

there is no level-crossing—where the party is simply crossing the line at a point which suits his own convenience—he has a duty to himself, first, to look up and down the line to see that it is clear, and secondly, to get across the line as fast as he can. According to the evidence of the pursuer, he appears to have performed the first duty but neglected the second. He nullified the effect of his previous outlook by standing on the line and looking around and calling to his companion. I agree with Lord Wellwood that we cannot accept his statement as to the exact duration of the time he so stood on the line. If we believe the evidence of the spectators, who had the best means of observing, the pursuer did not look out, but was in the act of attempting to cross the line when he was met by the advancing engine and knocked down. In either view I think the painful accident from which the pursuer suffered is directly attributable to his own failure to take the usual precautions which ought to be taken in such circumstances.

On these grounds, and without entering further on the evidence which has been very fully explained by Lord Wellwood, I agree that the verdict cannot stand, and the rule ought to be made absolute.

LORD KINNEAR—This is a distressing case, but I have arrived at the same conclusion as your Lordships, that the accident was due to the pursuer's own want of reasonable care.

I do not think it is necessary to decide absolutely that the railway company was in fault, but I think there was evidence to go to the jury to show that they had failed to take the reasonable and proper precautions taken by other companies in similar places, and if the jury found against the railway company upon that ground, there is, I think, no evidence to satisfy us that they were wrong. Therefore I assume the jury were right in holding that the railway company had failed to take sufficient precautions for the public safety.

But the pursuer had to show further two things—(1) that the defenders' failure to take reasonable precautions was the cause of the accident, and (2) that he had not materially contributed to the accident by his own negligence.

In one view of the evidence he appears to have failed to show that the company's negligence was the cause of the accident at all, because if, in his anxiety to reach his ship, he crossed a line of rails without looking for a moment to either side to see whether there was any risk of a train coming down upon him, it appears to me that in that case he ran voluntarily into a danger, from which the precautions which the company are said to have omitted would not have saved him.

But I agree with Lord Adam that if there is another view more favourable to him, we must assume that the jury adopted it; and there certainly is evidence that the pursuer did not cross the line without looking before him; but then according to his own evidence he paused between the

lines of rails for some forty seconds, and the train came down upon him while he was so standing with his back to the direction from which it came.

The question then is, whether that was a course which a man would take who takes reasonable precautions for his own safety. If the company failed to take proper precautions, and so placed the pursuer in a position of danger, the pursuer cannot recover damages, if it be shown that he might have escaped the injury of which he complains by the exercise of the ordinary care for his own safety which is to be expected of a reasonable man. Now, his own evidence shows that he was not acting with ordinary and reasonable care; and that, taking his own statement as true, his recklessness was the direct cause of the accident. I therefore concur in thinking that there must be a new trial.

LORD PRESIDENT—In expressing my concurrence with your Lordships in making the rule absolute, I desire to state in a few sentences the grounds of my opinion.

In the first place, if there had been no evidence of contributory negligence on the pursuer's part here, I think there was a case for the jury on the fault of the defenders, and I should not have been disposed to disturb their verdict for the pursuer had that been the state of the case. In the second place, I think the true ground of judgment is, that the great weight of the evidence is in favour of the proposition that the accident was caused to a material extent by the fault of the pursuer himself, by the grossly negligent way in which he attempted to cross the line. These are the two views I take of the branches of the case, and they are substantially in accordance with the opinion of Lord Wellwood.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuer—Comrie Thomson—Shaw—P. J. Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—D. F. Balfour, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.

Friday, January 23.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

CLARKE AND CRABB v. CUMMING.

Bankruptcy — Sequestration — Cessio — Action Depending before Bankruptcy Settled by Trustee—Right of Bankrupt to have Settlement made by Trustee Set aside and to Insist in Action—Process.

Clarke and Crabb raised an action of damages for £4000 against Cumming, a law-agent, for negligence when acting for them professionally. After the case was in Court, decree of *cessio* was granted

against Clarke at the instance of his creditors, and Crabb was sequestrated. Thereafter the trustee in Clarke's *cessio* settled his claim against Cumming for £105, and Crabb's trustee, with the sanction of the creditors in the sequestration, settled his claim against Cumming for £25, and the two trustees and Cumming lodged a minute stating that the action had been settled, and craving the Court to assoilzie the defender. Clarke and Crabb, with a view to being themselves allowed to go on with the action, thereupon lodged a minute, in which they made allegations to the effect that the bankrupts' claims against Cumming had been discharged for grossly inadequate sums, and that the settlements had been carried through by Cumming's influence, and in flagrant disregard of the bankrupts' interests.

The Court held (1)—*diff.* from Lord Trayner — that the bankrupts were entitled before answer to a proof of the averments contained in their minute, and (2) after the proof, that they had entirely failed to show that the settlements had not been duly carried through by the trustees for the benefit of the creditors, and *assoilzied* the defender.

On 24th January 1889 this action was brought by David Wilkie Clarke and David Crabb, sub-feuars of a small piece of ground in Dundee, against Andrew Watt Cumming, solicitor, Dundee, for payment of £4000, as damages for alleged negligence on the part of the defender when acting as law-agent for the pursuers in obtaining said feu.

The negligence alleged against the defender on record consisted in his having failed to disclose to the pursuers the proper state of his title, and to procure a minute of allocation of the feu-duty from the over-superior of the lands, or to inform the pursuer that under their title the subjects feued to them were liable for the whole feu-duty and casualties due by their author to his own superiors, and by the latter to certain over-superiors, and hence were liable to be irritated by the over-superiors, who might also raise actions of pointing of the ground, and that the pursuers might also be liable in a personal action at the instance of these over-superiors.

Various actions and proceedings which had been taken against the pursuers were set out on record. These, it was alleged, had been instigated by the defender with a view to render the pursuers bankrupt, and so defeat any claims they might have against him.

On 15th April 1889, Crabb's estates were sequestrated, and thereafter Alexander Watson Stiven was duly elected and confirmed trustee thereon.

On 23rd May 1889, on the petition of a creditor, decree of *cessio* was pronounced against Clarke, and James Constable Robertson, accountant, Dundee, was appointed trustee in the *cessio*.

The creditors in Crabb's sequestration

having directed the trustee and commissioners to compromise the claim against Cumming, provided he obtained from Cumming a payment of not less than £25, the trustee, with the consent of the commissioners, accepted from Cumming a payment of £25 in full of all claims against him under the action. In like manner the trustee on the cessioned estate of Clarke settled his claim against Cumming in consideration of a payment of £105.

On 12th June the trustees on the cessioned estate of Clarke and the sequestrated estate of Crabb were sisted as party pursuers in the action against Cumming, and on the same day a joint-minute was lodged for the said trustees and the defender Cumming, in which counsel for these parties concurred in stating that the action had been compromised and settled, and craved the Court to assoilzie the defenders, and to find no expenses due to either party.

On 21st June the original pursuers, Clarke and Crabb, lodged a minute in which they made averments to the following effect—The said proceedings of *cessio* and sequestration took place at the instance of certain clients of the defender, and the defender was truly the party by whom and in whose interest they were carried on, and the minuters believed and averred that he had undertaken to relieve his said clients of any loss in connection with the said proceedings of *cessio* and sequestration. The trustee in the sequestration was really his nominee, and the defender's local agent acted as agent for both the trustees. The said proceedings were nimious and oppressive, and were taken by the defender with the view of rendering the pursuers bankrupt, and of carrying through the settlements alleged to have been made with him by the trustees in the *cessio* and sequestration, and thereby preventing the pursuers following up their present claim against the defender. After the trustees had been appointed, the defender's agent opened negotiations with them with the view of arranging a settlement of the minuters' claims against him. In connection with these negotiations there was submitted to the trustees a valuation of the minuters' sub-feu proposed by a relative of the defender (though the trustees were not aware of that relationship), which valued the property far under its true value. This was practically the only information as to the value of said property before the trustees during the negotiations, which resulted in an agreement whereby the defender undertook to pay £105 to the trustee in the *cessio*, and £25 to the trustee in the sequestration in full of all claims made against him in the action. Meetings of the creditors in the sequestration were thereafter held, at which the whole creditors represented were clients of the defender, and the trustee and commissioners were directed to settle Crabb's claim against the defender for not less than £25, and according to the allegations of the defender, the defender, the trustee, and the commissioners thereafter agreed to settle

Crabb's claim in the action for that sum. The settlement alleged to have been made by the trustee in the *cessio* was agreed to by said trustee without authority from anyone. The said negotiations and agreements were entered upon by the defender in further pursuance of the attempt already set out on record to defeat and evade the pursuers' just claims in the present action. The sums of £25 and £105 were illusory and unconscionable in view of the fact that the pursuers have sustained loss, injury, and damage to the extent of £4000 by the proceedings complained of. The said alleged agreements were, so far as the said trustees were concerned, *ultra vires* and in flagrant disregard of the pursuers' interests, and they were illegal and invalid.

These averments were denied by the trustees and the defender so far as they called in question the good faith of the parties carrying through the settlements complained of.

On 10th July 1889 the Lord Ordinary (TRAYNER), having heard counsel for the whole parties, interposed authority to the joint-minute for the trustees and defender, and in terms thereof assolized the defender from the conclusions of the action.

Clarke and Crabb reclaimed, and argued—They were entitled to a proof of the averments made by them in their minute of 21st June, and if they succeeded in substantiating these averments, to insist in the action—*Marshall & Aitken v. Campbell's Trustee*, July 2, 1889, 16 R. 895; *Robertson v. Adam*, February 20, 1857, 19 D. 502; *Crichton v. Bell and Gillon*, June 25, 1833, 11 Sh. 781; *Macalister v. Swinburne*, November 5, 1873, 1 R. 166.

The defender and the trustees argued—The proceedings which resulted in the compromises had been regular and proper, and the trustees had acted quite within their powers in agreeing to the compromises. The trustee in a sequestration was specially empowered by statute to compromise any questions regarding the bankrupt estate with consent of the commissioners. The remedy of a bankrupt, if he were dissatisfied with any resolution of the creditors or deliverance by the trustee, was to appeal to the Lord Ordinary, such appeal being competent only within fourteen days from the date of such resolution or deliverance—19 and 20 Vict. c. 79, secs. 169 and 176. A trustee in a *cessio* had right at common law to compromise claims by or against the cessioned estate, and the debtor's remedy was to complain to the Accountant of Court if dissatisfied—Act of Sederunt, 22nd December 1882, sec. 18. The debtors having failed to take the proper means for redressing any wrong which in their opinion the compromise of their claims against the defender inflicted upon them, could not be listened to now, and were not entitled to a proof of their averments.

It was stated at the bar for Crabb that the settlement in his sequestration had been agreed to on 13th May, but that he had no information of it till 5th June.

On 29th October 1889 the Court (Lord President, Lord Shand, and Lord Adam) before further answer allowed Clarke and Crabb a proof of the averments contained in their minute of 21st June 1889.

The proof was taken before Lord Adam on 3rd November 1890, and counsel for Clarke and Crabb having been heard thereon, the Court (Lord President, Lord Adam, and Lord Kinnear), without calling on counsel for the other parties, expressed themselves as satisfied, that the compromises entered into by the trustees had been duly carried through by them in the exercise of their judgment for the benefit of the creditors, and that the original pursuers had entirely failed to substantiate the allegations made by them in their minute.

The Court accordingly adhered to the Lord Ordinary's interlocutor of 10th July 1889.

Counsel for Clarke and Crabb—R. Johnstone—C. S. Dickson—Macfarlane. Agent—J. Smith Clark, S.S.C.

Counsel for the Trustee in Clarke's *Cessio*—W. Campbell. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Trustee in Crabb's Sequestration—Kennedy. Agent—George Macgregor, S.S.C.

Counsel for the Defender Cumming—Craigie—Graham Murray. Agents—Watt & Anderson, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, February 2.

(Before the Lord Justice - Clerk, Lord M'Laren, Lord Trayner, Lord Wellwood, and Lord Kyllachy.)

MONTGOMERY v. LOUGHRAN.

Justiciary Cases—Sheriff—Process—Small Debt Court—Litis Contestatio—Decree in Absence—Sist—Small Debt Act 1837 (1 Vict. cap. 41), sec. 16.

In an action in the Small Debt Court, in which both parties appeared, the pursuer asked and obtained an adjournment on account of the non-appearance of his witnesses. At the adjourned diet the defender failed to appear, and decree was pronounced against him "in respect of absence," with execution after a charge of ten free days. Held that there was no litiscontestatio, that the decree was a decree in absence, and that the defender was entitled to have execution sistid and the case heard under section 16 of the Small Debt Act.

Worrall, Hallam, & Company v. M'Dowall, August 29, 1885, 23 S.L.R. 5, distinguished.

Opinions (per Lord Trayner and Lord