

Wednesday, November 21.

FIRST DIVISION.

THE NORTHERN HERITABLE SECURITIES  
INVESTMENT COMPANY (LIMITED) AND  
OTHERS v. WHYTE.

*Bankruptcy—Trustee—Discharge—Appointment  
of New Trustee—Nobile Officium.*

A bankrupt was discharged without composition in 1884, and his trustee was also discharged. By the contract of marriage of the bankrupt's parents the fee of certain bank shares remained in his mother. By deed of transfer dated 1870 she transferred the shares to herself in liferent, and to her children, including the bankrupt, in fee. She died in 1887. In a petition for the revival of his sequestration, on the ground that these shares had not been ingathered and divided, the bankrupt averred that the shares had not vested till his mother's death, which happened after the date of his discharge, but that in any view the trustee had abandoned them. There was no evidence of abandonment by the creditors. The Court held that the shares had vested in him before the date of his discharge, and (following the case of *Thomson, Petitioner*, December 17, 1863, 2 Macph. 325) remitted to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a trustee.

The estates of George Whyte & Company, and George Whyte sole partner thereof, were sequestrated on June 7, 1882, and James Alexander Robertson, C.A., Edinburgh, was appointed trustee. He took measures to realise and divide the estates, which paid a dividend of 7½d. per £.

On 18th March 1884 the bankrupt was discharged without composition, and on 4th November 1887 the trustee was discharged by the Sheriff.

Mrs Isabella Mess or Whyte, the bankrupt's mother, died on 18th January 1887. Sometime before her death there stood in her name in liferent, and in the name of the bankrupt and of his three sisters in fee, certain shares of the Commercial Bank of Scotland.

By the contract of marriage entered into between the parents of the bankrupt, Mrs Whyte conveyed these shares to herself in liferent, but exclusive of the *jus mariti*, and failing her by death to her husband George Whyte in liferent, and in either case to the children of the marriage, equally among them if more than one, in fee, subject to the power of division and other conditions mentioned in the contract.

By transfer dated May 1870 Mrs Whyte transferred and made over these shares to herself in liferent, and her children equally in fee.

The present petition was accordingly presented by the Northern Heritable Securities Investment Company (Limited) (who were creditors of the bankrupt to the extent of £8124, 5s. 7d.) and others, who averred that the said Commercial Bank shares had fallen under the sequestration, and that the creditors of the bankrupt were entitled to this asset, and to any other estate

which might yet fall in and be available for distribution. The petitioners applied to the Court to remit to the Lord Ordinary on the Bills to order an early meeting of the creditors of George Whyte & Company, and of the said George Whyte sole partner of the said company, to be held to elect a trustee on the sequestrated estate.

Answers were lodged by the said George Whyte, who averred that his whole assets were fully known to his trustee and creditors before his sequestration came to an end, and that the petitioners were consenters to his discharge; that he acquired a vested right to these shares only on his mother's death; and that neither the creditors nor the trustee, who were both well aware of the condition of these shares, had taken any steps to have it found that they were entitled to them; and that accordingly the creditors and trustee had abandoned any right competent to them to these shares.

The respondent referred to the action at his instance against D. H. Murray, *supra*, p. 67.

Argued for the petitioner—The bank shares formed estate falling under the sequestration which had not been ingathered. They were vested in the bankrupt at the time of his sequestration. The bankrupt being discharged without composition the sequestration was not ended, and he was not reinvested in his estates. The present question related to a claim of debt under a marriage-contract. The effect of the marriage-contract was to leave Mrs Whyte the *fiar* of these shares. A power of apportionment did not affect vesting, nor did a destination-over where there was no clause of survivorship. Vesting here took place subject to defeasance if the children died leaving issue—*Snell's Trustees v. Morrison*, March 20, 1877, 4 R. 709; *Haldane's Trustees v. Murphy*, December 15, 1881, 9 R. 269. The share of each child vested in 1870 at the date of the transfer, and that being so, the bankrupt's share vested in him prior to his sequestration, and so passed to his trustee—Bankruptcy Act 1856, secs. 102 and 103. The trustee had not abandoned this security, although he did not take any active steps to bring it into the sequestration. In order to infer abandonment there must be something more than mere silence; there must be actually abandonment in favour of the bankrupt. Here, at the most, there was abandonment in error—*Greig v. Fraser*, February 6, 1850, 12 D. 684; *Mackay v. Brownlee*, January 31, 1866, 4 Macph. 333; *Douglas v. Mactachlan*, February 4, 1881, 8 R. 470. At all events there had been no abandonment by the creditors.

Argued for the respondent—The proposal of the petitioner was to revive a sequestration in order to deal with estate which had been overlooked by the negligence of the trustee, and this four years after both the bankrupt and the trustee had been discharged. No case could be cited where the Court had appointed a new trustee to deal with estate which had come to the bankrupt during the course of his sequestration or prior to his discharge. This application could not be made under section 103 of the statute. It could only be under section 102, and under that section there was no provision for such an appointment as was here sought. There was no vesting of this stock under the clause in the marriage-contract, for the fee was in Mrs

Whyte—the children's rights were qualified by the terms of the transfer. No right vested in them till after the death of Mrs Whyte—*Kirkland v. Kirkland's Trustee*, March 8, 1886, 13 R. 798. This was an appeal to the *nobile officium* of the Court, and it was a case in which to preserve the interests of all parties a judicial factor should be appointed, for if the sequestration was revived the old trustee would be re-appointed, and this was undesirable, as he would thereby be in a condition to control any proceedings which might be taken against himself relative to the past management of this estate—*Thomson, Petitioner*, December 17, 1863, 2 Macph. 325; *Fleming v. Walker's Trustees*, November 16, 1876, 4 R. 112; *Taylor v. Charteris*, November 1, 1879, 7 R. 128; *Abel v. Watt*, November 21, 1883, 11 R. 149.

At advising—

LORD PRESIDENT—This is an application to revive a sequestration in which both the bankrupt and his trustee have been discharged. Such an application is addressed to the *nobile officium* of the Court, and in the series of cases which have occurred since the case of *Thomson* we have followed the course which was then adopted.

What is necessary in order to sustain this application is, first, an averment that there are funds which belonged to the bankrupt at the date of his sequestration, and which have not been divided among his creditors; and second, that there are creditors who were ranked in the sequestration, and who have not been paid in full, who are supporting the petition.

Now, the objection which is taken by the respondent is, that there are no funds to be recovered, and so that the present application is useless. It would certainly be a very awkward matter if a question of this kind fell to be determined in a process like the present. If, however, any difficulty were to arise as to whether or not these funds were to be held as forming part of the bankrupt's estate, that is a matter which the trustee will have to determine after his appointment. In the present case, however, there can be no question that the fund now sought to be brought into the sequestration formed part of the bankrupt's estate at the date of his sequestration. The bank shares in question were thus dealt with by Mrs Whyte, the bankrupt's mother. There was no trust created by the marriage-contract, but she simply conveyed these shares to herself in *lifereit*, and to the children of the marriage in *fee*. Mrs Whyte thus remained the undivested *fiar*, while the right of her children was confined to a mere *spes successionis*. But after her husband's death in 1869 Mrs Whyte in 1870 executed a transfer of these shares, and it is of importance, looking to the contention of the respondent, to see in what way the rights of the children were affected by this transfer. By this deed, which bore to be in corroboration of a transfer already granted by her, Mrs Whyte transferred the said bank shares to herself in *lifereit*, for her *lifereit* use *allenerly*, and to the children of the marriage *nominatim* in *fee*.

Now, the effect of this transfer was to alter materially the relative positions of Mrs Whyte and her children; all that she thereafter had, was a reserved *lifereit*, while the *fee* vested in the children whenever they accepted the transfer.

It is said that there is a clause in this deed which restricts the right of the children by stipulating that the acceptance of the transfer by the children was not to affect their interests *inter se* under their father's marriage settlement and trust-disposition, but I can find nothing in the deed of transfer which can in any way qualify these children's right of *fee*. As regards their father's trust-disposition, it clearly does not carry any right to these bank shares, while all that the marriage-contract provides is, that the *fee* of these shares is to be in the children of the marriage, if more than one, then equally among them. In neither of these deeds can I find anything which, taken along with the clause in the deed of transfer, can be said to prevent the vesting of these shares in the children as at the date of the transfer. There is not, I understand, any dispute about the proportion of stock which fell to the bankrupt. He was entitled to one-fourth of these shares, and it is equally clear that they formed part of his sequestrated estate at the date of his sequestration. But it may be said if all this is so clear, why did not the trustee take up these shares and realise them, and divide the proceeds among the creditors? and it is now urged by the respondent that in consequence of his not doing so the trustee must be held to have abandoned this asset, and that the sequestration cannot be revived in order that these shares may now be taken up and dealt with by any trustee who may be appointed. Now, the evidence of what the respondent terms abandonment is somewhat remarkable. The trustee seems to have been placed in rather a curious position with reference to these shares, as a Mr David Hill Murray was said to be in right of them under an assignment alleged to be granted by the trustee and commissioners of the residue of the estate of the bankrupt's deceased father. In these circumstances the trustee had some difficulty in determining whether or not this could in any sense be viewed as an available asset. But what satisfies me that there was in the present case no abandonment of this asset is that anything that was done in the matter was done by the trustee alone. Abandonment to be effectual must be by the creditors, or by the trustee with the consent of the creditors. I know of no case where there was held to have been abandonment without evidence of the consent of the creditors, and there is not the slightest trace of anything of that kind here.

But it has been further urged that we should not in the present case follow the procedure which was followed in the case of *Thomson*, but that we should appoint a judicial factor to protect the various interests which are said to be involved. I can only say that it would require very strong reasons indeed to induce us to adopt any such course.

The appointment of a trustee must lie of course with the creditors, and it has been urged that the petitioners having a majority of votes will carry their own trustee and commissioners, and will re-appoint to this office the late trustee. This argument is somewhat inconsistent with what was stated in the course of discussion, *viz.*, that the petitioning creditors are almost entirely paid up by collateral securities. If this be so, then their voting power will be proportionately reduced. All this, however, is mere speculation,

and does not enter into the present question. If the bankrupt has anything to allege against the management or actings of the late trustee he has his remedy, if so advised, in an action of reduction. Upon these grounds I think that the course proposed by the respondent is not only quite irregular, but that it is also unauthorised by decision. I am therefore for granting the prayer of the petition.

LORD MURE—If the right to these bank shares was in Whyte at the date of his sequestration, then there can be no doubt that it passed to his trustees, and that these shares formed an asset available for division among the creditors of the bankrupt. What the petitioners now propose is, that this sequestration should be revived in order that this fund may be made available for distribution. As regards the question of vesting, with which so large a part of the discussion was occupied, I quite concur in the view your Lordship has expressed upon that matter, and have nothing to add. I further think that there is not the slightest evidence to show that either the trustee or the creditors were at all aware that this asset was of any value whatever; and that being so, it is impossible to say that there was here anything of the nature of abandonment. With reference to the proposal that a judicial factor should be appointed on this estate instead of a trustee on the revived sequestration, I can only say that I have heard nothing from the respondent to justify so unusual a proposal.

I am therefore prepared to concur in the course proposed by your Lordship.

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

LORD SHAND and LORD ADAM were absent from illness.

The Court granted the prayer of the petition.

Counsel for the Petitioners—D.-F. Macintosh, Q.C.—C. S. Dickson. Agent—A. Morison, S.S.O.

Counsel for the Respondent—Gloag—Watt. Agent—Party.

## HIGH COURT OF JUSTICIARY.

Thursday, November 22.

(Before the Lord Justice-Clerk, Lord Rutherford Clark, and Lord Lee.)

DUNLOP v. WEIR.

*Justiciary Cases—Contagious Diseases (Animals) Act 1878 (41 and 42 Vict. cap. 74), sec. 61, sub-sec. (1)—Permitting Animals to be Moved without Declaration under Local Authority Regulations—Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62), sec. 3, sub-sec. (9)—Amendment of Case.*

The Contagious Diseases (Animals) Act 1878, by section 61, provides that if any person without lawful authority or excuse, proof whereof shall lie on him, does any of the following things he shall be guilty of an

offence against this Act—(1) If he does anything in contravention of this Act or of a regulation of a local authority. The Animals Order 1886, passed by the Privy Council, provides—“If an animal is moved in contravention of a regulation made by a local authority, . . . the owner of the animal, and the person for the time being in charge thereof, and the person causing, directing, or permitting the movement of the animal . . . shall be deemed guilty of an offence.”

A cattle-dealer was convicted of an offence within the view of these provisions, on the ground that he had permitted the removal of certain cattle from his farm into Lanarkshire unaccompanied by a declaration under the regulations of the local authority of Lanarkshire. In a case on appeal obtained by him it was stated that the appellant sold the cattle at his farm in Ayrshire, where they were delivered to the purchaser; that the person who drove them into Lanarkshire had not a declaration properly filled up under the regulations of the local authority of that county; that the Justices were “of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be removed into the county of Lanarkshire, was guilty of the offence charged.”

*Held* that the grounds stated were not sufficient to justify the conviction, which must be set aside, and a motion to remit the case to the Justices to be amended *refused*.

*Observations (per Lord Justice-Clerk) upon the practice of remitting for amendment.*

This was an appeal by Gabriel Dunlop, cattle-dealer, residing at Castle Farm, Stewarton, in the county of Ayr, on a case stated under the Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62) against a conviction obtained against him in the Justice of Peace Court of Lanarkshire, at Hamilton, on the 25th June 1888, upon a complaint at the instance of Robert Weir, Procurator-Fiscal of the Court.

The complaint set forth that the appellant “did, on 30th of April 1888 or 1st May 1888, move, or cause, direct, and permit to be moved, by some person to the complainer unknown, 8 cattle, of which he the said Gabriel Dunlop was then the owner or person in charge, from Castle Farm, Stewarton, aforesaid, being within the district of the local authority of the county of Ayr, by road into the district of the local authority of the county of Lanark, without the said cattle being accompanied with the declaration required by the regulations dated 11th April 1888 made by the said local authority of the county of Lanark in virtue of the powers conferred on them by the Contagious Diseases (Animals) Acts 1878 to 1886, and the Animals Order of 1886, the said movement being thus contrary to the Act of Parliament 41 and 42 Vict. cap. 74, sec. 61, sub-sec. (1), and the said Gabriel Dunlop was, before your Honours’ Court, at Hamilton, on 19th January 1888, convicted of an offence against the same sub-section of said section of said Act of Parliament, whereby the said Gabriel Dunlop is liable to a penalty not exceeding £5 for each of the said 8 cattle so moved as above labelled, together with expenses, said penalty and expenses