

"The result therefore is, that in my opinion the pursuer is entitled to recover payment of the share of her father's estate which falls to her, and for the purpose of ascertaining its amount the trustees are bound to hold count and reckoning with her."

Counsel for the Pursuer—John Wilson—W. E. Mackintosh. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Burnet. Agents—Carmichael & Miller, W.S.

Wednesday, November 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

M'LACHLAN v. BELL AND ANOTHER.

Reparation—Relevancy—Interim Judicial Factor on Bankrupt Estate—Breaking Open Lockfast Room.

In an action of damages at the instance of a bankrupt's wife against the *interim* judicial factor on the bankrupt's estate, appointed under the Bankruptcy Act 1856, sec. 16, the pursuer averred that the judicial factor visited the farm-house occupied by the bankrupt to take an inventory of his effects; that one of the rooms contained effects belonging entirely to the pursuer; that the defender was informed of this, and that he nevertheless broke open the door of the said room, and that he "rudely meddled with the pursuer's property, and, ransacking a wardrobe, he tossed the contents about the floor of the room."

Held (*rev.* judgment of Lord Kincairney) that the pursuer's averments were irrelevant, and that absolvitor must be pronounced, on the ground (1) that, apart from the allegation as to breaking open the door of the room, there was no relevant averment of damage; (2) that in breaking open the door for the purpose of obtaining an inventory of the bankrupt's estate, the defender was acting in the discharge of his duty; and (3) that assuming any legal wrong to have been done by his doing this, it was the bankrupt and not the pursuer who had suffered that wrong.

On the 13th May 1895 Mrs Jane Borland or M'Lachlan, wife of George M'Lachlan, farmer, Craighorn Farm, near Strathaven, raised an action for £200 damages against Thomas Bell, sheriff-officer, Hamilton, *interim* judicial factor appointed under the Bankruptcy Act 1856, sec. 16, on the sequestered estate of the pursuer's husband, and against the said Thomas Bell's cautioner.

Sequestration of the estate of the pursuer's husband was awarded on 17th November 1894, and the defender Thomas Bell was appointed *interim* judicial factor on his estate by the Sheriff-Substitute of Lanark-

shire at Hamilton, pending the appointment of a trustee.

Up to Martinmas 1894 the bankrupt had occupied the farm of Kirkland House, Avondale.

The pursuer averred—" (Cond. 3) On or about 28th November 1894 the defender came to Kirkland House Farm about 8 o'clock in the morning, and said he had been sent to inventory the effects in the farm-house. He was asked by the pursuer's husband for his warrant, but refused to show any, and wrongfully proceeded to go through the house, and take a note of the contents of the various rooms. One of the rooms, a parlour, contained effects belonging entirely to the pursuer. The defender was informed that this was the case, and he was refused admittance, the door being locked. (Cond. 4) The defender thereupon left, but shortly afterwards returned. He then wrongfully, and without warrant, re-entered the house, and by sheer force violently burst open the door of the said parlour, breaking the lock. There he rudely meddled with the pursuer's property, and ransacking a wardrobe he tossed the contents about the floor of the room. (Cond. 5) All the articles in the said parlour were the property of the pursuer, and had been bought by her previous to her marriage in 1889. The defender was distinctly and emphatically informed of this fact, and although he was made aware of it, and was remonstrated with, he persisted in going on with his high-handed and illegal proceedings. (Cond. 7.) The defender's conduct was not only wrongful and illegal, but injurious to the pursuer, and an invasion of her rights."

The pursuer pleaded—"The defender having acted unwarrantably, wrongfully, and illegally, to the injury of the pursuer, she is entitled to decree as craved with expenses."

The defender pleaded—" (1) The pursuer's statements are irrelevant, and insufficient to support the conclusions of the summons. (3) The pursuer having suffered no damage, the defender should be assoilzied with expenses. (4) The defender having acted in the proper discharge of his duty as judicial factor, is entitled to absolvitor."

On 5th November 1895 the Lord Ordinary pronounced an interlocutor approving of the following issue:—"Whether on or about 28th November 1894, the defender, in Kirkland House Farm-house, Avondale, wrongfully and without a legal warrant forced an entrance to a lockfast room, which was solely the repository of the pursuer's property, and interfered with said property, to the loss, injury, and damage of the pursuer. Damages laid at £200 sterling."

The defender Bell reclaimed, and argued—(1) It was part of the judicial factor's duty to take an inventory of the estate. The only reason for the factor being appointed was that loss was apprehended between the date of the sequestration and the appointment of the trustee. The defender therefore was not only entitled but bound to do what it is alleged that he did. (2) If there was a wrong done here, it was a wrong to the bankrupt, and not to the pursuer, his

wife. It was not averred that there was any contract entitling the wife to exclusive use of the room. The pursuer's averments were consequently irrelevant, and she was not entitled to an issue.

Argued for the pursuer—(1) The judicial factor's powers, as set forth in his appointment in the Bankruptcy Act 1856, sec. 16, gave him no power to open shut and lockfast places. If in the discharge of his duty he required to do so, he must first go to the Sheriff for an express warrant. (2) Apart from actual injury to the property, the opening of the lockfast room was an injury to the bankrupt's wife. [LORD PRESIDENT—As I read your record you have no case, unless the breaking open of the door is illegal. The word "interfere" is very vague, and you have no averment of damage]—Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), sec. 12; Personal Diligence Act (1 and 2 Vict. c. 114), sec. 9; *Meikle v. Sneddon*, March 5, 1862, 24 D. 720; *Wilson v. Mackie*, October 22, 1875, 3 R. 18; *Ross v. Wilson*, October 29, 1884, 12 R. 26; *Lord Advocate v. Cook*, April 17, 1856, 2 Irv. 446.

LORD PRESIDENT—This defender happens to be a sheriff-officer, but it is necessary to bear in mind that it was not in his quality of sheriff-officer but in his character of judicial factor that he was in the house on the occasion now in question. He had been appointed under the 16th section of the Bankruptcy Act, and the terms of the section show that such an appointment is only made in case the Court thinks proper to take immediate measures for the preservation of the estate. Armed with that appointment, this defender goes to this farmer's house and enters it. It was conceded that he had a right to go into the house and take an inventory of the property. Being lawfully in the house, he was entitled to go through the house on his errand of finding out the estate of the bankrupt and taking measures for its protection. He comes to the door of the parlour, and according to the pursuer what he is told by the bankrupt is, that the room contained effects belonging entirely to the pursuer. Was the judicial factor bound to accept that, and to desist from verifying the statement of the bankrupt? It appears to me that that is entirely out of the question. The bankrupt is not a person whose word is to be final as to what are the contents of particular rooms, and accordingly I think it clear that this judicial factor was entitled to prosecute his mission and examine the house for the purpose of preserving the estate. I think, therefore, that he was entitled, if the door was locked, to make his way in by forcing the lock.

If that be the case, the claim for damages falls to the ground, for the pursuer has no case such as this, that, assuming the judicial factor to be lawfully in the room, he proceeded to do something unlawful, namely, to damage and injure her property. Her case falls to the ground completely if her proposition in law is bad, namely, that the

judicial factor had not the right to force his way into the room. It seems to me also that, that being the legal act complained of, it is not an act giving a claim of damages to the bankrupt's wife, for *non constat* upon this record that the wife suffers any damage at all. If the opening of the place was an invasion of the legal rights of anybody, it was the farmer whose door was forced open that has a right to complain. I think this is a clear case where the action is irrelevant, and that on the showing of the pursuer no legal wrong has been done.

LORD ADAM—I am of the same opinion. This is the case of a judicial factor appointed on a bankrupt estate, and, as we all know, that is not a common appointment, and is only made in cases of emergency, where it is necessary to preserve the bankrupt's estate until the appointment of a trustee; and that is the nature of the appointment here. I am of opinion that it was the duty of the judicial factor so appointed to take possession of and inventory the whole of the bankrupt's estate. I think, when he was in this house, and legally in this house, it was his duty to see, and inventory, and take possession of the whole contents of the house. It was no reason for his not doing so that some one came forward and said "These particular articles in the bankrupt's house do not belong to him." It might be so, but he has nothing to do with that. The articles were in the bankrupt's house, and presumably in his possession at the moment. I think he would not have been doing his duty if he had not taken possession of the whole articles, which presumably were in the bankrupt's possession at the time. Well, if in the performance of his duty, he comes to a locked door in the house, was he to take the bankrupt's word or the bankrupt's wife's word, that that room contained property belonging exclusively to her? I think he would not have been doing his duty to the estate if he had remained satisfied with that declaration. I think it was his duty to see what was in that room, and to inventory what was in that room. It was in the discharge of his duty that he had the door opened.

Here occurs what is fatal to the pursuer's case. That room, if it was in possession of anyone, was in possession of the husband. If anyone was injured, it would not be the bankrupt's wife, but the bankrupt. I suppose the husband and the judicial factor in his place could have opened the room if they liked. Where, then, is the legal wrong to the wife? I cannot see it. It was not the wife's door that was broken open; it was a door in the possession of the husband, the bankrupt. I therefore agree with your Lordship that the only thing to do is to assoilzie the defenders from this action. I do not think that the cases cited to us by Mr Smith as to the duties of sheriff-officers and messengers-at-arms have anything to do with this case.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, and assailed the defenders.

Counsel for the Pursuer—A. J. Young—Macaulay Smith. Agent—George Meston Leys, Solicitor.

Counsel for the Defenders—Salvesen—Morison. Agent—Alex. Morison, S.S.C.

COURT FOR TRIAL OF ELECTION PETITIONS.

Friday, November 15.

(Before Lord Adam, Lord M'Laren, Lord Kyllachy, and Lord Stormonth Darling.)

IVORY v. MACRAE (INVERNESS-SHIRE ELECTION).

Election Law—Returning Officers' Charges—Presiding Officers and Clerks—“Travelling Expenses” — Returning Officers (Scotland) Act 1891 (54 and 55 Vict. cap. 49), sec. 3, and Schedule, Part I.

The Returning Officers (Scotland) Act 1891, Schedule, Part I., provides that the returning officer at a Parliamentary election shall be entitled to charge as a maximum, “For travelling expenses of presiding officers and clerks per mile, one shilling.” *Held (diss. Lord Adam)* that the expression “travelling expenses” in the schedule includes hotel bills and other personal expenses reasonably and necessarily incurred by presiding officers and clerks while absent from home in the performance of their duties in connection with the election.

Election Law—Returning Officers' Expenses—Deputy Returning Officer—Ballot Act 1872 (35 and 36 Vict. cap. 33), sec. 8, and Schedule I., Part I., Rule 47.

A deputy returning-officer is not entitled to any fee for acting as a presiding officer at a Parliamentary election.

On 13th June 1895 an election was held for the county of Inverness. The Sheriff of Inverness-shire, returning officer at the election, in terms of “The Returning Officers (Scotland) Act 1886” (49 and 50 Vict. cap. 58), section 3, transmitted to the election agents of the candidates an account of his expenses in respect of the election. Mr. H. Rose Mackenzie, solicitor, Inverness, election agent for Mr Donald Macrae, one of the candidates, thereafter by letter dated 16th July, made application, to the Auditor of the Court of Session for a taxation of the account, and it was taxed accordingly. On 29th July the Auditor issued a report, in which he taxed the account at £469, 9s. 7d.

The returning officer, in terms of the same

section, lodged with the Election Judges for the trial of election petitions a note of objections, in which it was stated that “The report of the Auditor was objected to, in so far as he has disallowed or taxed off (1) the sum of £90, 17s. 5d., representing, with the exception of one or two items of very small amounts, charges by presiding officers and their clerks for hotel bills and other personal expenses; and (2) the sum of £3, 3s., the amount of the fee charged by Mr Duncan Shaw, Writer to the Signet, Inverness, for acting as presiding officer at Inverness on the polling day.”

The Returning Officers (Scotland) Act 1891 (54 and 55 Vict. cap. 49), section 3, provides:—“The returning officer at an election shall be entitled to his reasonable charges, not exceeding the sums mentioned in the schedule to this Act, in respect of services and expenses of the several kinds mentioned in the said schedule, which have been properly rendered or incurred by him for the purposes of the election; and, save as hereinafter mentioned, he shall not be entitled to payment for any services or expenses other than the before-mentioned charges, or at any greater rates than as in the said schedule mentioned, any law or usage to the contrary notwithstanding.”

The schedule referred to provides, *inter alia*—“The following are the maximum charges to be made by the returning officer, but the charges are in no case to exceed the sums actually paid or payable:—Part I. Counties and districts, or groups of burghs . . . for each presiding officer, £3, 3s. If the presiding officer is obliged to leave home in order to perform his duties in connection with the election, a further fee of £1, 1s. shall be allowed him for each night he is absent. For one clerk to each presiding officer, £1, 1s. If the clerk is obliged to leave home in order to perform his duties in connection with the election, a further fee of 10s. shall be allowed him for each night he is absent. For travelling expenses of presiding officers and clerks, per mile, one shilling. No travelling expenses to be allowed beyond the limits of the sheriffdom.”

The Ballot Act 1872 (35 and 36 Vict. cap. 33), section 8, provides:—“A deputy returning officer,” duly appointed in terms of the Act, “may exercise any powers and do any things which the returning officer is authorised or requested to exercise or do in relation to such election;” and Schedule I., Part I., Rules for Parliamentary Elections, Rule 47:—“The returning-officer may, if he think fit, preside at any polling-station, and the provisions of the Act relating to a presiding officer shall apply to such returning-officer, with the necessary modifications as to things to be done by the returning-officer to the presiding officer, or the presiding officer to the returning officer.”

Argued for the objector—(1) The Auditor has taken too narrow a view of the expression “travelling expenses,” which in ordinary use includes not only the expense of locomotion, but hotel bills and personal