

discharging of iron ore from the main hatch of the steamship "Palatyn" at the General Terminus, Glasgow. (Cond. 5) Pursuer began working in the after end of the said hatch at 11 o'clock, and continued to do so till 11.25, when he was struck on the right wrist by a piece of ore weighing about seven or eight pounds that fell from the ship's beam directly above him, and sustained injuries to his wrist which necessitated him going to the Western Infirmary, where the wound was stitched. Pursuer will be unable to resume work for a considerable time to come."

The pursuer further averred that his wages averaged 30s. per week. The action was raised within a week of the occurrence condescended on, and on 17th May the Sheriff-Substitute closed the record and allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

On the case being called in Single Bills counsel for the respondents moved that the case should be sent back to the Sheriff for proof, and argued—the case was of a trifling nature and would not warrant a verdict for £40; it therefore fell within the class of cases in which the Court would refuse a jury trial, as indicated by the Lord President in *Sharples v. Yuill & Company*, May 23, 1905, 42 S.L.R. 538

Argued for the appellant—The pursuer's averment did not warrant the view that the case was trifling; issues should be ordered—*Dickie v. The Scottish Co-operative Wholesale Society*, November 17, 1903, 6 F. 112, 41 S.L.R. 64.

LORD JUSTICE-CLERK—I must say if there ever was a case in which the rule should be applied which has been laid down by the Lord President in *Sharples v. Yuill & Co.*—that a case must be remitted to the Sheriff for proof if it does not appear on the averments of the pursuer that a jury could reasonably give a sum of £40—this is that case. The averment here is that owing to an accident the pursuer was wounded on the wrist, that it was necessary to have the wound stitched, and that it will be some time before he is able to return to work. That is all that he is able to state, and it indicates no case of serious injury. In these circumstances it would be an injustice, not only to the defender but to the pursuer also, to send the case to a jury.

LORD KYLLACHY—I am of opinion that this case should go back to the Sheriff. *Prima facie*, the pursuer's case as disclosed on record would not justify a verdict for anything like £40 damages. The case therefore I think falls within the exception stated by the Lord President in *Sharples v. Yuill & Co.*

LORD KINCAIRNEY—I agree. The accident happened on March 19, and it is averred on record, which was not closed till May 17, that the pursuer would not be able to resume work for a considerable time. I hesitate to call that a slight injury which disables a man for work for two or

three months. But that averment is very vague, and the only specific statement indicates a slight injury for which, as averred, there is no probability that a jury would award £40.

LORD STORMONTH DARLING concurred.

The Court refused the appeal and remitted to the Sheriff-Substitute to proceed with the proof allowed.

Counsel for the Pursuer and Appellant—Trotter. Agents—Struthers, Soutar, & Scott, Solicitors.

Counsel for the Defenders and Respondents—Spens. Agents—Whigham & MacLeod, S.S.C.

Friday, June 9.

## SECOND DIVISION.

[Lord Dundas, Ordinary.]

MACDONALD v. MACKINTOSH.

*Bankruptcy—Discharge of Trustee and Bankrupt without Composition—Action by Discharged Bankrupt for Recovery of Asset Alleged to have been Abandoned by Creditors—Averment of Abandonment—Relevancy.*

A granted a trust-deed for creditors in favour of B as trustee. The trust was superseded by A's sequestration. B was ranked as a creditor in the sequestration, and no appeal was taken by A against the trustee's adjudication. A dividend of 1½d. per £ was paid in the sequestration, and A and his trustee in bankruptcy were subsequently discharged. Two years thereafter A raised an action of count, reckoning, and payment against B, concluding for an alleged balance due to him in respect of B's intromissions under the trust-deed for creditors. No discharge had ever been granted to B by the trustee in the sequestration for his intromissions with the estate. A sought to recover the sum in question for his own behoof, and averred—"The trustee and the creditors in the sequestration abandoned that asset, and left it to the pursuer to recover it if he cared to." *Held (aff. judgment of Lord Dundas)* that the averment of abandonment was irrelevant, and the action dismissed.

*Question* whether the pursuer's claim was not excluded by the fact that the defender had been ranked as a creditor in the pursuer's sequestration, and that no appeal had been taken from that ranking.

This was an action of count, reckoning, and payment at the instance of Donald Macdonald, Tuach Cottage, Inverness, sometime flesher there, against John Mackintosh, Glenholme, Crown Drive, Inverness. The action was raised in July 1904, and concluded, *inter alia*, that the

defender should be ordained to produce a full account of the "intrusions had, or which must in law be held to have been had, by the defender," as trustee for the pursuer's creditors, with the pursuer's estate.

In 1898 the pursuer executed a trust-deed for creditors in favour of the defender.

In 1899 the trust was superseded by the pursuer's sequestration under the Bankruptcy Acts, and Mr David Munro, Solicitor, Inverness, was appointed trustee in the sequestration.

The pursuer averred—" (Cond. 10) . . . No dividend was or has been paid by the defender under the trust-deed, and only a dividend of 1½d. per £ was paid in the sequestration. The claims ranked for, however, were unvouched and not due by pursuer. In particular, the defender ranked for £4946, 3s. 4d., which was not due to him, and which was unvouched. The pursuer and the trustee on the sequestrated estate were both discharged by the Sheriff-Substitute at Inverness on 18th April 1902. . . . No discharge has ever been granted to the defender as trustee under the trust-deed, neither by the trustee in the sequestration nor by the pursuer. Notwithstanding the existence of the sequestration, the defender, as trustee foresaid, with the consent or acquiescence of the said David Munro as trustee on the pursuer's sequestrated estates, was left in possession of the said shop" (the butcher's shop in which the pursuer had carried on business), "stock, and fittings, and continued to carry on the said business, and was never called on to account for his intrusions in connection with the said business. The trustee and the creditors in the sequestration abandoned that asset, and left it to the pursuer to recover it if he cared to." The other averments of the pursuer, so far as material, are sufficiently set forth in the opinion of the Lord Ordinary *infra*.

The defender pleaded—" (2) No relevant case."

On 11th March 1905 the Lord Ordinary (DUNDAS) sustained the second plea-in-law for the defender and dismissed the action.

*Opinion.*—"The pleadings in this case are of inordinate length and great complexity. The pursuer was formerly a fletcher carrying on business in Inverness, and on 31st March 1898 he executed a trust-deed for behoof of his creditors in favour of the defender as trustee. The summons contains various declaratory conclusions, and asks (*fourth*) that the defender be ordained to produce a full account of his intrusions 'had, or which must in law be held to have been had,' by him as trustee for the pursuer, and to make payment to the pursuer of £8000, or such other sum as may be ascertained to be due. It appears that on 19th October 1899 decree of *cessio* was pronounced against the pursuer, and that the *cessio* proceedings were superseded by an award of sequestration under the Bankruptcy Acts upon 22nd December 1899. No dividend was paid by the defender as trustee foresaid, and only a dividend of 1½d. per £ was paid in the sequestration. The trust-

tee in the sequestration (a Mr Munro) and the bankrupt were subsequently discharged. The pursuer now alleges that many things were wrongfully and illegally done and left undone by the defender as trustee, and for these he seeks now to call him to account. Some of the charges made are very difficult to understand, although they are set out at great length. For example, throughout the record, and particularly in condescendences 6 and 7, there is alleged against the defender an illegal 'purchase or appropriation' of the pursuer's business. I cannot discover any relevant averment of a purchase of the business by the defender as an individual, and though the phrase 'appropriation' recurs frequently, its meaning, and the circumstances in which it is said to have taken place, are to me exceedingly obscure, even with such assistance as is afforded by a perusal of the defender's answers. Condescence 9, perhaps, makes the matter clearer, for it roundly avers that the defender as trustee carried on the business for his own behoof exclusively, and illegally appropriated the profits to his own uses and purposes. Condescence 11 alleges, *inter alia*, that the defender appropriated certain book debts. Condescence 12 sets out an alleged illegal sale by him of heritable property. Other charges are made against the defender in condescendences 13 to 15, including one of failing to realise anything for the goodwill of the pursuer's business. Now, if the defender had obtained from the trustee in the sequestration a formal discharge of his whole intrusions with the estate of the bankrupt, it would, I apprehend, have been hardly possible for the pursuer now to maintain against him any of the allegations which he puts forward. Unfortunately for himself the defender did not take steps to procure a formal discharge. It appears (Cond. 10) that he made some accounting to Mr Munro, though the pursuer avers that it was a grossly inadequate one. But it is to be observed that the defender was or claimed to be a large creditor of the pursuer, and that he was in fact ranked by the trustee in the sequestration for £4946, 3s. 4d., upon which he received his dividend of 1½d. per £. It is difficult to conceive that he could have been thus admitted to a ranking unless Mr Munro had been satisfied that he had duly accounted for all his intrusions with the estate, and indeed it appears from a letter dated in January 1903, which the pursuer has incorporated (Cond. 16) as a part of his pleadings, that though no formal discharge was granted to the defender, he had supplied Mr Munro with 'the information necessary,' and the whole tone of the letter so far as it is quoted by the pursuer seems to show that in Mr Munro's view there was and is no good claim against the defender in regard to his intrusions. Moreover, the pursuer, at and before the inception of the sequestration, was admittedly on the alert, and had (Cond. 10) been pressing for information with regard to his affairs. He now denies that the claim for which the defender was ranked was

a just one (Cond. 10). Yet, so far as appears, he took no objection either to that ranking or to any other step in the sequestration. An appeal was open to him against the deliverances of the trustee under section 169 of the Bankruptcy Act 1856. Nor is any satisfactory explanation forthcoming as to why the present action was not raised until July 1904. These considerations, in my opinion, raise a very adverse impression of the pursuer's case, but I do not find it necessary to decide whether or not they amount to an absolute bar to the present proceedings, for there is another ground upon which, as I think, the case is fatally irrelevant. The theory of the action is that the pursuer is to recover for himself assets belonging to the estate of which the defender was for a time trustee, and which was subsequently sequestered. But if such assets exist, and could be recovered, the benefit would *prima facie* enure to the creditors of the pursuer, who have only received a dividend of 1½d. in the £, and the appropriate method of recovery would seem to be by way of a revival of the sequestration. The pursuer was apparently conscious of this difficulty, and he has sought to avoid it by the bare averment (Cond. 16, see also Cond. 10) 'that the trustee and creditors in the sequestration abandoned any right they had to recover any assets of the pursuer's estates in the hands of the defender as trustee foresaid.' Now that, in my opinion, is not a relevant or sufficient averment of abandonment. It would require to be stated that the existence of the alleged asset was brought home to the creditors and dealt with at their meetings, and there and then disposed of in one way or another—*Northern Heritable Securities Investment Company, Limited, v. Whyte*, 16 R. 100 (*per* Lord President Inglis, p. 103, *affirmed* 18 R. (H.L.) 37, *per* Lord Watson, p. 39). There must be a transaction with the trustee and creditors. Nothing of the sort is here alleged, nor are any minutes of meetings bearing upon the matter produced, or said to be in existence. It is possible that the pursuer may have some right or claim capable of statement and enforcement against the defender, but for the reasons indicated, I am of opinion that the case, as presented by this summons and record, is irrelevant. I shall, therefore, sustain the second plea-in-law for the defender and dismiss the action, with expenses."

The pursuer reclaimed, and argued—The Lord Ordinary's ground of judgment would apply if the pursuer's creditors had come forward, but as they had made no claim, abandonment was to be presumed—*Northern Heritable Securities Investment Company, Limited, v. Whyte*, November 21, 1888, 16 R. 100, 26 S.L.R. 91; June 16, 1891, 18 R. (H.L.) 37, 28 S.L.R. 950. The pursuer was entitled to an opportunity of proving abandonment and of enforcing his radical right to the asset in question—*Geddes, v. Quistorp*, December 21, 1889, 17 R. 278, 27 S.L.R. 224.

Argued for the respondent—The case of *Geddes v. Quistorp, cit. sup.*, did not apply.

Abandonment could not be inferred from any facts averred by the pursuer. The deliverance of the trustee in the pursuer's sequestration upon the defender's claim therein was *res judicata*, to the effect that the defender was the pursuer's creditor.

LORD KYLLACHY—This case is not exactly within the letter of any previous decision. It is a case in which a bankrupt who has been discharged but not retrocessed makes a claim several years after his discharge and the discharge of the trustee in his sequestration not on behalf of his creditors but for his own behoof. In these circumstances we are not embarrassed by certain recent decisions, in particular the cases of *Whyte v. Murray* and *Geddes v. Quistorp*. All that these cases decided was that a bankrupt had a *prima facie* title to bring an action, leaving it to the Court to say whether intimation should be made to the creditors. Here the claim is by the pursuer, confessedly on his own behalf; and, recognising that, he quite frankly accepts the situation, and avers that the creditors have abandoned the claim to him. The question therefore comes to be whether the pursuer has relevantly averred a case of abandonment. I am of opinion that he has not. All that is averred is that the trustee has been discharged, that the bankrupt has been discharged, and that a certain number of years has elapsed without anything having been done. The Lord Ordinary has held that an averment of abandonment in general terms is not enough, and I agree with him.

That makes it unnecessary to consider another ground of defence, for which I must say that I think there is a great deal to be said, *viz.*, that the pursuer's claim is excluded by the fact, which appears upon the proceedings, that in his sequestration a state of accounts was made up and adjudicated on by the trustee, with the result that the present defender was decided to be not a debtor but a creditor of the pursuer—a creditor to the amount of about £5000. That adjudication by the trustee was capable of being appealed to the Sheriff or to this Court, but no appeal was taken; and it therefore seems to me that the state of accounts must be taken to have been finally fixed between the parties. If an appeal had been taken as it might have been to this Court, and we had found that the defender was a creditor to the extent of about £5000, that I suppose would have been conclusive. Our judgment would have been *res judicata* both against the bankrupt and against any new trustee who might be appointed in the sequestration. And that being so, I see no reason why the result should be different when the trustee's adjudication was acquiesced in as it seems to have been. It is not, however, necessary to express a final opinion on this point, because I agree with the Lord Ordinary that the pursuer has not relevantly averred a case of abandonment.

LORD KINCAIRNEY—The Lord Ordinary has dismissed the action on the ground that there is not a relevant averment of

abandonment. I accept that view of the case, and I am not inclined to go in the least beyond it.

LORD STORMONTH DARLING—I agree with Lord Kyllachy.

LORD JUSTICE-CLERK—My view is the same.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. Watt, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Defender and Respondent—M'Lennan, K.C.—Cullen. Agent—Thomas Liddle, S.S.C.

Thursday, June 8.

### FIRST DIVISION.

[Lord Low, Ordinary.]

CHRISTIE'S TRUSTEES v.

M'DOUGALL.

*Superior and Vassal—Entry—Casualty—Exemption from Casualty to First Purchasers from Original Vassal—First Purchase from First Vassal's Heirs.*

A feu-charter of 1835 contained a clause whereby, in respect of prohibitions against assignation of the precept of sasine and subinfeudation, exemption from payment of a casualty was granted to the first purchasers from the original vassal A, on their entry with the superior, provided such entry were taken within six months of such first purchasers' entry to the subjects purchased by them. *Held* that the clause of exemption applied only to a first purchaser from the original vassal, and not to one purchasing from his heirs.

*Superior and Vassal—Entry—Casualty—Division of Superiority—Liability of One of the Vassals in the One Portion of the Property for the Cumulo Casualty Due from that Portion—Right of Recourse of Vassal Paying a Casualty against Other Vassals.*

The superiority of a parcel of land, which had been feued out for building purposes, was subsequently divided into two, following one of the divisions which had arisen in the *dominium utile*, the *cumulo* feu-duty being similarly divided. The *dominium utile* of each portion was enjoyed by a number of vassals, but the vassals in the one portion were different from those in the other. The superior in the one portion of the superiority having raised an action for the *cumulo* casualty due from his portion of the holding against one of the vassals therein, the vassal resisted the demand on the ground that the division of the superiority had prejudiced his position, inasmuch as he would not have recourse against the

whole vassals of the original holding. *Held* that the vassal was liable, but had recourse against the other vassals in the same portion of the original holding.

*Superior and Vassal—Casualty—Prohibition against Subinfeudation—Clause of Irritancy—Implied Entry—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 4, sub-secs. 3 and 4—Action of Declarator and for Payment of Casualty against a Vassal Impliedly Entered—Competency.*

In 1904 the superior brought an action of declarator and for payment of a casualty against the impliedly entered vassal in a holding, the feu-contract of which contained a prohibition against subinfeudation protected by an irritant clause. The vassal last entered with the superior was dead.

Objection having been taken to the competency of the action on the ground that where the feu-contract contained such clauses the superior's proper course was an action upon the contract, *held* that where the vassal last entered with the superior was dead the statutory action of declarator and for payment of a casualty was competent.

*The Church of Scotland v. Watson*, December 24, 1904, 42 S.L.R. 299; and *Dick Lauder v. Thornton*, January 13, 1890, 17 R. 230, 27 S.L.R. 455, *commented on and distinguished.*

*Superior and Vassal—Casualty—Restriction of Casualty—“Where the Vassal Last Infeft is Still Alive”—Effect of Implied Entry—“Infeft.”*

A feu-charter of 1835 contained a prohibition of subinfeudation protected by an irritant clause. It stipulated for the payment of a duplicate feu-duty by each heir or singular successor in name of entry to the subjects, in the first year of their entry in addition to the feu-duty for the year, but contained this restriction—“Excepting only, that in the case of such entry by a singular successor where the vassal last infeft is still alive, the feu-duty of the year wherein such entry is made shall not be exigible over and above the duplicate feu-duty payable as above.” The vassal died, and his heirs became impliedly entered, but did not pay a casualty.

In an action of declarator and for payment of a casualty by the superior against a disponent of the deceased vassal's heirs, who were still alive, *held* that the restriction was not applicable, and that the full casualty and feu-duty were exigible.

In 1904 William Christie, Braemar House, Edinburgh, and others, the marriage-contract trustees of Mr and Mrs John Christie, Ravelston Park, Edinburgh, as superiors, brought an action of declarator and for payment of a casualty amounting to £50, 4s. against Patrick M'Dougall, wine and spirit merchant, 7 Spittal Street, Edinburgh. The original holding, of which