

Now, by statute it is competent to a pursuer to appeal for jury trial whenever the sum sued for is not less than £40. If the case had been brought originally in the Court of Session the pursuer would have been entitled to demand a trial by jury, and when the case is brought in the Sheriff Court the pursuer is entitled, if the sum sued for is not less than £40, to come here so as to put himself in the same position as regards the right to jury trial as if he had brought the case in this Court originally.

I should certainly think this is a case which ought not to be sent before a jury, but I am not able to see any ground for refusing the pursuer's motion. The cases which were quoted to us by Mr Salvesen were both cases in which there were special difficulties which might have raised questions at the trial which would have necessitated rulings by the presiding judge, and perhaps led to a bill of exceptions. In this case there are no such complications or difficulties, and I am therefore reluctantly driven to the opinion that the case must be sent to a jury.

LORD YOUNG—I am of the same opinion. I have more than once expressed my views as to the expediency of allowing a pursuer as matter of right to demand a trial by jury in such cases as the present. I should suggest that it is a question whether the statutory rules upon this matter ought not to be modified. But as matters at present stand the pursuer has only exercised his statutory right, and in the case of an action of this kind—a simple case of damages for personal injuries sustained by being run over in the street—there is no precedent for refusing to send the case to a jury if the pursuer desires it. The statutory rule which gives him a right to demand a jury trial has not yet been altered, and I am not disposed in this case to make a first precedent for refusing his demand. The only ground suggested for doing so is that the injuries are admittedly inconsiderable, and the pursuer's damage is estimated by himself—and we may certainly assume not underestimated—at the sum of £50. It would be a very good rule that pursuers were not to be entitled to appeal for trial by jury when the damages sustained are only estimated at £50. Of course, if the limit were raised in point of amount, that could easily be evaded by putting the sum claimed sufficiently high to entitle the pursuer to have his case tried by jury, but other means might be taken to ensure that cases which are chiefly brought in the hope that defenders may be compelled by the certainty of being involved in great expense to pay something, although they are conscientiously persuaded that nothing is due, should not necessarily be sent to a jury. These means would require to be carefully considered, but though there are difficulties I do not think they are insuperable. At one time of my life I had occasion to consider the matter, and I came to the conclusion that the difficulties were not insuperable. But these are hardships for which a remedy must be sought elsewhere, and as

the rule stands at present I think this case must go to a jury.

LORD TRAYNER—I agree; but I do so with reluctance. I do not think this case should be sent to a jury, but as the law now stands I do not think we can refuse the pursuer's demand if he presses it. The injuries said to have been sustained were, on the statement of them, trifling, and the damages are estimated—and we may be sure not underestimated—at £50. The witnesses who can speak to the facts are all at Coatbridge, and the Sheriff is perfectly competent to try the case. The expense of bringing these witnesses here for the trial will nearly equal the whole amount which is claimed by the pursuer. I should like to add that in the event of the pursuer getting a verdict I shall not hold myself precluded by that fact from considering whether expenses should not be limited to expenses on the Sheriff Court scale.

LORD MONCREIFF—I am of the same opinion. I regret that we must send this case to a jury, but as the law now stands I think we have no alternative. It will be for consideration whether if the pursuer is successful he should be allowed more than Sheriff Court expenses.

Of consent the Court sent the case to trial on the record without an issue.

Counsel for the Pursuer and Appellant—Cullen. Agent—David Dougal, W.S.

Counsel for the Defender and Respondent—Salvesen. Agents—Macpherson & Mackay, S.S.C.

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Tuesday, February 15.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### MACKINTOSH'S TRUSTEES v. DAVIDSON & GARDEN.

*Inhibition—Discharge of Heritable Security on Payment of Debt—Assignment.*

At common law inhibition does not prevent the discharge by a creditor on payment by his debtor of a debt for which a heritable security has been granted, and it makes no difference that the debt was paid by another at the request of the debtor, in exchange for an assignment by the creditor of his security.

*Opinions* that a heritable creditor in a bond and disposition in security is bound to assign it to any nominee of his debtor on receiving payment of the amount due to him, provided that such an assignment was not to his own prejudice.

*Inhibition—Registration—Notarial Intimation—Act of Sederunt, 19th February 1680—Court of Session (Scotland) Act 1868 (31 and 32 Vict. c. 100), sec. 18.*

Registration of inhibition in terms of section 18 of the Court of Session Act 1868 is not equivalent to a notarial intimation under the Act of Sederunt 19th February 1680.

In October 1894 Dugald Campbell Macdonald, solicitor, Aberdeen, in return for the sum of £800 which he had advanced to Otto Hermann Elfert, merchant there, received from the latter a bond and disposition in security, dated 29th October 1894 and recorded 19th February 1895, over certain heritable property in Aberdeen. Although the bond bore to be granted for £850, the sum actually advanced by Mr Macdonald to Mr Elfert was £800.

On 2nd September 1895 the trustees of the deceased Francis Henry Pottinger Mackintosh raised an action of count, reckoning, and payment against Mr Macdonald, and on the dependence of this action they used inhibition against Mr Macdonald, which inhibition was duly recorded in the General Register of Inhibitions on 6th September 1895.

In the beginning of 1896 Mr Macdonald called upon Mr Elfert for repayment of the £800 lent to him. Mr Elfert was not in a position to pay the money, and applied to Messrs Davidson & Garden, advocates in Aberdeen, to pay the debt to Mr Macdonald and to take over the bond and disposition in security. Messrs Davidson & Garden agreed to do so. In implement of this agreement they paid over the £800 to Mr Macdonald, and the latter in return therefor granted to them on 13th March 1896 a formal assignation of the bond and disposition in security.

On 28th January 1897, in the action by Mr Mackintosh's trustees against Mr Macdonald, Lord Pearson decreed against the defender for payment to the pursuers of £330, 17s. 6d., and subsequently payment of the taxed costs, amounting to £44, 14s. 9d., was also decreed for.

On 2nd February 1897 the estates of Mr Macdonald were sequestrated, and John Stewart Watt, advocate, Aberdeen, was appointed trustee in the sequestration.

Thereafter Mrs Mackintosh's trustees became aware of Mr Macdonald's assignation to Messrs Davidson & Garden. On 3rd June 1897 they brought an action against that firm and against Mr Watt, concluding, *inter alia*, for reduction of the assignation. They pleaded—“(2) The assignation libelled having been granted *spreta inhibitione*, decree should be pronounced in terms of the reductive conclusions of the summons.”

Messrs Davidson & Garden lodged defences, and pleaded—“(2) The pursuers having failed to intimate the inhibition in terms of the Act of Sederunt of 19th February 1680, it was ineffectual to prevent Mr Macdonald granting the deed complained of. (3) The assignation sought to be reduced not having been granted voluntarily by Mr Macdonald, but being a deed which he was bound to grant upon payment of the amount of the bond, is not reducible *ex capite inhibitionis*, and the defenders should be assolizied, with expenses. (4) The payment objected to

having been made in good faith, and without prior notice to either the defenders or Mr Elfert of the inhibition used against Mr Macdonald's estate, the defenders should be assolizied, with expenses.”

Proof was led before the Lord Ordinary (KYLACHY), and on 1st December 1897 he pronounced the following interlocutor—“Assolizies the comparing defenders from the conclusions of the action, and decerns.”

*Note*.—“I have heard a good deal of ingenious argument in this case, but with respect to a great part of it I confess I am not impressed. . . . Accordingly, if I thought that the assignation here was within the inhibition—that is to say, was struck at by the inhibition—I should have had no particular difficulty in sustaining the pursuer's case. . . . But I confess, having heard the former argument, and taken the proof and heard further argument to-day, I have come to be of opinion that this transaction was not struck at by the inhibition at all. In the first place, I cannot accede to Mr Glegg's ingenious suggestion that this whole transaction, so far as Macdonald was concerned, was voluntary, inasmuch as he need not unless he liked have called up his money, and inasmuch as by calling it up he brought within the inhibition everything done in the course of calling it up. I think it is too clear, and is indeed settled, that the existence of an inhibition does not prevent a creditor in a bond from exacting payment of his debt. I think it is put in one of the cases that inhibition does not strike at deeds of extinction; but in any case it is clear from the language of the inhibition itself that it does not strike at the exaction by heritable creditors of their debts, but only at deeds which are of the nature of alienations—deeds *ejusdem generis* with those mentioned in the inhibition. Well, but if that is so, if this creditor was entitled to call up his debt, that implies that he was entitled to grant any deeds which were necessary to the exaction of his debt—any deeds which the debtor was entitled to demand as a condition of paying his debt.

“Accordingly, the question really comes to turn upon this, whether Elfert when called upon to pay this debt and threatened with a charge under the personal obligation in the bond, was entitled to say, ‘Yes, I am quite ready to pay, but I insist on your granting an assignation to my nominee.’ Now, I think that Elfert was so entitled. I think the practice on this subject is well fixed, and indeed I think is recognised in the terms of this very bond, the practice being that the creditor, unless he has some interest to the contrary, must, when his debtor tenders him payment by a new creditor, grant an assignation to that new creditor in place of discharging the debt and obliging the debtor to grant a new bond. That is the practice, and, so far as I know, has always been the practice; and, further, it is a practice consistent with principle, because the general law is that the creditor is not entitled to refuse an assignation on payment of his debt if the

debtor has some interest to ask it and he (the creditor) has no interest to refuse it. Here there is no doubt of the debtor's interest. He saved, it appears, largely in conveyancing charges. And I have not heard any stateable suggestion of a contrary interest on the part of the creditor.

"On the whole, therefore, I hold that this was not a transaction which involved—to use the words of the inhibition—the "selling, disposing, conveying, burdening, or otherwise affecting his lands or heritages to the prejudice of the complainer."

The pursuers reclaimed, and argued—Inhibition affected a heritable bond duly recorded in the person of the creditor, and if the creditor in the bond after inhibition assigned away his rights under the bond, such assignation was struck at by the inhibition and was invalid. The bond and disposition in security in question was at the date of the inhibition part of the heritable estate of Mr Macdonald, and subsequently thereto he voluntarily transferred this part of his estate to third parties. That was a violation of the rights of the pursuers under the inhibition—Erskine ii. 11, 10 and 11; Ross's Lectures, i. 495; *Watson v. Marshall*, June 19, 1782, M. 7009; *Low v. Wedgewood*, December 6, 1814, F.C. If it was held that under the old law intimation in terms of the Act of Sederunt 19th February 1680 was required to make the inhibition effective, they contended that section 18 of the Court of Session Act 1868 had introduced constructive intimation to all having interest in the matter by registration of the inhibition, and this did away with any necessity for further intimation. In any event, even if it was held that Mr Macdonald could have been compelled to grant a discharge to his debtor on payment of the debt, he could not have been compelled, and had no power in prejudice of his creditor's rights, to grant an assignation to a third party—Erskine, iii. 5, 11; *Mitchell v. M'Kinlay*, February 9, 1842, 4 D. 654; *Guthrie v. Smith*, November 19, 1880, 8 R. 107.

Argued for defenders—Under the common law of Scotland an inhibition did not restrain a person from receiving payment of a sum of money due to him and discharging the heritable security which had been granted to him in security of the debt. The only qualification of this rule was in cases where notarial intimation of the inhibition had been made to the debtor in terms of the Act of Sederunt 19th February 1680. Unless this notarial intimation had been made, the rule applied that an inhibition did not hinder a person from discharging debts due to him—Stair, iv. 50, 20; *Elies v. Wishart & Keith*, February 27, 1667, M. 7020; Menzies' Lectures on Conveyancing (3rd ed.), 872; Bell's Conveyancing (3rd ed.), 1186. Section 18 of the Court of Session Act 1868 did not supersede the procedure under the Act of Sederunt of 1680. Where a creditor presses his debtor for payment of the debt the former is bound to assign his security to any friend of the debtor whom the latter may point out on receiving from him the

amount of the debt—*Fleming v. Burgess*, June 12, 1867, 5 Macph. 856, opinion of Lord Neaves, 861.

LORD YOUNG—I cannot say that I think this a perfectly clear case and unattended with difficulty. The Lord Ordinary tells us in his note that he heard a good deal of ingenious argument in the case, but with respect to a great part of it he confesses that he is not impressed. We have heard a good deal of ingenious argument too—I do not think any of it out of place—on both sides, showing the difficulties which have to be dealt with. The pursuers are the creditors of a sequestrated bankrupt, Mr Macdonald, a solicitor in Aberdeen, and had got a decree against him for the sum of about £300 or a little more. On the dependence of the action on which they got that decree they used inhibition on 6th September 1895. The decree was got on 28th January 1896, and so far as we know there was really no opposition to it. In March 1896, some months after the inhibition, Macdonald granted an assignation of a debt which was due to him by a person of the name of Elfert—a debt of £800. He granted the assignation to Davidson and Gardiner, from whom he received payment of the amount; and this action is for the purpose of setting aside that assignation, as having been granted in violation of the inhibition to which I have referred as used by the pursuer. The *prima facie* strength of the pursuer's case may be thus I think stated—that by that assignation in March 1896 Macdonald, their debtor, divested himself of his estate so far as consisting of this debt secured by bond and disposition in security, and which belonged to him when the inhibition was used, and that the pursuer's debtor is thereby a less wealthy man by the amount of that debt than he was when he granted the assignation, and they represented—in a sense quite accurately—that this was heritable estate, inasmuch as the debt for £800 was heritably secured by disposition in security, and that the defenders Davidson and Garden are now in possession of it under the assignation reduction of which is sought. That is *prima facie* a pretty strong case. On the other hand, the case of the defenders Davidson & Garden has great apparent strength in it also. They were acting, not for themselves, but as agents for Elfert, who was the debtor in the heritably secured debt to Macdonald. Elfert was required by Macdonald to pay up, and he applied to his man of business to pay the debt for him and take an assignation of the bond and also the disposition in security which were contained in one deed. The defenders were acting, not as independent parties on their own account, but as representing Elfert, acting as his men of business in this matter, and I think it is fair to deal with them accordingly. In short, I regard the case exactly as if Elfert upon Macdonald's demand paid up the debt, whether upon a discharge which would have put an end to the disposition in security in favour

of Macdonald, or by an assignation of it to himself or to others to whom he directed it to be given. Now, so far as I know, any person has considered himself hitherto quite safe in paying a debt to the person whom he knows to be the creditor therein upon receiving up from him the document of debt discharged or cancelled and any security which he holds for it transferred in the proper mode of transferring such security; and it has not in practice been at all necessary for the debtor before granting such discharge to consider or inquire whether any actions have been raised against the creditor, and whether any inhibitions have been used upon these. In short, it has been regarded as a commonplace safe proceeding for a debtor to go directly or send his man of business to pay the debt which he owes to the creditor therein upon receiving a discharge from him and getting up the document of debt. Now that was done here, and that is, *prima facie*, a strong case so far as reason and justice and equity go on the part of the defenders. Now, I think the solution of the case in law is really here. The relation between Macdonald and Elfert was that of debtor and creditor. The contract between them was a contract of loan. Macdonald lent Elfert £800, and he was creditor for that amount of lent money. He got an heritable security for it. That was accessory to the debt. His position was that of a creditor for money—for £800. Now, an inhibition certainly does not hinder the party inhibited from receiving payment of a debt. He is entitled to receive payment of a debt, and if it is tendered to him he is bound to receive it. The inhibition does not interfere with his right to demand it, and receive it if tendered to him in answer to his demand, or his obligation to receive it if it is voluntarily tendered to him after it is due by the debtor therein. Therefore *prima facie* the inhibition does not interfere with his receiving payment of the debt, although when he gets the money into his pocket it is very apt and liable to go pretty speedily beyond the reach of his creditors. But the difficulty arises upon the security. The security is simply an incident of the debt, and when the debt is discharged—that is to say, when payment is made and received—the security is gone. It may be convenient with reference to other business transactions that there should be an assignation of it, and for the purpose of absolute security, although generally superfluous, a discharge is taken. But it is a superfluity, for if the debt is paid the security which is granted for it has gone and lapsed. A receipt for the money written on the back of the bond would deprive it of all force, and if anything was necessary in order to clear the record that would be done, and the party entitled to have the record cleared would be entitled to have that done, and nobody could resist his claim to it. Now, how does inhibition operate to interfere with that? I really know of no way. It may be hard on the inhibiting creditor, and this Court had

occasion to consider and take notice of the hardship to the inhibiting creditor so long ago as 1680; and they passed an Act of Sederunt providing a remedy, the idea being that if the inhibiting creditor got information of any debt of this kind or any wadset or mortgage—wadset is the more proper Scottish name—he should be at liberty to get a notary-public to give special notarial intimation of the inhibition to the debtor in that debt and the owner of the property which would put him in bad faith to pay without taking account of the inhibiting creditor's interest. But that very proceeding on the part of the Court indicates, indeed expresses in terms, their opinion that by the law of Scotland inhibition does not protect the inhibiting creditor against such a proceeding, and that in order to do it the device which the Court suggested or specified in the Act of Sederunt should be followed. I say that indicates in a manner not to be mistaken the opinion of the Court that according to the law of Scotland inhibition, although proclaimed to the lieges, had no such operation. Then what we have to consider is—does this case fall under the Act of Sederunt, and I am very clearly of opinion that it does not, for I do not assent at all to the argument that the 1868 Act, clause 18 of which was referred to, is equivalent to notarial intimation under the Act of Sederunt of 1680. Now then, the case not falling under the Act of Sederunt, and the Act of Sederunt itself proclaiming the law to be as the Lord Ordinary has stated, and as I think it, namely, that inhibition published in the usual way, or registered in the usual way, does not prevent the inhibited creditor from receiving payment of his debt—with the consequent discharge of any security which he holds for it—the result in my opinion is that the judgment of the Lord Ordinary must be affirmed, and this reclaiming-note dismissed. I repeat I think the case is attended with difficulty, and that it is worthy of all the argument on both sides which we have heard.

LORD TRAYNER—I come to the same conclusion as the Lord Ordinary. An inhibition does not preclude the person inhibited from demanding payment of a debt due to him, nor his debtor from paying that debt when demanded. It appears to me that these propositions cover the case before us. Mr Macdonald demanded payment of his debt from Mr Elfert, and the latter paid it. The receipt, discharge, or assignation to the debt was merely incidental to the payment which was made. It was not a substantive alienation by Mr Macdonald of a part of his heritable estate. The payment of the debt was the essential matter; on that payment being made Mr Macdonald's security right fell.

But further, an inhibition does not strike at any conveyance or other writ which the inhibited person is under obligation to grant. Now, I think Mr Macdonald was, from the date of the bond, bound to assign

it to any nominee of his debtor on receiving payment of the amount due to him, provided that such an assignation was not to his own prejudice. No such prejudice is here pretended. Mr Macdonald was therefore bound to assign. I think there is an essential difference between the case of an inhibited person going into the market to realise part of his estate by assigning it to a purchaser and the case we have before us of a creditor assigning a debt and its security on payment by his debtor who asks an assignation rather than a discharge.

I must say it is new to me to hear it suggested that a debtor ready to pay his creditor (heritably secured) required before paying him a search against his creditor in the personal registers.

**LORD MONCREIFF**—At first I had some doubt on the point argued by Mr Kennedy, but I have now come to be satisfied that the judgment of the Lord Ordinary is right. I think that the case must be taken exactly as if the debtor in the bond, Elfert, had paid up his debt and got a discharge from the creditor, and as if this action were a reduction of the discharge. The fact that the bond was assigned and not discharged is immaterial. Now, I think that at common law inhibition does not apply to a transaction such as we have here. It does not apply to the discharge of a debt for which a heritable security has been granted, whether that discharge is made on the initiative of the creditor or the debtor. The question really is in this case whether through the inhibition the debtor was put in bad faith to pay his creditor and obtain a discharge. Now, at common law there is no authority to the effect that inhibition applies to that transaction at all. A discharge is regarded not as an alienation but as a deed which the creditor is bound to grant on payment if he is called upon by the debtor to do so.

Now, if that is the common law on the subject, the only question is whether it has been altered either by Act of Parliament or Act of Sederunt. I think that the Act of Sederunt of 19th February 1680 was intended to make and does make an alteration on the matter. The inhibiting creditor is entitled under that Act of Sederunt by following certain specific procedure giving special and personal intimation to the debtor in the bond to put the debtor in bad faith in paying to the creditor in the bond. But that requires to be done notarially, and admittedly no such intimation was given in this case.

I am of opinion that section 18 of the Act of 1868 did not supersede the procedure enjoined by the Act of Sederunt of 1680. If an inhibiting creditor wishes to prevent the debtor in a heritable bond from making payment of his debt he must still adopt the procedure enjoined by the Act of Sederunt of 1680.

**LORD JUSTICE-CLERK**—I am of the same opinion. I think that the case must be taken as at the time the defender Elfert tendered payment of his debt, and that

payment by the debtor to the creditor was not struck at under the common law by the inhibition which had been put on by the pursuers. If all that had passed had been payment of the money and a receipt for it taken, which would have entitled the debtor to demand a formal discharge of the bond, there could be no question. Does it make any difference that the debtor says that it will suit him better to get an assignation of the bond? I do not think that it does. I think that in equity he had right to demand an assignation.

Lastly, as regards the question of notice, I do not think that the Act of 1868 in any way supersedes what was provided by the Act of Sederunt 1680, to the effect that notarial notice must be given in order to effectual taking up of a position such as the pursuers here desire to maintain.

I therefore agree that we should adhere to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for Pursuers — The Solicitor General—Kennedy. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders—H. Johnston, Q.C. —John Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Friday, February 18.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

**ROBERTSON v. SUBURBAN DISTRICT COMMITTEE OF MID-LOTHIAN COUNTY COUNCIL AND ANOTHER.**

*Process — Caution for Expenses — Poor's Roll — Pauper Pursuer.*

*Held* that a pursuer in receipt of parochial relief must sue *in forma pauperis*, or find caution for expenses. *Hunter v. Clark*, July 10, 1874, 1 R. 1154, followed.

James Robertson raised an action against the Suburban District Committee of the County Council of Midlothian and J. W. Inglis, concluding for payment of £500 damages for personal injury.

On 21st December 1897 the Sheriff-Substitute (**MACNOCHIE**) allowed parties a proof of their averments, and on 4th January 1898 the pursuer appealed for jury trial to the Court of Session.

The Suburban District Committee presented a note in the First Division setting forth that "the pursuer has been since 1895 and still is a pauper in receipt of parochial relief from the Parish Council of Liberton," and craving the Court to allow the pursuer an opportunity of applying for the benefit of the poor's roll, and failing his doing so or obtaining admission to the said roll, to ordain him to find caution for expenses.