should dismiss the appeal and let the Sheriff's interlocutor stand.

Lord Mure—I concur. The cases on which the appellant founds were cases in which the parties could not have the benefit of legal advice. Here the appellant is a man of means, who was entitled to have the advice of an agent. I am not prepared to extend the rule laid down in the Small Debt Court cases to cases like the present.

Lord Curriehill—There is a clear distinction between cases under the Small Debt Act and cases like the present. In the Small Debt Court most cases, as your Lordships are aware, are disposed of at one diet. There is usually no chance of a second appearance. Here, on the other hand, the defender appeared and pleaded that the debt was paid. The Sheriff-Substitute noted that plea, and appointed the case to be tried on a subsequent day; so that the defender had thus two opportunities of informing himself as to the facts and the law, and he did not avail himself of them. I also agree that this is not a case to which prescription clearly applies. There was, therefore, no obligation on the Sheriff-Substitute to notice that plea of his own motion.

Lord Deas and Lord Shand were absent.

The Court adhered.

Counsel for Appellant—M'Kechnie. Agent—William Black, S.S.C.

Counsel for Respondent—Strachan. Agents—Davidson & Syme, W.S.

Friday, February 4.

FIRST DIVISION.

[Lord Adam, Ordinary.

DOUGLAS *v.* MACLACHLAN AND ANOTHER, *et e contra.*

Agreement—Informal Agreement Validated by Actings—Bankrupt—Title to Sue.

D.'s estate was sequestrated. C. was his creditor for £408, £300 being secured by a bond over heritable subjects belonging to D., and the balance of £108 being unsecured. A memorandum of agreement was drawn up between C. and D.'s trustee, which was approved by the commissioners in the sequestration, and by the creditors, and by which C. was to withdraw the claim for £108, and the trustee to grant a conveyance to him of the subjects contained in the bond. The claim was accordingly withdrawn, and a conveyance drafted, but never executed. C. and her law-agent M., to whom she subsequently assigned the bond, possessed the subjects, executed considerable improvements thereon, and drew the rents for twenty years. D., who had meanwhile been discharged without composition, brought an action against M. of declarator, count, reckoning, and payment of all intromissions with the rents. M. raised a counter-action of declarator and adjudication in implement, to have it declared that he had acquired a right of absolute property in the subjects. *Held* that D. had no title to sue his action, having been divested by his sequestration of all property in the subjects; that there had been no abandonment by the trustees or creditors; and that the terms of the agreement having been validated by the actings of parties, fell to be implemented.

Observed per Lord Shand, that an objection to the agreement on the ground that it was a sale by private bargain, and therefore under section 115 of the Bankruptcy (Scotland) Act 1856, required "concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the Accountant," though it might be competent for the creditors, could not be raised by the bankrupt himself.

On 25th August 1859 the estates of Donald Douglas, wright and builder, Tarbert, were sequestrated, and Dugald Campbell appointed trustee thereon. Miss Christina and Miss Margaret Campbell were creditors of Douglas for £400, with £8, 4s. 4d. of interest, in security of which he had granted them a bond and disposition in security, dated 28th March 1859, over certain heritable subjects in Tarbert which belonged to him, and were known as Arbuthnot's Feu, and an assignation of same date to certain building materials on the ground. They lodged an affidavit and claim in the sequestration, in which it was stated that the security over the land was valued at £250, and that over the building materials at £50; and they therefore claimed to rank in the sequestration for £108, 4s. 4d., being the unsecured balance of the debt due to them. On 13th October 1859 a memorandum of agreement was drawn up between the trustee and Mr Dugald Maclachlan, as agent for the Misses Campbell, which contained the following heads—"(1st) In consideration of the trustee allowing Mr Maclachlan's clients to retain Arbuthnot's Feu aud buildings thereon, and the materials included in the assignation by the bankrupt to Misses Campbell, they are to withdraw the claim lodged by them in the sequestration, and are to have no ranking on the estate. (2d) The stones on the pier not being included in the assignation, Misses Campbell are to purchase them from the trustee at the price of ten pounds sterling, on payment of which delivery is to be given. (3d) The trustee to grant Mr Maclachlan or his clients, as he may prefer, a conveyance to the feu, or any right of property or reversion the bankrupt may have therein, the title to be taken as it at present stands, but the trustee not to be bound to produce any of the titles except the act and warrant in his own favour. The trustee to relieve Mr Maclachlan or his clients, the disponees, of all feu-duties, public and parochial burdens, due and exigible at and preceding Whitsunday last, which is to be the term of entry, the disponees relieving the trustee of feu-duties and burdens exigible after that term, and repaying to the trustee the proportion of feu-duty charged against the bankrupt by Mr Campbell of Stonefield up till Martinmas next. (4th) A mutual discharge to be granted by the parties." . . . This agreement was approved of by the trustee and commissioners in the sequestration, as authorised by

a meeting of the creditors, and the memorandum was engrossed in the sederunt-book of the sequestration. The Misses Campbell accordingly withdrew their claim in the sequestration and received no dividend. They entered into possession of the subjects, paid the £10 for the stones as stipulated by the second head of the agreement, expended about £500 in completing the building on the subjects, and continued in possession, Mr Maclachlan drawing the rents for them till 28th January 1869, when they assigned the said bond and disposition in security to him; thereafter Maclachlan drew the rents for himself. A draft disposition in terms of the memorandum of agreement was, with approval of the trustee and commissioners, prepared but never executed. Douglas obtained his discharge without composition on 26th December 1862; a dividend of 1s. 6d. per £ being subsequently paid by the trustee on his estate, who was not discharged till 24th May 1866.

In February 1879 Douglas raised an action against Mr Maclachlan and against the Misses Campbell for their interest, to have it declared that the said bond and disposition in security was legally extinguished by the intromissions of the defenders with the rents of the lands and others therein contained, and that the said lands and others were duly and lawfully redeemed from said bond, and freed and disburdened from it as fully as if it had never been granted. The summons further sought an order on the defenders to deliver up the writs and title-deeds of said lands, including the said bond and disposition in security, and the assignation in favour of Maclachlan, and to grant pursuer a discharge of said bond; and it contained further a conclusion for count and reckoning by Maclachlan of his whole intromissions as agent for the bondholders from 25th August 1859 to 28th January 1869, and thenceforward as heritable creditor on his own account. Mr Maclachlan raised a counter action of declarator and adjudication in implement against Douglas and his creditors, to have it declared that his rights as bondholder had, by the agreement and subsequent actings of the parties, become rights of absolute property. The two actions were conjoined. In the leading action Mr Maclachlan pleaded—"(1) The pursuer has no title to sue."

The Lord Ordinary (Adam) pronounced an interlocutor sustaining the defender's first plea in the leading action, and finding and declaring in the other action, that by virtue of the said memorandum of agreement and subsequent actings, Mr Maclachlan, as assignee of the Misses Campbell, was vested in the absolute right of the subjects in question.

This note was added — "The said Donald Douglas was sequestrated on the 25th August 1859. Dugald Campbell, accountant in Greenock, was thereafter duly confirmed trustee on his sequestrated estates.

"The effect of the confirmation of the trustee was, under the 102d section of the Bankruptcy Act, to vest in him for behoof of the creditors, absolutely and irredeemably as at the date of the sequestration, the whole property of the debtor Donald Douglas as regards the heritable estate, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt subject to no legal reversion, had been pronounced in favour of the trustee and recorded at the date of the sequestration. It appears, accordingly, that the pursuer Donald Douglas was thereby divested of all right of property in the heritable subjects which he now claims, and the same were vested in the trustee on his sequestrated estates.

"The pursuer was discharged without payment of a composition on 26th December 1862, and consequently was not retrocessed in his estates.

"It is no doubt true that if the trustee and creditors abandon a claim to property, the bankrupt's radical right may revive to the effect of entitling him to sue therefor—*Fleming* v. *Duncan*, Nov. 16, 1876, 4 R. 112. But there is no such case here. What took place is this—The Misses Campbell held an heritable bond over the subjects for £400, and an assignation to certain building materials on the ground. They value this security at £300, leaving an unsecured balance of principal and interest of £108, 4s. 4d., for which they claimed in the sequestration. Thereafter in October 1859 they entered into an agreement with the trustee, by which it was, *inter alia*, agreed, that in consideration of the trustee allowing them to retain Arbuthnot's Feu and buildings thereon, the subjects in question and the materials included in the assignation, they should withdraw the claim lodged by them in the sequestration, and have no ranking on the estate. It was further agreed that the trustee should grant the defender Mr Maclachlan, or his clients (the Misses Campbell), as he might prefer, a conveyance to the feu, and any right of property or reversion the bankrupt might have therein, the title to be taken as it stood, and the trustee not to be bound to produce any of the titles except the act and warrant in his own favour. This agreement was submitted to the commissioners and creditors, and approved of by them, and recorded in the minute-book of the sequestration. It has been acted on by all concerned, and in respect of it the Misses Campbell, and the defender who is now in their right, have been in possession of the subjects ever since. Had the defender obtained from the trustee the conveyance specified in the agreement, the Lord Ordinary does not see what possible ground of claim to the subjects the pursuer could have had. Unfortunately, however, the defender neglected to do so. The proceedings in the sequestration were brought to an end, and the trustee discharged, on 24th May 1866 without having granted a conveyance of the subjects. This may create some difficulty in the way of the defender now getting a title from the trustee; but the Lord Ordinary does not see how it should revive any right to the subjects on the part of the pursuer, who was absolutely divested of them as at the date of the sequestration."

Douglas reclaimed, and argued—He was the real proprietor of the subjects, his radical right in them reviving as from the date of his discharge. This was a pure question of heritable title. His charter and sasine must be held preferable to the agreement founded on by the other side, which was an informal document, not holograph nor tested, nor even dated. The alleged *rei interventus* was inadequate to validate it. The possession might be ascribed to the respondent's security title. The trustee and creditors had practically abandoned their claim. To establish that it was

not necessary to show any active step by the trustee or the creditors. It was sufficient if they did not deal with the property, or, trying to do so, failed. (2) If the transaction founded on was anything at all, it was a sale by private bargain. If so, it was not in conformity with the provisions of sec. 115 of the Bankruptcy Act, which requires "concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the accountant." (3) Nor was the transaction one of the nature contemplated by the provisions of sec. 176 of the Act, as to "compromises."

The respondent replied—Though the conveyance to be granted in terms of the memorandum of agreement had never been executed, that agreement had been acted on for 20 years with consent of all parties and in the knowledge of the bankrupth imself. The actings indicated quite the reverse of an intention to abandon. (2) The objection under sec. 115 of the Act might have been a good one if raised by the creditors, but the bankrupt had no title to plead it. (3) This was a transaction of the nature contemplated by sec. 176 of the Act. *Dalziel's* case was a direct authority.

Authorities—*Dalziel* v. *Dennistoun, &c.*, Dec. 12, 1876, 4 R. 222; *Fleming* v. *Walker's Trustees*, Nov. 16, 1876, 4 R. 112; *Smith* v. *Smith*, March 7, 1879, 6 R. 795; *Thomson* v. *Threshie*, June 7, 1844, 6 D. 1106.

At advising—

Lord President—The question in this case regards the right of property in a subject in Tarbert which formerly belonged to Donald Douglas, the reclaimer. He was sequestrated in August 1859, and this subject along with the rest of his estate passed to his trustee under his statutory title conferred by section 102 of the Bankruptcy Act. Mr Douglas has been discharged, not on composition, but after paying a dividend of 1s. 6d. per £. His discharge is dated 26th December 1862. His object in this action is to recover this heritable subject, and he is opposed by Mr Maclachlan, who says he has obtained right to the property from the trustee. The agreement by which this transfer is said to have been accomplished is dated October 13, 1859, —that is written two months after the sequestration —and the trustee was authorised to enter into it by the commissioners on the estate, and also by special direction from a general meeting of the creditors. At that time the Misses Campbell, who are Mr Maclachlan's authors, held a bond for £300 over this subject, and it appears that an arrangement was entered into for making over the property to them. The heads of the agreement are:—(1st) In consideration of the trustee allowing Mr Maclachlan's clients to retain Arbuthnot's Feu and buildings thereon, and the materials included in the assignation by the bankrupt to Misses Campbell, they are to withdraw the claim lodged by them in the sequestration, and are to have no ranking on the estate. (2d) The stones on the pier not being included in the assignation, Misses Campbell are to purchase them from the trustee at the price of ten pounds sterling, on payment of which delivery is to be given. (3d) The trustee to grant Mr Maclachlan or his clients, as he may prefer, a conveyance to the feu or any right of property or reversion the bankrupt may have therein, the title to be taken as it at present stands, but the trustee is not to be bound to produce any of the titles except the act and warrant in his own favour. The trustee to relieve Mr Maclachlan or his clients, the disponees, of all feu-duties, public and parochial burdens due and exigible at and preceding Whitsunday last, which is to be the term of entry, the disponees relieving the trustee of feu-duties and burdens exigible after that term, and repaying to the trustee the proportion of feu-duty charged against the bankrupt by Mr Campbell of Stonefield up till Martinmas next. (4th) A mutual discharge to be granted by the parties." . . . . Now, the proceedings which terminated in this agreement appear to have been quite regular and complete, and the trustee had full authority to enter into it. The estate, on the one hand, gained by the arrangement by a claim in the sequestration, amounting to £108, 4s. 4d. being withdrawn, which was the unsecured balance due to the Misses Campbell; and the Misses Campbell gained, on the other hand, by getting a right of property in the subjects instead of a mere security over them. If the trustee had executed the disposition, which he was bound by this agreement to grant, there can, I think, be no doubt that the Misses Campbell, and therefore Mr Maclachlan, would have had a complete title to the subjects. But that was not done, and the matter remains on the personal contract in this memorandum of agreement. Douglas now says that in consequence of the termination of his sequestration, and his discharge, the subjects revert to him; and when a trustee and creditors abandon a subject or a right falling under the sequestration it does revert to the bankrupt. That as a general rule may be quite true. But I see no room here for the application of such a rule. For the trustee and creditors have not abandoned the subject in this case. On the contrary, they dealt with it as an asset, and made an arrangement—an onerous contract—for transferring it to the Misses Campbell. It appears to me that that ground, on which Mr Douglas relies, has entirely failed, and I agree with the Lord Ordinary's judgment and with the terms of his interlocutor. There may occur some technical difficulty in completing the title, but I can have no doubt as to where the substantial right is vested.

Lord Shand—I agree with your Lordship in thinking that there is no doubt that the Lord Ordinary's judgment is sound. The bankrupt was divested of his estate by the sequestration, and by force of the Bankruptcy Act this heritable estate was entirely transferred from him as if adjudication had been granted in favour of his trustee. Now, I know of two ways, and only two, by which a bankrupt can recover title to his heritable estate. The first is by retrocession; the second is by abandonment of their right to that property by the creditors. There is no suggestion that retrocession took place here. The bankrupt was discharged without composition, but was not reinvested in any part of his estate. The only question therefore that remains as to his title to sue this action is whether the trustee and creditors abandoned the subject so as to leave him in a position to take it up. It was argued that they did so; but I have rarely listened to an

argument with less of the feeling that I was following and understanding it. It seems perfectly clear to me that there was no abandonment. After the sequestration began these heritable creditors—the Misses Campbell—lodged a claim in the sequestration, in which it was brought out, on figures which have not been disputed, that the unsecured balance due to them amounted to £108, 4s. 4d. A negotiation between the trustee and commissioners on the one side, and these heritable creditors on the other, accordingly began, by which the heritable creditors agreed to withdraw their ranking on condition that the trustee and commissioners should transfer to them the absolute right to the property which they had previously held in security. This was simply a transaction of sale of the property, and utterly excludes the notion of abandonment. If, then, there has been no abandonment, and no retrocession, there can be no title in the bankrupt to ask that the subjects should be held to belong to him.

Another argument was presented to us, founded on the circumstance that this property, though sold, was sold by private bargain, and not, as the statute provides, with "concurrence of a majority in number and value of the creditors, and of the heritable creditors, if any, and of the Accountant." If the creditors had raised this objection, it might have been a formidable one, but has the bankrupt any title to plead it? He was discharged without composition, and after payment of a dividend of only 1s. 6d. in the £. I think he has no title to raise a question of this kind. If the estate had paid a considerable composition, he might possibly have been allowed to object to a private sale, on the ground that a larger price might otherwise have been received, and there might so have been a reversion in his favour. But that notion is, I think, excluded by the circumstances of the case.

There is another ground on which, though it is not necessary for the decision of the case, I think the bankrupt is not entitled to succeed. He was personally quite aware in 1859 that the trustee and commissioners and these heritable creditors had made this transaction. He was not only aware of this, but he made two offers by letter to buy the subject himself from the creditors. Those offers were not agreed to; and the bankrupt stood by and let them lay out money on improvements, and go on acting on the faith of the contract. They possessed the subject, and acted on the faith of the arrangement for twenty years, and it is now proposed to overturn it. I cannot give effect to such a contention; and if it were necessary for the decision of the case I think this ground alone would be sufficient to justify us in holding that the bankrupt is not entitled to succeed.

The Lord President stated that Lord Deas, though absent, concurred in the judgment of the Court.

Lord Mure having been absent when the case was heard, took no part in the judgment.

The Court adhered.

Counsel for Reclaimer—Solicitor-General (Balfour, Q.C.)—Lang. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondent — Robertson — D. Robertson. Agents—M'Neill & Sime, W.S.

Saturday, February 5.

FIRST DIVISION.

[Lord Lee, Ordinary.

BIRKMYRE AND OTHERS, PETITIONERS.

Trust—Long Lease—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3.

Held (*rev.* Lord Lee) that a lease for 999 years, which was expedient in itself, was not inconsistent with the intention of a trust which directed that the subjects should be held by the trustees until the expiry of certain liferents and thereafter sold and the proceeds divided among the children of the liferenters then in life.

The leading petitioners in this case were the trustees of the late William Birkmyre, merchant, Port-Glasgow. The petitioners desired the authority of the Court to enter into a long lease with the Corporation of Port-Glasgow, by which certain subjects belonging to the trust were to be held by the Corporation for a period of 999 years for the purposes of the Corporation gas-works; the lease to be registered in terms of the Registration of Leases (Scotland) Act 1857 (20 and 21 Vict. cap. 26). The petition was presented under section 3 of the Trusts (Scotland) Act of 1867 (30 and 31 Vict. cap. 97), by which the Court are empowered to grant authority to the trustees to grant long leases "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof."

The trust-deed directed that after the death of the truster's widow, who was to have a liferent of the subjects in question, the trustees were to enter upon the possession of the lands disponed, to realise the profits, and to divide and pay over the proceeds half-yearly among the truster's children as an alimentary fund. Upon the death of the last survivor of the children the trustees were directed "to sell and dispose of the whole lands and others above conveyed, and on realising the proceeds thereof, to divide the same, after deducting any expenses which may have been incurred in the management of the said trust, and in the sale of the said lands and others, equally among the lawful children then in life of" the truster's children. There was no power to grant long leases contained in the deed, nor any power of sale other than the above. The truster's widow was still alive, and she, along with all the other parties beneficially interested in the subjects so far as in existence, concurred in the petition; some of the grandchildren, however, were pupils or minors.

It appeared that the Corporation had already feued part of the adjacent ground for their gas-works; that they also possessed a part of the proposed subjects of the long lease under a lease for twenty-one years from 21st September 1863; and that they were prepared to give a rent of £110, with a duplicand every nineteenth year, instead of £78, 8s., which was the present rental of the entire subjects, including those already possessed by the Corporation.

The Lord Ordinary (Lee) found "that the proposed lease is inconsistent with the intention of the trusts referred to in the petition, and expressed in the trust-disposition and settlement;"