partner is to go on with the business, retains the whole assets of the company, and merely gives an obligation to the outgoing partner to pay him a certain sum by instalments upon the footing

that he is to go out, or merely gives a mortgage or bond over part of the company's estates, the result of that plainly is, that the company's estates remaining the same, the partner remaining in the business is buying out the partner who goes out of it, and it may fairly be represented that that is the case of one partner purchasing the interest of the other. As was said in the case of *Christie*, I think that may be represented as practically the same thing as if a third party, altogether unconnected with the firm had purchased the outgoing partner's interest by undertaking to pay him so much for that interest, leaving the assets of the company the same as they had been before. The present is not a case in which the assets of the company are so left. The assets are divided, and it appears to me, therefore, that this is clearly a case of partition, and that it is quite distinguishable from the English authorities which have been referred to.

LORD ADAM—I concur, and have nothing to add.

The determination of the Court was:—

“Having heard counsel for the parties, Reverse the determination of the Commissioners: Assess the duty of ten shillings on the assignation mentioned in the foregoing Case, being the duty chargeable on a conveyance or transfer other than a conveyance or transfer on a sale, and ordain the Commissioners of Inland Revenue to repay to the appellant the sum of £44, 5s.: Find them liable in expenses,” &c.

Counsel for MacLeod—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Inland Revenue—Sol.-Gen. Asher, Q.C. — Moncreiff — Lorimer. Agent — David Crole, Solicitor of Inland Revenue.

Tuesday, June 2.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

### JACK v. NORTH BRITISH RAILWAY COMPANY.

*Jurisdiction — Sheriff — Railway Company — Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. cap. 70), sec. 46—Carrying on Business in Sheriffdom.*

*Held* that under the provisions of the 46th section of the Sheriff Courts (Scotland) Act 1876, a railway company is subject to the jurisdiction of the Sheriff of a county in which they have one of their principal places of business, though not the county in which they have their domicile, or in which the cause of action has arisen.

This was an action at the instance of Mrs Mary Gray Wilson or Jack, 13 Royal Buildings, Uddingston, widow of the deceased John Jack, commercial traveller, Drymen, against the North British Railway Company, concluding for damages for the death of her husband who had been killed at the defenders' station at Balloch through the alleged fault of the defenders.