

Friday, December 21.

## FIRST DIVISION.

[Sheriff Court at Edinburgh.]

KING v. EDINBURGH COLLIERIES  
COMPANY, LIMITED.

*Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—Option of Claiming Compensation under Act or of Taking Proceedings Independently thereof—Intimation of Claim under Act Followed by Common Law Action—Whether Option Finally Exercised—Locus penitentiæ.*

A workman having given notice to his employers of an injury, and thereafter through his law agents claimed "compensation as for total incapacity since the date of the accident" at 35s. per week, the employers repudiated liability and applied for arbitration in terms of the Workmen's Compensation Act 1906. Thereafter, and while the arbitration was still pending, the workman brought an action at common law or alternatively under the Employers' Liability Act 1880 against his employers, to which the defenders pleaded that the action was barred in terms of section 1 (2) (b) of the Act of 1906 in respect that the pursuer had elected to claim compensation under that Act. The Sheriff-Substitute having repelled the plea of bar the defenders appealed. *Held* that the Sheriff-Substitute had acted prematurely in repelling the plea *simpliciter* inasmuch as his doing so enabled the workman to insist at one and the same time in alternative remedies—a course which he was not entitled to follow; that the proper course was to have sisted the action for such time as might be thought reasonable to enable the workman to make his election between his alternative remedies and to intimate his decision; and case *remitted* accordingly.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts:—Section 1—“(1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act. (2) Provided that— . . . (b) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible nothing in this Act shall affect any civil liability of the employer, but in that case the workman may at his option either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid.”

Thomas King, miner, Musselburgh, brought an action in the Sheriff Court at Edinburgh against his employers the Edinburgh Collieries Company, Limited, for damages at common law, or alternatively under the Employers' Liability Act 1880, in respect of injury sustained by him on 15th May 1922.

The defenders pleaded, *inter alia*—“Pursuer having prior to service of the petition claimed compensation from defenders under the Workmen's Compensation Act 1906 in respect of said injury, which claim is presently the subject of arbitration proceedings in the Edinburgh Sheriff Court, the present action is barred by the terms of section 1, sub-section (2) (b), of said Act. . . .”

On 10th July 1923 the Sheriff-Substitute (ORR) repelled that plea and allowed a proof.

The defenders appealed by way of Stated Case.

The Case set forth—“The averments of the parties which raise the questions of law to be determined in this appeal are as follows:—In article 11 of his condescendence the pursuer and respondent avers that the injury to him was at once reported to the defenders and appellants, who within a week of the occurrence reported the matter to their agents; that the agents of the defenders and appellants immediately caused inquiries to be made regarding the injury; that the pursuer and respondent furnished the defenders and appellants with additional particulars required by them and their agents; that on 14th June 1922 written notice of the injury was duly sent to the defenders and appellants; that the defenders and appellants repudiated liability for compensation under the Workmen's Compensation Act 1906, and that the pursuer and respondent made no binding election to accept such compensation if entitled thereto, and *quoad ultra* he denies the statements in answer for the defenders and appellants. In their answer to said article 11 of the condescendence the defenders and appellants aver that the pursuer and respondent was medically examined on their behalf at Glasgow on 26th June 1922. They produce a letter dated 14th June 1922 from the agents for the pursuer and respondent to the manager of the Insurance Company representing the defenders and appellants, and refer to it for its terms. The said letter is in the following terms:—‘Chambers, 19 Alva Street, Edinburgh, 14th June 1922. Dear Sir—*Thomas King v. Edinburgh Collieries Company Limited.*—We have been consulted by Thomas King, 75 Newbigging, Musselburgh, with regard to his claim for compensation in respect of an accident at Carberry Colliery on 15th May 1922. We understand that you have received full particulars regarding the accident, so that it is unnecessary that we should go into many details in the course of this letter. On the above date, King, while employed with the above company, was incapacitated owing to gas poisoning, and he has since been unfit for work owing to the accident in question. He claims compensation as for total incapacity since the

date of the accident. We shall be glad therefore to receive in course a remittance for the compensation due at the rate of 35s. per week. As there has been considerable delay in settling this claim we have been instructed to take action at once failing an immediate settlement—Yours faithfully (Sgd.) G. M. Wood & Robertson.—The Manager, the Scottish Mine Owners' Defence and Mutual Insurance Association, Limited, 135 Buchanan Street, Glasgow.' *Quoad ultra* the defenders and appellants deny the averments of the pursuer and respondent above referred to, and aver that the pursuer and respondent definitely elected to claim compensation from the defenders and appellants under the Workmen's Compensation Act 1906, and in point of fact made said claim against them in said letter of 14th June 1922, his agents intimating that pursuer and respondent 'claims compensation as for total incapacity since the date of the accident,' and adding, 'We shall be glad therefore to receive in course a remittance for the compensation due at the rate of 35s. per week.' They further explain and aver that a question having arisen as to the liability of the defenders and appellants to pay compensation under this Act (the pursuer and respondent insisted on 22nd July 1922 upon payment of 'the compensation due to date,' and the defenders and appellants repudiating liability) they applied for arbitration in Edinburgh Sheriff Court, which arbitration is still pending. The first plea-in-law stated for the defenders and appellants is in the following terms:—'Pursuer having prior to service of the petition claimed compensation from defenders under the Workmen's Compensation Act 1906 in respect of said injury, which claim is presently the subject of arbitration proceedings in the Edinburgh Sheriff Court, the present action is barred by the terms of section 1, sub-section (2) (b), of said Act and should be dismissed with expenses.' The record in the action was closed on 2nd February 1923, and parties were subsequently heard in the debate roll. In the course of the hearing it was admitted that the said application for arbitration was presented on 27th July 1922, that answers thereto for the present pursuer and respondent were lodged on 13th October 1922, and that since that date no further step in said arbitration proceedings had been taken by either party. It was also admitted that the initial writ in the present action was presented on 14th November 1922."

The *questions of law* for the opinion of the Court were:—*"1. Was I entitled, on the facts stated, to find that the present action was not barred by the terms of section 1, sub-section 2 (b), of the Workmen's Compensation Act 1906? 2. Was I entitled, on the facts stated, to repel the first plea-in-law stated for the appellants?"*

The Sheriff-Substitute annexed to his interlocutor a *note* in the following terms:—*"This is an action of damages at common law and alternatively under the Employers' Liability Act. The action is founded on averments of fault against defenders in*

respect of failure in their statutory duty to provide adequate ventilation in the mine where pursuer worked. It is also said defenders failed in their duty to have the section of the mine duly inspected by competent persons as provided for by the Coal Mines Act 1911. Alternatively it is averred that certain servants of defenders entrusted with the duty of superintendence caused or materially contributed to the injuries sustained by pursuer by their fault or negligence.

*"There is a preliminary defence founded on section 1 (2) (b) of the Workmen's Compensation Act 1906. It is said the pursuer has exercised the option given him in that section by making a claim for compensation under the Workmen's Compensation Act, and that he is thereby barred from insisting in the present action. The claim is contained in a letter dated 14th June 1922, in which pursuer's agents wrote—'He claims compensation as for total incapacity since the date of the accident. We shall be glad therefore to receive in course a remittance for the compensation due at the rate of 35s. per week.' The accident happened on 15th May 1922. The defenders repudiated liability. On 27th July they wrote to that effect and stated that they were applying for arbitration. On 28th July pursuer's agents replied that to prevent any misapprehension they thought it right to state that their client did not restrict his claim to one under the Workmen's Compensation Act 1906; that he had a claim at common law or alternatively under the Employers' Liability Act 1880, and they ask defenders to hold that letter as intimation of a claim on both grounds.*

*"The question that arises is therefore whether the intimation of claim in the letter of 14th June is a good and effectual exercise of pursuer's option so as to bar the present action.*

*"I take it as intimation of a claim under the Workmen's Compensation Act 1906, although that Act is not mentioned by name, but I am of opinion that it does not bar the pursuer from adopting the course he is now taking.*

*"The authority relied on by the defenders is *Burton v. Chapel Coal Company, Limited*, 1909 S.C. 430, in which previous cases both in Scotland and England were discussed and explained. I accept as correctly stating the meaning of section 1 (2) (b) the words of Lord Low—'The workman is expressly put to his option between two courses, and the essence of an option between two courses is that whichever is adopted the other is altogether rejected.' His Lordship puts it otherwise—'The workman must elect either to claim compensation under the Act or to sue for damages independently of the Act, and cannot adopt both courses either concurrently or consecutively.' When has a workman exercised his option? In *Burton's* case he was held to have done that, and therefore that he was not entitled thereafter to bring an action of damages. But what he had done was first to intimate a claim under the Act; he then brought an arbitration and followed out the arbitration to a final decision, when*

the arbiter refused him compensation on the ground that the accident was caused by his own serious and wilful misconduct. It was held by all the learned Judges that that amounted to an exercise of his option. Lord M'Laren says—'In the present case the claim under the Compensation Act was tried and decided against the claimant on its merits, and he is now attempting to follow out by action at law the alternative claim, which is founded on the alleged fault of the employer. This proceeding, as I think, is contrary to the letter and the spirit of the statutory provision against double liability. The Lord Justice-Clerk and Lord Kinnear adopt as expressing the true meaning of the language of the statute the language of the Master of the Rolls in *Cribb v. Kynoch* (1908), 2 K.B. 551. I think the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail and then proceed by common law action, and also cannot proceed by common law action and having failed in that action then proceed under the Act.'

'The case of *Burton* therefore is not authority against the present pursuer, who went no further than intimating a claim. Lord Low expressly reserves his opinion on a case like the present. 'What, however, would be the result if a workman who had a title to claim compensation under the Act made such a claim but withdrew it before final judgment is a question upon which I would desire to reserve my opinion.' So also Lord Pearson. Intimating a claim may not necessarily be the same thing as making in Lord Pearson's language 'a final election,' or as Lord Kinnear puts it 'finally and conclusively exercising his option in one way.' In *M'Donald v. James Dunlop & Company* (1900), *Limited*, 7 F. 533, Lord M'Laren said—'But then, while an election exists in that case it does not follow that it is an irrevocable election, and in the absence of any provision to that effect, and keeping in view the explanatory proviso that the employer shall not be liable to pay under both claims, I come to the conclusion that a workman may if he pleases abandon the claim first made and fall back on the alternative claim.' That case arose under the Compensation Act of 1897, which contained a similar provision to that of the present Act. I find no case where the mere writing of a letter such as the letter of 14th June was held to be a 'final' and 'irrevocable' election by a workman of the one course open to him to the exclusion of the other. That is all the workman did here. His claim was at once repudiated, and I cannot think that defenders have succeeded in shutting him off from his alternative by intimating in the same letter in which they repudiated the claim that they were applying for arbitration. Pursuer's alternative intimation of a claim independently of the Act was given without delay.

'The second preliminary plea was not insisted in.

'I shall repel the two preliminary pleas.'

The case was heard before the First Division on 13th December 1923.

Argued for defenders—Under the Workmen's Compensation Act 1906, section 1, sub-section 2 (b), the workman had an option to take one of two courses. If he took one he might not take the other. Here the workman had clearly made a claim under the Act and defenders had taken him at his word and lodged an application for arbitration. Thus the parties had definitely joined issue under the Act—*Stark v. Jardine* (1882), 7 A.C. 345, Lord Blackburn at 360; *Burton v. Chapel Coal Company*, 1909 S.C. 430, Lord Kinnear at 436, Lord Low at 438, 46 S.L.R. 375; *M'Donald v. James Dunlop & Company*, 7 F. 533, 42 S.L.R. 394; *Harrison v. Wythmore Colliery Company*, [1922] 2 K.B. 674, Lord Sterndale, M.R., at 685, Scrutton, L.J., at 698; *Cribb v. Kynoch, Limited* (No. 2), [1908] 2 K.B. 551, Buckley, L.J., at 560; *Taylor v. Hamstead Colliery Company*, [1904] 1 K.B. 838. The Lord President referred to *Westville Shipping Company v. Abram Steamship Company*, 1922 S.C. 571, per the Lord President at 580, 59 S.L.R. 539, and *Perry v. Clements*, (1901) 17 T.L.R. 525.

Argued for pursuer—The notification of injury and claim for compensation did not constitute a final exercise of the workman's option in terms of section 1 (2) (b) of the Act. Litiscontestation had not been reached. The application for arbitration had not come from the workman—*Stewart v. Perth General Station Committee*, 1923 S.C. 356, per the Lord President at 361, Lord Sands at 364, 60 S.L.R. 194.

At advising—

LORD PRESIDENT (CLYDE)—The workman's action is founded alternatively on common law or on the Employers' Liability Act 1880, and the present appeal is accordingly presented under section 14 of the Workmen's Compensation Act 1906. The questions of law submitted for answer arise on the relevancy of certain averments of the pursuer and defenders regarding a claim for compensation under the Act of 1906 made by the workman prior to the raising of the action. The employers contend that by making a claim the workman exercised the option given him by section 1 (2) (b), and thus became barred from taking proceedings independently of the Act of 1906.

It was laid down by the House of Lords in the case of *Powell v. Main Colliery Company* (1900 A.C. 366) that the workman's claim for compensation, which is the first step in, and a condition-precendent of, any further proceedings for the recovery under the Act of compensation for an injury (section 2 (1)), need not take the form of an actual application for arbitration, but may be satisfied by a simple notice of a claim for compensation given to the employer. With regard to the "proceedings" under the Act, of which the claim is the preliminary step, it was pointed out in *Powell's* case that the proceedings referred to are not primarily judicial in character, though arbitration may be required to decide differences which arise in the course of them—see section 1 (3). In the present case the

workman's claim took the form of a perfectly clear and unambiguous letter from his solicitors claiming the statutory compensation of so much a week, and intimating immediate action to enforce it if not immediately settled. In the proceedings thus instituted, which included a medical examination of the pursuer, a question arose in consequence of the denial by the employers of their liability to pay compensation to the workman, and the employers thereupon applied for the settlement of that question by arbitration under the statutory schedules. This arbitration is still pending, and the workman has not withdrawn the claim which must accordingly be settled in it. It is necessary to keep in mind the imperative character of the provisions of section 1 (3).

To the action of damages which the workman subsequently raised against his employers the latter pled that the action should be dismissed in virtue of the provisions of section 1 (2) (b). The Sheriff-Substitute repelled this plea *simpliciter*. I gather from his note that the reasons which led him to take this course were (1) that in no decided case has it been held that the mere intimation of a claim constituted an election by the workman between claiming compensation under the Act and taking proceedings independently of it; (2) that the claim was not admitted by the employers; and (3) that the pending of the arbitration is not material because it was applied for by the employers pursuant to the workman's statutory claim.

It is in my opinion plain on the terms of the Act that "when the statute gives to a workman an option between two different proceedings before two different tribunals it means that he may take either the one or the other as he thinks fit but that he cannot take both. I do not see" (said Lord Kinnear in *Burton v. Chapel Coal Company*, 1909 S.C. 430) "that any other meaning can be ascribed to the words of the Act. The workman may at his option do one thing or the other; it is necessarily involved in my opinion that he is not to do both." There may be difficulty in a particular case—due to the no doubt intentionally untechnical draftsmanship of the Act—in determining at what point the workman's election is or must be actually made, and for reasons to be explained in a moment I agree with the Sheriff-Substitute so far as to hold that the mere intimation of a claim for compensation under the Act is not enough to prove that the workman has elected. But the workman is not in my opinion entitled, under circumstances such as those presented in this case, to pursue at one and the same time both kinds of proceedings against the employer—those of which the first step is a claim under the Act and those which begin with service of a summons independently of it. A person who is put to his option may delay exercising it, but he has no right whatever to approbate and reprobate meanwhile. Now it is precisely this which a dismissal of the employers' plea *simpliciter* sanctions and approves in the circumstances of the present case.

My reasons for agreeing with the Sheriff-

Substitute in holding that the mere intimation of a claim for compensation under the Act is not enough to constitute election are (first) that the second part of section 1 (2) (b) seems to me to be exegetical of the first, and points to the exclusion of double liability on the part of the employer (whether for payment or for proceedings to recover payment) as being the reason for putting the workman to his option; (second) that a claim—apart from its function as the first step in proceedings under the Act—is by section 2 (1) made a condition of preserving the workman's right to compensation under the Act from perishing by delay; and (third) that in none of the cases in which the question of election has been discussed (in some of which the sufficiency of a claim to constitute election would have afforded a short and conclusive solution of the question presented for decision) has it been held, or indeed suggested, that the mere intimation of a claim involves election by the workman. With regard to the Sheriff-Substitute's other grounds for dismissing the employers' plea *simpliciter* there is in my opinion nothing relevant in the circumstance that the employers disputed liability, and that accordingly a difference arose in the proceedings which followed the claim—unless, indeed, it could be said that the workman's option as between statutory claim and action at law depends on his success in the one or the other. But this would be to read the option out of the Act altogether. I have already stated my reasons for regarding the pending of the proceedings under the claim—including as it happens an arbitration—as being material.

For the reasons shortly indicated in the earlier part of this opinion I think the Sheriff-Substitute instead of dismissing the employers' plea *simpliciter* should have given the workman a reasonable time in which to make up his mind between the alternatives of withdrawing his claim for compensation under the Act and insisting in his action independently of the Act, or insisting in his claim and suffering dismissal of the action. In short, a stage had been reached in which the employers were entitled to insist on the workman using his statutory option, and the workman was bound to exercise it. The withdrawal of the claim for compensation under the Act would, of course, have the result of nullifying the effect of the difference which arose in the proceedings of which it was the first step, and of making it impossible for the workman to recover anything in the arbitration. But this would leave intact and unaffected his right under section 1 (4) to recur to such of his rights under the Act as that enactment gives him if he proved unsuccessful in his action. For his right so to recur is independent of any claim within the meaning of section 2 (1) or section 1 (2) (b), and depends solely upon the action having been raised within the time limited for taking proceedings by a claim under the Act, namely, six months. The action was timeously raised in the present case. If the workman had withdrawn his claim to the statutory compensation as provided to him

by section 1 (1), (2), and (3), it might be a harmless, though in my opinion an unnecessary, proviso to reserve his contingent right to recur to the form of statutory compensation available to him, in the action under section 1 (4)—*Stewart v. Perth Station Committee*, 1923 S.C. 356. The workman's statutory rights under section 1 (1), (2), and (3) on the one hand, and under section 1 (4) on the other hand, are distinct and independent. Under section 1 (4) there is no arbitration and no award. With regard to the questions in the case, I think it was premature to find that the action was not barred, and premature to repel the employers' plea.

LORD SKERRINGTON—No case was cited to us where it was decided on a construction of section 1, sub-section (2) (b), of the Workmen's Compensation Act 1906, or of the identical provisions in the Act of 1897, that an injured workman must be deemed to have exercised the option conferred upon him by the Act merely because he had made a claim upon his employers for payment of a specified weekly sum by way of statutory compensation for his injuries. It would be very unfortunate and indeed anomalous if that was the law. Why should a workman's legal rights be prejudiced merely because he made an offer to his employer which the latter was free to reject and did in fact reject? In the case with which we are concerned the workman's solicitors wrote to the employers claiming compensation as for total incapacity at the rate of 35s per week. This was plainly a claim for statutory compensation. It was therefore implied that if the claim should be admitted by the employers any other claims which the workman might have in respect of his injuries independently of the Act would be discharged. Equally I think that it was implied that there would be no such discharge if the workman's offer was not accepted. On principle, therefore, I think that the contention of the employers fails. Further, there is no authority in its favour although twenty-five years have elapsed since the passing of the Act of 1897. Lastly, there are weighty dicta which are unfavourable to it both in Scottish and in English cases—*Burton v. Chapel Coal Company* (1909 S.C. 430); *Cribb v. Kynoch, Limited* ([1908] 2 K.B. 551). As Lord Dundas observed in the case of *Burton*—"It is unnecessary for the decision of this case to attempt to lay down any general or exhaustive definition of what might or might not under varying circumstances and conditions be held in cases of this sort to amount to a conclusive exercise of the workman's option."

For the foregoing reasons I think that the arbitrator came to a correct conclusion, and that the two questions of law should be answered in the affirmative. So far as I recollect, no alternative argument was presented by the appellants' counsel to the effect that, assuming the appellants to be wrong in their contention that the pursuer "definitely elected to claim compensation under the Workmen's Compensation Act

1906," the time had nevertheless come when he ought to be called upon by the Court to make his election, and that the action ought to be dismissed if he refused to do so within a reasonable time to be fixed by the Court. I do not doubt that in a fitting case the Court would have power to call upon a workman to make his election, but I am not satisfied that there is any reason why we should adopt that course in the present case.

LORD CULLEN—I concur in the opinion of the Lord President.

LORD SANDS—This is a Stated Case in an action, alternatively at common law and under the Employers' Liability Act 1880, by a workman against his employers in respect of personal injury attributed to the alleged negligence of the employers. The defenders plead that the action is excluded by reason of the fact that the pursuer has elected to claim against them, in respect of the alleged injury, under the Workmen's Compensation Act 1906, and that by section 1 (2) (b) of that Act such election bars any other remedy. Under this sub-section the workman may "at his option either claim compensation under this Act or take proceedings independently of this Act."

In this case, by a letter of his law agent to the representatives of the defenders dated 14th June 1922, it was intimated on behalf of the pursuer that "he claims compensation for total incapacity since the date of the accident." The language and the context make it impossible to interpret this as referring to anything else but a claim under the Workmen's Compensation Act 1906.

To affirm that a person may at his option take one or other of two courses does not necessarily imply final election. It may imply no more than one at a time. I take it to be a correct statement of the law that a wife who charges her husband with infidelity may at her option take proceedings either for judicial separation or for divorce. (This does not happen to be a statutory provision, but it might quite well be a clause in a statutory code.) This rule forbids simultaneous actions, but it does not forbid commencement and abandonment of one and recourse to the other. In judging whether an option is of one kind or the other, regard must be had to the finality in itself of the step taken. Condonation is a good example of a final and irrevocable option.

In my view the provision of the option in the section we are called upon to construe forbids simultaneous insistence in two sets of proceedings. It has been authoritatively determined that it implies final election if the one form or the other be adopted and sued out to judgment, subject of course to the special provision in 1 (4)—*Burton v. The Chapel Coal Company*, 1909 S.C. 430. It has not been determined that if the initial steps are taken either by intimation of a claim or by service of a summons the election is final without any *locus poenitentiae*. But whilst the question has not been made matter of express decision, the reports of the judgments in the cases both in

England and in Scotland appear to me negative of the view that the Court contemplated that mere initiation of steps towards one remedy or the other imported final election.

The particular question which we are called upon to decide in the present case is whether an intimation of claim (an intimation necessary to be given within six months if the right to this form of remedy were not to be surrendered) must be held to import a final election. In my view, whilst the provision in the section is capable of bearing this severe construction, it is not a necessary construction or one encouraged in any way by judicial dicta, and therefore I answer the question in the negative.

If in the present case the pursuer had applied for arbitration, and whilst insisting in these proceedings had raised the present action, I desire to reserve my opinion as to the competency of such an action. In the circumstances of the present case, however, the application for arbitration having been made by the defenders, I do not think that the pursuer is foreclosed from withdrawing any claim to have compensation awarded in the arbitration proceedings and from insisting in the present action.

The Court pronounced this interlocutor—

“Find with reference to the questions of law in the case that it was premature at this stage to repel the first plea-in-law for the appellants: Therefore recal the interlocutor of the Sheriff-Substitute of 10th July 1923, and remit to him to sist the action for such period as he may think reasonable to enable the respondents to decide, and to intimate to the Court his decision, as to withdrawing the claim made by his solicitors on his behalf on 14th June 1922 as a condition of proceeding with the present action, under reservation always of the respondent’s right under section 1 (4) of the Workmen’s Compensation Act 1906; and decern.”

Counsel for Pursuer—Wilton, K.C.—Scott. Agents—G. M. Wood & Robertson, W.S.

Counsel for Defenders—Robertson, K.C.—Russell. Agents—W. & J. Burness, W.S.

Thursday, January 17, 1924.

## SECOND DIVISION.

[Sheriff Court at Ayr.

### INGLIS’ TRUSTEE v. INGLIS.

*Bankruptcy—Sequestration—Alimentary Provision—Excess—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 98 (2).*

A bankrupt had an alimentary income from trust funds amounting to £721, and besides himself had to support a wife and daughter and two sons, one of whom was at the university and the other at school. In a petition by his

trustee in bankruptcy for an order on him to pay over to the trustee a part of the alimentary income accruing to him after the date of his sequestration, held that £300 per annum was the excess beyond a suitable maintenance which he was bound so to pay over.

The Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 98 (2), enacts—“Where the bankrupt is in right of an alimentary provision it shall be competent to the Lord Ordinary or the Sheriff, upon a petition by the trustee, to determine whether the amount of such provision is in excess of a suitable aliment in view of his existing circumstances, and if he shall determine that it is, to fix the amount of the excess and to order the same to be paid to the trustee as part of the property of the bankrupt falling under the sequestration. . . .”

Peter Lyle, chartered accountant, Ayr, trustee on the sequestrated estates of Quentin Godfrey Inglis, Ayr, pursuer, brought an action against the said Quentin Godfrey Inglis, defender, in the Sheriff Court at Ayr, in which he craved the Court “to find that the defender is in right of the following alimentary provisions, namely—[an enumeration of certain trust funds followed], which said alimentary provisions amount in cumulo to about £1250 per annum, and that said sum is in excess of a suitable aliment to the defender in view of his existing circumstances; to fix the amount of the excess; and to order the same to be paid to the pursuer as trustee on the defender’s sequestrated estates periodically as it falls due, in terms of section 98 (2) of the Bankruptcy (Scotland) Act 1913.”

The pursuer averred—“(Cond. 3) The defender is about forty-four years of age. For some years he has not attempted to follow any occupation notwithstanding the fact that a job was available had he chosen to accept it. He has a wife and three of a family, two boys and one girl. The children are now of an age to maintain or partially maintain themselves. The defender and his wife and family are all able-bodied and suffer from no defect whatever, and considering the existing circumstances the foresaid alimentary provisions are in excess of what is necessary to afford suitable aliment to the defender.”

The pursuer pleaded—“The said alimentary provisions being in excess of a suitable aliment to the defender in view of his existing circumstances, a portion thereof should be ordered to be paid to the pursuer as trustee foresaid in virtue of section 98 (2) of the Bankruptcy (Scotland) Act 1913.”

On 27th November 1923 the Sheriff-Substitute (BROWN), after a proof, pronounced the following interlocutor:—“Finds in fact (1) that the estates of the bankrupt were sequestrated by the Court on 16th January 1923, and the pursuer was duly elected trustee thereon, and confirmed as such on 1st February 1923; (2) that on 20th October 1923 the pursuer had realised property of the bankrupt amounting to £1230, 18s. 6d., from which there fall to be deducted preferable claims amounting to £101, 4s. 6d.,