such as goods, claims, bills, and so on, and I do not think it has ever in practice been held that this factor's lien could or should extend to an estate manager who is called in Scotland a factor, but who in England would be called a land agent.

Now this gentleman pleads, and must plead, his alleged lien as high as if he were a law agent. No case has arisen in Scotland in which this demand has been put forward. But I have come across a case in England to which I think it is worth while to draw attention. The report is so very brief that I may read it. It is the case of *Champernown* v. *Scott*, in which the precise question we have here came up for consideration. The case came before the Vice-Chancellor, Sir John Leach, and is reported in 6 Maddock 93, and also in 22 Revised Reports 248. A motion was made that the defendant might deliver up books and papers.

The defendant was a solicitor, and insisted that he had a lien upon them, and his answers stated that he received them in his capacity of steward of a manor and not as solicitor.

The Vice-Chancellor held that though a solicitor had a lien upon all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remained in his hands, yet that he had no lien as solicitor on papers which he received as steward.

That seems to be exactly in point. And in accordance with it I hold that this alleged lien cannot be sustained.

LORD PRESIDENT—LORD DUNDAS concurs.

LORD KINNEAR and LORD MACKENZIE did not hear the case.

The Court pronounced this interlocutor—

"Order the respondent David Leith within eight days to deliver up to the petitioner the whole leases mentioned in the prayer of the petition, and further, to lodge in process within eight days an inventory of all other writs and documents in his possession, and decern."

Counsel for Petitioner—Hon. W. Watson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Respondent—W. T. Watson. Agents—Melville & Lindesay, W.S.

Wednesday, January 29.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

STURROCK *v.* CARPHIN.

Bankruptcy—Trustee—Personal Liability—Adoption of Bankrupt's Contract.

The trustee on the sequestrated estate of a bankrupt, and of the firm under which he carried on business, having brought an action against the bankrupt's former partner under the deed of dissolution of the copartnery, the latter thereupon brought an action against the trustee for implement of the obligations thereby undertaken by the bankrupt. *Held* that the trustee had not by so suing adopted the deed of dissolution so as to render himself personally liable for the obligations incurred by the bankrupt thereunder.

John Sturrock, solicitor, Edinburgh, *pursuer*, brought an action against George Henry Carphin, C.A., Edinburgh, trustee on the sequestrated estate of the late John Logie Robertson, W.S., Edinburgh, and of the firm of Wylie & Robertson, W.S., of which Mr Robertson was sole partner, and also against William Robertson, F.F.A., Edinburgh, as Mr Robertson's cautioner for any interest he might have, *defenders*, for declarator that the defender Carphin had adopted a memorandum of agreement between Mr Robertson and the pursuer dated 30th December 1907, providing for the dissolution as at 10th November 1907 of the firm of which Mr Robertson and the pursuer were then partners, and that the pursuer was bound as trustee and also as an individual to implement the obligations therein undertaken by Mr Robertson, and in particular to free and relieve the pursuer of all claims and liabilities to which he was subject or which he had paid as a partner of the dissolved firm.

The memorandum of agreement for the dissolution of the copartnery provided, *inter alia*—"4. In respect that the said John Logie Robertson is to continue the business of Wylie & Robertson for his own behoof, the partners agree as follows:—The said John Logie Robertson will take over the whole assets and liabilities of the firm, conform to balance-sheet as at tenth November nineteen hundred and seven, and signed as relative hereto, it being expressly stipulated that the said John Sturrock shall not be liable for any of the liabilities which may be shown in the said balance-sheet, but subject always to clause sixth hereof; the said John Sturrock on the other hand agreeing not to make any claim on the firm of Wylie & Robertson in respect of capital, accounts outstanding, goodwill, or any other claim which he could make, with the exception of the furniture to be delivered to him conform to inventory annexed, and signed as relative hereto. . . . 6. . . . [*Arrangement as to a cash-credit bond.*] . . . 7. The said John Logie Robertson, as principal, and the said William Robertson, as cautioner and as taking burden on him for the said John Logie Robertson, hereby discharge and free and relieve (subject to the agreement mentioned in article sixth hereof) the said John Sturrock of all claims and liabilities of every kind against the said firm of Wylie & Robertson as partner of the said firm."

The pursuer averred—"(Cond. 5) On 20th March 1909 the defender George Henry Carphin, as trustee foresaid, raised an action in the Court of Session against the present pursuer, in which he sued for payment to himself, the said George Henry Carphin, as trustee foresaid, of the sum

of £458, 13s. 6d., which he alleged to be due to him as trustee foresaid under said memorandum of agreement of dissolution in name of profits overdrawn by the present pursuer. The sum sued for in said action was subsequently increased by an amendment to the sum of £1000. The ground of action was that the sum sued for being a debt due by the present pursuer to his said firm of Wylie & Robertson was one of the assets of that firm to which the said John Logie Robertson acquired right under said memorandum of agreement of dissolution. The said defender founded in said action upon said memorandum of agreement of dissolution and thus adopted it, and he has become liable for the obligations therein undertaken by the said deceased John Logie Robertson."

The pursuer pleaded, *inter alia*—"(1) The defender Carphin having enforced the provisions of said memorandum of agreement of dissolution against the pursuer, has thereby adopted it, and is now liable to implement the obligations therein undertaken by the said John Logie Robertson, and in particular to free and relieve the pursuer of all claims and liabilities which remain outstanding against said firm, and the pursuer is accordingly entitled to decree as concluded for."

On 29th June 1912 the Lord Ordinary (ORMIDALE) dismissed the action.

Opinion. — ". . . Every case which involves the question whether a trustee in bankruptcy has adopted an onerous contract must be decided according to its own particular circumstances. The circumstance I chiefly go on here is that the trustee's right to vindicate as for the bankrupt's creditors the sums due to the late firm of Wylie & Robertson by the defender seems to me to arise solely out of the minute of dissolution whereby that firm's assets were vested in the bankrupt. But for that minute he has no right of action at all. His act and warrant gives him a right to take possession of all the bankrupt's estate, but not the assets of an unsequestrated firm of which the bankrupt had at one time been a partner. Accordingly the pursuer is compelled to seek elsewhere for a title to sue, and finds it only in the minute of dissolution. If that be so, then the ratio of the decision in *Craig's Trustee* v. *Malcolm*, 2 F. 541, covers the present case. It is only by adopting the minute that the trustee can show that what was once an asset of the firm of Wylie & Robertson had become a part of the bankrupt's estate. . . .

"With regard to the action *Sturrock* v. *Carphin and Another*, I cannot hold that it is of the same nature as *Doig* v. *Lawrie*, 5 F. 295. In that case there was a definite liability as cautioner resting on the pursuer, clearly ascertained by a letter of guarantee, which also bore that the guarantee was to remain in force until recalled in writing. The pursuer had so recalled the guarantee, but the defender took no steps to have his name removed from the cash-credit bond under which the bank had already made advances to nearly the amount of the guarantee. In those circumstances the pursuer was held to be entitled to call in aid an order of the Court. Here the circumstances are totally different. I cannot give relief when there has not been and may never be distress, and as I read the pursuer's averments that is the position of matters with regard to the majority of the claims which are enumerated in the summons. To the extent of claims actually made I should have been prepared to pronounce such an order as is asked if the conclusions of the summons had been so restricted, or indeed capable of being so restricted. This action in my judgment falls to be dismissed."

The pursuer reclaimed, and argued—The trustee had adopted the minute of dissolution by suing on it—*Torbet* v. *Borthwick*, February 23, 1849, 11 D. 694; *Makessack & Sons* v. *Molleson*, January 15, 1886, 13 R. 445, 23 S.L.R. 301; *Craig's Trustee* v. *Malcolm*, January 31, 1900, 2 F. 541, 37 S.L.R. 398. The test of his liability was whether he had taken up the contract, and not whether it had proved profitable to the trust estate. Whenever a trustee attempted to enforce a personal obligation, under a contract, of the bankrupt he adopted the contract as being his own contract, and thus bound himself personally — Goudy on Bankruptcy, 2nd ed., p. 375. Such personal liability of a trustee in bankruptcy was clearly recognised in the law of Scotland by a number of decisions—*Ross* v. *Monteith*, February 5, 1786, M. 15,290; *Nisbet & Company's Trustee*, December 10, 1892, M. 15,268; *Kirkland* v. *Gibson*, May 17, 1831, 9 S. 596, *aff.* 6 W. & S. 340; *Dundas* v. *Morison*, December 4, 1857, 20 D. 225. These were cases of leases, but the rule was not confined to leases but was put on general grounds, *e.g.*, by Lord Fullerton in *Torbet* v. *Borthwick* (*cit. sup.*) There was a distinction between realising property and enforcing contract rights. In the former case the trustee was not affected by the bankrupt's personal obligations, but where contract rights were concerned he must either take the contract up wholly or let it alone. The pursuer was entitled to decree of declarator without waiting till he had suffered distress at the hands of the creditors of the dissolved firm—*Doig* v. *Lawrie*, January 7, 1903, 5 F. 295, 40 S.L.R. 247; *Cunningham* v. *Montgomerie*, July 19, 1879, 6 R. 1333, 16 S.L.R. 801.

Argued for the defender—The defender had not adopted the minute of dissolution by suing the pursuer thereunder so as to render himself personally liable. His actings were done solely in discharge of his duty of realisation of the estate, and this did not constitute adoption—*M'Gavin* v. *Sturrock's Trustee*, February 27, 1891, 18 R. 576, 28 S.L.R. 414; *Imrie's Trustee* v. *Calder*, October 21, 1897, 25 R. 15, 35 S.L.R. 14. In the present case if the trustee had omitted to sue on the minute of dissolution, he would have rendered himself liable to an action of damages at the instance of the creditors for negligence. The cases cited *contra* in support of the trustee's personal

liability were not in point, because they were cases of running contracts, whereas in the present case the contract was a completed one, and adoption therefore did not apply.

At advising—

LORD SALVESEN—In this action the pursuer seeks to have it found and declared that the defender Carphin adopted a memorandum of agreement between the deceased John Logie Robertson and the pursuer, and that the defender as trustee on Robertson's estate is now bound, as such trustee and as an individual, to implement the obligations therein undertaken by the bankrupt, and in particular that he is bound to free and relieve the pursuer of all claims and liabilities to which he is subject or which he has paid as a partner of the dissolved firm of Wylie & Robertson. The Lord Ordinary has dismissed the action on the somewhat narrow ground that he cannot give relief where there has never been and may never be distress, and that this is the position of matters with regard to the majority of the claims enumerated in the summons. I cannot agree that that is a sufficient ground for disposing of the action as the Lord Ordinary has done, and it is necessary, therefore, that we should examine the case upon the merits.

The material facts are as follows:—The late J. L. Robertson carried on the business of a solicitor in partnership with the pursuer under the firm name of Wylie & Robertson from November 1898 to November 1907. The copartnery was dissolved by agreement, the dissolution to take effect as at 10th November 1904. Under the agreement contained in the minute of dissolution signed by the partners Mr Robertson was to continue the business for his own behoof, he taking over the whole assets and liabilities of the firm; and it was expressly stipulated that the pursuer should not be liable for any of the debts apart from the firm's liability to the bank, which does not enter into this case. Mr Robertson continued to carry on business until his death on 23rd June 1909. His estates were afterwards sequestrated, and the defender Carphin was elected trustee. As such he undoubtedly became bound to implement the agreement of the bankrupt; but the question is whether he has become liable to do so as an individual—in other words, to pay out of his own pocket in the first instance, with such relief as he may have against the estate in his hands, the whole debts of the dissolved firm. The pursuer maintains that he has become so liable on the ground that he adopted the contract contained in the minute of dissolution. Such adoption is said to be inferred from the circumstance that in another action which we have just disposed of he sued for and established the pursuer's liability to account for a sum of £732, 16s. 7d., representing the extent to which the pursuer had overdrawn his share of the profits of the dissolved firm during its existence. Now the pursuer has been assoilzied in that action on the ground that the defender refused to implement the obligations of the bankrupt under the minute of agreement. The defender has accordingly not recovered any sum from the pursuer for behoof of the estate which he administers, and yet it is said that he has rendered himself personally liable by raising the action for all the debts of the dissolved firm. The Lord Ordinary has given countenance to this view in some of the observations contained in his opinion. He says—"The pursuer (that is, Mr Carphin) is compelled to seek elsewhere for his title to sue, and finds it only in the minute of dissolution. If that be so then the ratio of the decision in *Craig's Trustee* v. *Malcolm* (2 F. 541) covers the present case. It is only by adopting the minute that the trustee can show that what was once an asset of the firm of Wylie & Robertson had become a part of the bankrupt's estate." I think it would have been more correct to say that the trustee founded upon the contract contained in the minute of dissolution, but that is a very different matter from adopting it in the sense in which the trustee on the sequestrated estate of a farmer adopts a lease so as to make him personally liable for arrears of rent due to the landlord. Such adoption may be inferred from possession being taken of the subjects let when such possession is not merely for the purpose of realisation of the estate. It has been held in a long series of cases, of which *Ross* (M. 15,290) was the earliest cited, that such adoption of a lease by a trustee on a bankrupt's estate renders the trustee personally responsible for implement of the tenant's obligations. In such a case, however, the position of the landlord is changed by the action of the trustee, but for which he would be entitled to resume possession of the subjects let; but the principle upon which this legal result has been reached is not applicable to such a contract as we have here, except to the effect (of which the defender has already received the benefit) that the trustee is not entitled to enforce the contract unless he is prepared to implement the obligations incumbent on the bankrupt. The trustee erroneously believed that he could do so, but he has had to pay the penalty of his mistake in law by having to submit to a decree of absolvitor and to a partial finding for expenses against him. I know of no authority for holding that such a mistaken course which is not said to have in any way prejudiced or changed the position of the pursuer should have the extraordinary result of making the trustee personally responsible for the bankrupt's obligations towards the person whom he unsuccessfully sued. The penalty of his rashness in this case would represent a sum of between two and three thousand pounds payable out of his own pocket, for which he can only partially recoup himself, if at all, out of the estate under his charge.

If the principle contended for by the pursuer were sound it would be capable of extensive application. Thus the trustee on the estate of a bankrupt shipowner sues for a balance of freight due to the bankrupt. He is met with a claim of damages for

injury to the cargo largely in excess of the freight sued for. The trustee honestly believes that the claim of damages is unfounded, and that it is his duty to prosecute the action. The contrary is found by the Court; and according to the pursuer not merely must the trustee fail in his action, but because he brought it he must be held to have adopted the charter-party to the effect of becoming personally liable for all the shipowner's obligations under the contract of carriage. One is not surprised to find that there is no authority for such a proposition. Apart from the cases upon current leases to which I have already referred, the nearest analogy was said to be found in the liability of a trustee to pay the expenses of an unsuccessful action against the bankrupt to which he has sisted himself as a party. The reason for this liability, according to the pursuer, was that he had adopted the contract of litiscontestation. This so-called contract is a mere legal fiction for which no doubt there is respectable authority, but it is not upon this ground that the trustee is rendered personally responsible for such expenses. It is because he has elected to sist himself as a party to the litigation, and so must incur all the risks of an ordinary litigant. He has, in short, taken control of the pending suit, which but for his action would at once have been decided adversely to the bankrupt. There is really no analogy between such a case and that with which we are now dealing. The decision most strongly founded on,—that of *Malcolm* v. *Craig's Trustee*,—was not one where the personal liability of the trustee was in issue. The sole question was whether the landlord was entitled to set arrears of rent against a claim by the trustee for the price of certain sheep stock as determined by the valuation of arbiters, which in terms of a clause in the lease he had insisted that the landlord should take over at valuation. The true ground of judgment was thus stated by Lord Moncreiff in a single sentence—"He thus appealed to the contract, and having done so he cannot enforce the claim which he has thus obtained against the landlord without satisfying or giving credit for the landlord's counter-claims under the same contract." That is merely an application of a principle which was given effect to in somewhat similar circumstances in the case of *Dingwall* (1912 S.C. 1097). The point now raised might have arisen in *Malcolm's* case if the valuation of the sheep stock had been less than the arrears of rent due to the landlord, but the decision gives no countenance to the view that in such circumstances the trustee would have been held personally liable for the difference. I am therefore of opinion that the unsuccessful action of the trustee founded upon the contract contained in the minute of dissolution did not constitute an adoption by him of that agreement so as to infer personal liability. The trustee is therefore entitled to be assoilzied from the conclusions so far as directed against him as an individual, and as no question has been raised with regard to his liability as trustee, the action *quoad ultra* should be dismissed. The pursuer must, of course, pay the expenses of this action.

LORD DUNDAS, LORD GUTHRIE, and the LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor of the Lord Ordinary assoilzied the defender from the conclusions of the action so far as directed against him as an individual, *quoad ultra* dismissed it.

Counsel for the Pursuer and Reclaimer—Chree, K.C.—D. P. Fleming. Agents—Purves & Simpson, S.S.C.

Counsel for the Defender and Respondent—Solicitor-General (Anderson, K.C.)—Kemp. Agents—Wylie, Robertson, & Scott, Solicitors.

Friday, January 31.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

PONTON'S EXECUTORS *v.* PONTON.

Sheriff — Jurisdiction — Reconvention — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 6 (*h*).

The Sheriff Courts (Scotland) Act 1907 enacts—Section 6—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (*h*) where the party sued is the pursuer in any action pending within the jurisdiction against the party suing."

Held that a foreigner, who as sole surviving executor on a Scottish estate was suing in the Sheriff Court the executors on another Scottish estate, was not subject to the jurisdiction of the Court *ex reconventione* in an action at their instance against him as an individual.

Opinion (*per* Lord Salvesen) that to found jurisdiction in the Sheriff Court under the Sheriff Courts (Scotland) Act 1907, section 6 (*h*), it was not necessary that the actions should be *ejusdem generis*.

John Watson M'Crindle, LL.D., Westcliffe-on-Sea, Essex, and another, the trustees and executors of the late Mrs Jane Maclean or Ponton, who resided at Westcliffe-on-Sea, Essex, *pursuers*, brought an action in the Sheriff Court at Edinburgh against Archibald Campbell Ponton, Guildford Road, Tunbridge-Wells, *defender*, for payment of certain sums alleged to be due by him to Mrs Ponton's estate. Pursuers claimed that the defender was subject to the jurisdiction of the Court *ex reconventione* by virtue of section 6, sub-section (*h*), of the Sheriff Courts (Scotland) Act 1907 (quoted *supra* in rubric) in respect that as sole surviving executor of the late Mungo Ponton, Bristol, he was pursuer in an