

dividends out of what was really the capital of the company, because the first branch of the case consists in an application to restrain them from paying away their whole gross profits in dividends without making any provision for depreciation, and Sir G. Jessel, M.R., gave an injunction against them. That judgment seems to have been misunderstood, and this gave rise to the other branch of the case. The company refused to pay the preference shareholders a dividend until the reserve fund had reached what ought to have been its proper position if it had been kept up all along. But Jessel, M.R., explained that his judgment did not go to that. It did not lay down that since they had fairly made profits this year they were not only to set aside a sum for depreciation out of these profits but also to apply the whole of them to making up deficiencies in the reserve fund. Accordingly he held they were not entitled to injure the preference shareholders by making up in one year what was necessary to put the line in condition. No question arose in that case as to the possibility of creating a reserve fund at all. The class of question that arises here did not and could not arise in *Dent*.

I am of opinion that we should answer the first question in the negative and the second in the affirmative.

LORD ADAM—I concur.

LORD M'LAREN—In considering the construction of power given to directors by articles of association it is well to bear in mind that directors are almost always substantial holders of shares in the company whose affairs they are administering, and that they are selected by the other shareholders as men of capacity and honesty to manage their affairs. Directors as such are not expected to take part in the mechanical details of the business, but only to give their attention to matters of general administration, and it is necessary that they should be entrusted with considerable powers. Any power may, of course, be proved unworkable if it is supposed that the directors are incompetent or untrustworthy. But the answer is that in such a case the shareholders would not continue such a body in the control of their affairs.

When we come to clause 138 in these articles of association—a very usual clause in articles of association—we find that this clause gives the directors such powers of dealing with the reserve fund as a reasonable man might be expected to use in the conduct of his own affairs. Before recommending a dividend they are to consider the wants of the undertaking, the amount of depreciation, and the future contingencies to be provided for. When the articles were amended by the introduction of 6-1 and 7-1 there is nothing in the language of either of these clauses to suggest that it ever was in the minds of the shareholders to interfere with the directors' powers as to reserves.

As I have said, such powers may be abused. But even if these additional pro-

visions had not been introduced into the articles of association the directors might have put the whole profits into the reserve fund without declaring a dividend at all. It is probable, indeed, that they would not be able to do so more than once. That being so, I think the directors were within their powers in carrying these sums to the reserve fund, even though the effect of that was to deprive the preference shareholders of the additional one per cent. to which they would otherwise have been entitled. They could, of course, not be permanently deprived of this one per cent. if the increase in the profits became so large that the directors, acting in good faith, could not refuse to increase the dividend according to the rule prescribed. I think that the discretion of the directors under section 138 is not interfered with by the new articles, and that the decision to which your Lordship has referred is clearly in point.

LORD KINNEAR was not present.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Parties—Ure, K.C.—Hunter, K.C.—J. B. Young. Agents—Mitchell & Baxter, W.S.

Counsel for the Second Parties—Dean of Faculty (Campbell, K.C.)—Horne—J. M. Hunter. Agents—Carmichael & Miller, W.S.

Saturday, November 25.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles at Edinburgh.]

MACPHERSON v. DRUMMOND
(MACPHERSON'S TRUSTEE).

Bankruptcy—Sequestration—Beneficium Competentie—Working Tools—Implementments of Livelihood—Tools of a Practiser of Dentistry—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 102—Relevancy.

A, who practised dentistry, brought an action against the trustee on his sequestrated estate, in which he prayed the Court to interdict the defender from selling, removing, or otherwise interfering with certain articles. Pursuer averred that the articles in question were absolutely necessary and essential for his carrying on the business of dentist, and so earning his livelihood, and pleaded that these articles in consequence remained his property, and did not fall under the sequestration.

Held that the rule exempting working tools from being attachable for debt was not necessarily confined to labouring men, and proof allowed.

Observed that where "a dentist does

his whole work himself with his own hands, the tools and implements he so uses are, then, the tools and implements of his trade."

Process—Summons—Designation—Error in Designation—Party Illegally Designed seeking Equitable Remedy—Dentists Act 1878 (41 and 42 Vict. cap. 33), sec. 3.

The Dentists Act 1878, section 3, enacts—"From and after 1st August 1879 a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is specially qualified to practise dentistry, unless he is registered under this Act. Any person who . . . not being registered under this Act, takes or uses any such name . . . as aforesaid shall be liable, on summary conviction, to a fine not exceeding twenty pounds."

A, who practised dentistry, but was not registered under the Dentists Act 1878, raised an action to prevent the trustee on his sequestrated estate from selling certain implements alleged to be working tools of his profession, in which he was, through the error of his agent, designed as dental surgeon. His agent had simply followed the designation in the sequestration proceedings, and pursuer had never in his practice maintained that he was a qualified dentist or designed himself as dental surgeon.

Held that pursuer was not barred by the error in designation from stating a relevant case.

Observed that the practising of dentistry by an unregistered person was not of itself illegal.

The Bankruptcy (Scotland) Act 1856, sec. 102, enacts—"The Act and warrant of confirmation in favour of the trustee shall, *ipso jure*, transfer to and vest in him or any succeeding trustee for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor, to the effect following:—1st, the moveable estate and effects of the bankrupt wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null and reducible. . . ."

John Andrew Macpherson, 5 Eskgreen, Musselburgh, brought a petition in the Sheriff Court of the Lothians and Peebles at Edinburgh against William John Allan Drummond, C.A., 37 George Street, Edinburgh, trustee on the sequestrated estate of the petitioner. In this petition he designed himself as John Andrew Macpherson, dental surgeon, 5 Eskgreen, Musselburgh, and prayed the Court "to interdict the defender from selling, disposing of, removing, or in

any manner of way interfering with the following articles, presently in house No. 5 Eskgreen, Musselburgh, viz.—*A—In Surgery*—(1) Dental operating chair; (2) Dental operating chair attachment; (3) Dental operating chair spittoon; (4) Set of forceps, two gags, one mouth opener, two elevators, catch forceps, tongue forceps, scissors, artery forceps, absolutely necessary for operating purposes, all lying in righthand drawer of bookcase; (5) Burring engine and burrs; (6) Gasometer with two gas bottles attached and face piece; (7) Set of scaling, excavating, and filling instruments; and *B—In Glass House*—(1) Lathe; (2) Work bench; and (3) Set of workroom tools, all of which articles are absolutely necessary and essential for the pursuer carrying on the business of dentist, and so earning his livelihood, and which articles are the pursuer's property; and to grant interim interdict; and to find the defender liable in expenses in the event of his appearing and opposing the prayer of the petition."

The petitioner averred that his sole means of subsistence had always been and still was the practice or business of dentistry, and that he had no training for any other occupation or business, and that he had practised dentistry for over twenty years successfully and skilfully. He admitted, however, that he was not registered under the Dentists Act 1878.

He further averred—" (Cond. 2) The defender, as trustee foresaid, has intimated his intention of taking possession of the articles enumerated in the prayer hereof, for the purpose of realisation and sale. These articles are the necessary working tools of the pursuer, who could not follow his business, and so earn a livelihood without them. They are absolutely essential to his carrying on his business as a dental surgeon. They consequently do not fall under the sequestration, and they accordingly remain the property of the pursuer. (Cond 3) In consequence of the defender's intimation referred to in the preceding article, the present petition has been rendered necessary. In the urgent circumstances interim interdict is respectfully sought, as if the defender were to sell them the pursuer would be deprived of the working tools by which he is able to follow his vocation and earn his living."

The defender did not admit that the instruments mentioned in the prayer of the petition were necessary to the pursuer's business, but averred that in any case they were moveables attachable for debt and had vested in him in virtue of his act and warrant. He pleaded, *inter alia*, that the action was irrelevant.

The Sheriff-Substitute (HENDERSON) on 27th March 1905 repelled this and certain other pleas and allowed the parties a proof of their respective averments.

Note.—"The pursuer here, who alleges that he is a dental surgeon in practice, has become bankrupt, and the trustee under his sequestration has claimed certain articles enumerated in the prayer of the petition with a view to realising them for the behoof of the pursuer's creditors.

"The pursuer avers that the articles which he has enumerated are necessary working tools and that he cannot follow his business and earn a livelihood without them. He therefore craves for interdict against the trustee taking possession of and selling the same.

"The Vesting Clause of the Bankruptcy Act 1856 (sec. 102) carries to the trustee the moveable estate and effects of the bankrupt 'so far as attachable for debt.' Anything, therefore, which could not be poulded or arrested for debt is not conveyed to the trustee, and what has been decided as regards poulding has therefore a direct bearing upon what the trustee may claim.

"This question of what constitutes 'working tools' has not been, so far as I have been able to find out, the subject of judicial consideration in the Court of Session since 1814, although there has been at least one case in the Sheriff Court within recent times.

"The earliest case is that of *Reid v. Donaldson*, July 11th 1778, M. 1392, where the opinion was expressed that a creditor under a *cessio* was not entitled to attach 'the tools by which the suspender, as an artificer, gains his daily bread.' It is not mentioned in the report of this case what sort of an artificer the suspender was or what kind or quantity of tools he possessed. The next case is that of *Pringle v. Neilson*, August 5, 1788, M. 1393. There again the Court in like manner suspended as regarded wearing apparel and 'working tools.' Here also there is no allusion to what the 'working tools' consisted of, and it is somewhat difficult to figure what they can have been, as the suspender is described as, after having obtained *cessio bonorum*, 'a retail dealer in the town of Dalkeith,' being employed as a merchant's clerk. From this case to that of *Gassiot, Petitioner*, November 12, 1814, F.C., there is no reported case. In *Gassiot's* case a teacher of foreign languages was held not entitled to retain furniture which he had purchased after being liberated from prison in virtue of a decree of *cessio bonorum*, but the Lord Justice-Clerk expressed a clear opinion that books or desks would be considered implements of the profession of a teacher of languages. In this view Lord Robertson concurred, and Lord Meadowbank was inclined to find him entitled to furniture suitable to his station in life.

'The law remained in the position defined by the decisions in these cases—at all events as regarded reported judgments—until 1890, when the late Sheriff Cowan decided the case of *Macmillan v. Barrie and Dick*, February 25, 1890, 6 S.L. Review 103. Proceeding on the authority of *Pringle v. Neilson*, *supra cit.*, the Sheriff-Substitute held that a sewing-machine, the property of a dressmaker, was a tool or implement by which her livelihood was earned, and could not be poulded or sold for debt. In his judgment in that case Sheriff Cowan refers to a previous decision of his own (unreported) in which he made a similar finding as to a piano belonging to a teacher of music.

"In this state of the decided cases it becomes a matter of great difficulty to define, with any approach to certainty, what do and what do not constitute 'working tools' or 'implements for earning livelihood.'

"From a perusal of the list of articles annexed to the petition it seems as if some of them, such as forceps, &c., are really such 'working tools' as would fall under one or other of the above decisions.

"I confess I feel myself unable to distinguish among the enumerated articles as to which are 'necessary' to the bankrupt in order that he may earn his daily living and what are unnecessary for that purpose. As the parties are, moreover, also at issue as to the value of the articles claimed by the trustee—the petitioner's counsel assessing their value at about £20, and the counsel for the trustee stating that they are worth upwards of £100—I have considerable hesitation in handing the whole of these articles over to the bankrupt without knowing what their value is.

"I have, therefore, come to the conclusion that it is essential, before an intelligent judgment can be given in this case, that evidence of an expert or experts be led as to the necessity to the bankrupt of retaining all or any of the articles, and also as to their value, as this latter point must necessarily enter into the decision of the case.

"The trustee, by letter from his agent dated 22nd February 1905, indicates that he is prepared to leave the 'forceps, instruments, and workroom tools' in the possession of the bankrupt, but I do not think that such a concession is sufficient to settle the questions raised in this case.

"Some light as to the kind of articles which have been left with bankrupts in such circumstances is to be gathered from what is stated in a recent judgment by Lord Pearson in the Outer House in the case of *Thom v. Caledonian Railway Company*, February 25, 1902, 9 S.L.T. 440. The Lord Ordinary there states that a confectioner was allowed to retain certain dies used in his trade of the value of £50.

"Some doubts were thrown upon the petitioner's status as a dentist both on record and at the bar, and it might be as well that this point be cleared up also at the proof. Counsel for the trustee moved that caution should be found by the bankrupt before any steps be taken in process. I have repelled the plea on which that motion is based. It seems to me that a bankrupt is entitled to vindicate to himself property which he maintains is not carried by the vesting clause of the Bankruptcy Act to his trustee without finding caution. To hold otherwise would be to open a wide door to possible oppression and denial of justice. *Thom's case, supra cit.*, illustrates this view."

The defender appealed against this interlocutor to the Sheriff (MACONOCHE), who sustained the appeal, recalled the interlocutor appealed against, and dismissed the petition as irrelevant.

Note.—"In this case the Sheriff-Substitute allowed parties a proof of their

averments, but since he did so the defender has amended his record by stating that the pursuer is not only not a registered dentist, but that he is not 'a legally qualified medical practitioner,' and holds no special licence to practise dentistry from the General Medical Council. It is admitted that these averments are true, so that the pursuer admittedly cannot design himself 'dental surgeon,' or by any other words suggesting that he is qualified to practise dentistry in terms of the Dentists Act 1878. The statutory rule under the Bankruptcy Act is that the bankrupt must give up all his property, except wearing apparel, to his trustee, but the Court has to some extent relaxed that rule by allowing certain bankrupts to retain the tools which are necessary to enable them to carry on the trade by which they earn their livelihood. The question, then, is whether the pursuer is under that rule entitled to retain the articles mentioned in the prayer of the petition, the value of which, I am told, is over £50. The practice which has grown up is, as I have said, a relaxation of a statutory rule founded primarily on humanitarian grounds, and the first remark which I have to make is that the pursuer here is by no means in a position to have his request that the relaxation should be given effect to in his case favourably considered. In the first place he designs himself in the instance and in his condescendence as 'dental surgeon,' a designation which he has no legal right to assume, and the assumption of which lays him open to prosecution for penalties. I am by no means sure that I am entitled to consider at all a petition so brought, as to do so is to countenance an illegal act on the pursuer's part, but I do not wish to rest my judgment solely on that ground. It is, however, clear to my mind that the primary object of the Dentists Act was to protect the public from the tender mercies of quack dentists, whose opportunities of doing serious injury would otherwise be large, and what I am asked to do is on grounds of humanity to the pursuer to give him, contrary to the terms of the Bankruptcy Act, power to carry on his unauthorised trade. It is true that for an operator to pull out or stop teeth without being registered or being a qualified medical practitioner is not rendered illegal by the Dentists Act, but such a practice is not, in my opinion, to be fostered by the courts. The general question whether such a trade or profession as that of a dentist is one to which the relaxation of the statutory rule should apply is a difficult one, and I do not find anything to assist me in previous decisions. In various cases artisans and such persons as sempstresses have been allowed to keep the articles necessary for carrying on their trade—articles as a rule of no great money value—and the dicta in *Gassiot's* case, Fac. Coll., November 12, 1814, seem somewhat to extend the class which is to have the benefit of the relaxation, but until some definite rule is laid down by the Legislature or the Supreme Court, each trade or profession must be considered on its own merits. The line must be drawn somewhere,

as it would, for instance, be absurd to say that a large manufacturer who carried on his business by means of very expensive machinery should be allowed to withhold it from his trustee, and in like manner I do not think that a minister would be allowed to retain his divinity library or a lawyer his law books, though such aids are highly necessary for the successful exercise of their respective professions. Here the value of the articles is very considerable; the trade of dentist is a highly skilled one, and is one which the Legislature has seen fit to fence about with strict regulations if it is to be exercised under the authority of the law. In such circumstances I do not see my way to extend the benefit of an equitable relaxation to an unauthorised practitioner of a profession to which it has never yet been extended, but I wish to reserve my opinion as to what should be done in the case of a duly licensed dentist."

The pursuer appealed to the Second Division of the Court of Session, and argued—(1) The articles mentioned in the prayer of the petition were not attachable for debt. The vesting clause of the Bankruptcy Act 1856, section 102, only carried to the trustee the moveable estate and effects of the bankrupt, "so far as attachable for debt." The Sheriff was inaccurate, for the rule that means of livelihood could not be attached for debt was not a relaxation of the Bankruptcy Act but a rule of common law. The exemption from diligence of working tools and implements of livelihood was not confined to tools of little value of ordinary labouring men.—*Reid v. Donaldson*, July 11, 1778, M. 1392; *Pringle v. Neilson*, August 5, 1788, M. 1393; *Gassiot, Petitioner*, November 12, 1814, F.C. (Reference was also made to the following Sheriff Court case—*Macmillan v. Barrie and Another*, 1890, 6 S.L. Review 103). (2) The pursuer had never in his practice used the name of "dentist" or "dental surgeon," or any description implying that he was registered under the Dentists Act. The designation "dental surgeon" was due to a mistake of his agent, who had taken the designation from the act and warrant in the sequestration proceedings. The practising of dentistry by an unregistered person was not illegal—*Emslie v. Paterson*, June 12, 1897, 24 R. (J.) 77, 34 S.L.R. 674.

The defender (respondent) argued—(1) The cases of *Reid v. Donaldson* and *Pringle v. Neilson* gave no help as to what were working tools. The decisions referred to by pursuer were under the old law of *cessio*, which was as much for the benefit of the creditor as the debtor, and consequently the interpretation of the rule of exemption of working tools should not at any rate be extended. The width of the terms of the oath to be taken by bankrupts in section 95 of the Bankruptcy (Scotland) Act 1856, seemed to point in the same direction. Again, the question of value was of much importance, and the line must be drawn somewhere. In this case some of the articles were of great value. That value was a very important element was indi-

cated by the Wages Arrestment Limitation (Scotland) Act 1870 (33 and 34 Vict. cap. 63), which did not save from arrestment the surplus of wages above 20s. a-week. The pursuer could not recover in any court of law his earnings at dentistry, and therefore for him it was not properly a trade or livelihood at all. (2) What was a humanitarian rule should not be extended to the practice of dentistry by an unregistered practitioner, for though this was not illegal, it was not regarded with favour by the law.

LORD JUSTICE-CLERK—This case has got into a somewhat unfortunate position. The Sheriff says that the petitioner designs himself in these proceedings as a dental surgeon, but his agent simply followed the designation given in the application by those seeking his sequestration. Now, the petitioner never in his practice maintained that he was a qualified dentist, or designed himself as dental surgeon, which would have made him liable to certain penalties. It seems, then, a strange thing to say that because these words occur in his designation in the petition, the petitioner should be shut out from stating a relevant case. If he had come forward calling himself a surgeon dentist, and saying he had a degree which he had not, that would have been a different case.

I think the case must be remitted to the Sheriff for proof, and so holding, that it is advisable to say a few words further as to the nature of the case.

The practising of dentistry is not illegal though performed by a person who has not the qualifications of the Dentists Act 1878. This was expressly observed in *Emslie v. Paterson*, 1897, 24 R. (J.) 77. Therefore the petitioner in practising dentistry was not acting illegally. Is he then entitled to have excluded from the sequestration those implements, or any of them, mentioned in the prayer of the petition? That depends on questions of fact. Whether a person uses the tools himself, or carries on a trade where he makes other persons use the tools, is a question of fact which is very important. It is also a question of fact what are the ordinary implements and tools of every trade, and this the Court cannot be expected to know. I think, therefore, the Sheriff-Substitute was right in allowing proof. It may be that a dentist does his whole work himself with his own hands—the tools and implements he so uses are, then, the tools and implements of his trade. It was said by the respondents that only the tools and implements of an ordinary working man were exempt from being attachable for debt, but opinions were expressed in *Gassiot, Petitioner*, November 12, 1814 (F.C.), that books or even desks would be implements of trade of a teacher of languages, and so not attachable for debt.

I think, therefore, it is proper to have the facts ascertained, and therefore that it is necessary to recal the Sheriff's interlocutor.

LORD KYLLACHY, LORD STORMONT DARLING, and LORD LOW concurred.

The Court sustained the appeal, and remitted to the Sheriff to allow parties a proof of their averments.

Counsel for Pursuer (Appellant)—Thomas Trotter. Agents—Struthers Soutar & Scott, Solicitors.

Counsel for Defender (Respondent)—Cullen, K.C.—Ingram. Agent—J. Dunbar Pollock, Solicitor.

Thursday, November 30.

FIRST DIVISION.

JOHN NIMMO & SON, LIMITED,
PETITIONERS.

Witness—Foreign—Arbitration—Witness and Haver in England—Appointment of English Commissioner—Letters of Diligence to Cite Witness—Form of Interlocutor.

An arbiter having ordered a proof and appointed a commissioner in England for taking the deposition of a witness and haver who was resident there, the party at whose instance the commission had been granted presented a petition, *inter alia*, for approval of the appointment of the commissioner and for letters of diligence for citing the said witness to appear before him.

The Court *refused* to grant letters of diligence but *confirmed* the appointment of the commissioner.

By deed of submission dated 8th, 10th, 18th, and 21st January 1904, entered into between John Nimmo & Son, Ltd., 163 Hope Street, Glasgow, and the Collieries Consolidation Syndicate, Limited, and the United Collieries, Limited, both incorporated under the Companies Acts 1862 to 1890, it was agreed that all questions arising under or relating to the adjustment of a certain minute of agreement should be referred to the Right Hon. Charles Scott Dickson, Lord Advocate for Scotland, as arbiter.

The arbiter having accepted office, in the course of the proceedings under the reference allowed a proof, and it was found necessary for Nimmo & Son to recover certain documents mentioned in a joint specification. The arbiter accordingly pronounced the following orders:—On 13th November 1905.—“The arbiter . . . before answer allows both parties a proof of their respective averments and to each a conjunct probation; appoints the proof to proceed before him on . . . Further respectfully recommends to the Lords of Council and Session to grant warrant for citing witnesses and havers on the application of either party.”

On 25th November 1905:—“The arbiter, having considered the note for John Nimmo & Son, Limited, appoints the Mayor or Town-Clerk of Rotherham his commissioner in Rotherham for taking the deposition of D. W. Rees, secretary of the North Central Wagon Company, Limited, Rother-