been employed at this machine. The only point that was attempted to be made was that he was not properly instructed. I am of opinion that that has failed; fault has not been brought home to the masters. I think, therefore, that if the action had been laid on common law, the pursuer has failed to establish fault on the master's part.

But, then, it is said that the pursuer was under fourteen years of age, and that therefore he was illegally employed, in respect that the Factory Acts prohibit the employment of boys between thirteen and fourteen without an educational certificate. Now, I am disposed to hold that this is not relevant. I think that the Factory Act 1874 is for the benefit of boys' education, and that it has no reference to the possible danger the boys might incur by being employed too young. The object of the Act is to prevent the boys from being taken from school too soon, and not to prevent them from being employed where there might be danger. It is said that if the boy had not been there in violation of the Acts there would have been no accident. But this is no answer. You might as well say, if the factory had not been there, there would have been no accident. I cannot see that a liability which the statute does not impose can be laid on the master if he contravenes it.

But I go further, and I think that the seven days mentioned in the statutes applies to the educational certificate as well as to the medical. You must read all the Acts as one, and so doing I have come to this conclusion. This certificate is not a *sine qua non* precedent, but relates to what is to be ascertained by the master after the boy has entered his employment in order that he may decide whether he ought to remain. On all these grounds, therefore, I concur with your Lordship.

Lord Justice-Clerk—I concur. Apart from the Acts this case discloses no fault on the master's part.

The engagement began with a false statement on the part of the boy, and ended with rash conduct on his part. If, therefore, the pursuer had been above fourteen, he would have had no case whatever.

I so far differ from Lord Gifford that if the engagement had been contrary to the Factory Acts the master would, in my opinion, have been liable for the consequences. If I had thought that under the Factory Acts the master was not entitled to put the pursuer to this work, I should have held him responsible.

But I am quite satisfied with Lord Gifford's view, that under the Acts the period for making inquiries had not expired. Seven days are allowed the master to obtain certificates, both medical and educational; the seven days had not expired; and therefore the case fails on all its branches, and I can see no grounds for disturbing the Sheriffs' judgment.

The Court adhered.

Counsel for Pursuer (Appellant) — Lang—Patten. Agent—George J. Wood, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Fraser)—J. P. B. Robertson. Agent—P. Douglas, S.S.C.

Saturday, November 16.

SECOND DIVISION.

[Lord Craighill.

HARKNESS *v.* RATTRAY (M'EWEN AND NELSON'S TRUSTEE).

Landlord and Tenant—Bankrupt—Trustee in Sequestration—Liability of Trustee for Bankrupt's Obligations.

A landlord granted a lease of premises, with entry at Martinmas, in which he bound himself to make certain repairs and alterations. He became bankrupt in June following, before the repairs were executed, and a trustee was appointed upon his sequestrated estate. The trustee sold the property two months afterwards. *Held* that an action against the trustee concluding for a sum in name of damages, in respect the repairs which the landlord had undertaken to execute had not been carried out, fell to be dismissed as irrelevant, a trustee not being liable for the personal obligations of a bankrupt, and the only recourse in the circumstances in question being to rank upon the bankrupt's estate.

The pursuer in this case was Mrs Grace Bailie or Harkness, spirit merchant in Glasgow, and the defenders were David Rattray, accountant in Glasgow, trustee on the sequestrated estates of M'Ewen & Nelson, builders in Glasgow, and M'Ewen and Nelson as partners and as individuals. Defences were lodged only by Rattray.

By lease, dated 23d October 1876, M'Ewen & Nelson had let to the pursuer a shop and cellar for five years, with entry at Martinmas 1876, as a wine and spirit shop. The shop had been lately finished, and was not fitted up for the wine and spirit trade, and M'Ewen & Nelson in their lease had agreed to make various alterations and to equip it in a suitable manner. After entering into this lease the estates of M'Ewen & Nelson were, on 9th June 1877, sequestrated, and the defender Rattray appointed trustee. Nothing was done towards the fitting-up the shop, and on 29th August 1877 the defender sold the premises. The purchaser at once made the necessary alterations, which were completed on 8th October following.

The claim in the present action was for a sum in name of damages, as owing to the non-execution of the repairs the pursuer had not got the beneficial use of the premises for nearly a year from the date of her entry.

The pursuer averred that throughout the summer of 1877, before the property was sold, she had several times required the defender to make the alterations, and she stated that in one letter, dated 29th July 1877, the defender wrote asking whether in the event of his at once proceeding to fit up the shop the pursuer would give up any "supposed claim for damage that she might consider herself entitled to." This she stated she had declined to do, and at last, on 14th August, she had raised an action against the defender to have the alterations executed. The defender's pleas were that the action was excluded by a clause of reference in the lease, and that as he

had used all reasonable despatch in selling the subjects and getting the premises fitted up, the action was unnecessary. In his statement of facts there was a denial that he had refused to fit up the shop. But before any procedure in that case the estate was sold, the articles of roup taking a purchaser bound to implement all obligations under the lease, and to free and relieve the exposer of all claims. The purchaser made the alterations stipulated. The action was then taken out of Court, the defender in the present action paying the expenses, and the pursuer reserving her claim for damages.

The defender refused to admit the claim for damages, and the present action was raised.

It was averred, *inter alia*—"That the defender by his actings aforesaid, by his statements and pleas in the action referred to, and by the conditions and obligations he imposed on purchasers in the said articles of roup, adopted the said lease, and adopted and undertook the whole obligations therein by Messrs M'Ewen & Nelson, as individuals and as trustees for their firm."

The pursuer pleaded—"(1) The pursuer having sustained loss and damage through the failure of the said M'Ewen & Nelson, and of the defender Rattray, to implement the obligation in the lease in her favour as to fitting up the said shop in question, she is entitled to reparation as concluded for. (2) The defender Rattray having by his actings and admissions adopted the pursuer's lease, and undertaken or become bound to fulfil the obligations therein as to fitting up the said shop, and having failed to fulfil the said obligations, is liable in damages as concluded for."

The defender pleaded—"(1) The action is incompetent, in respect of the dependence of the sequestration; and, *separatim*, it is incompetent in so far as the damages are claimed through the failure of the bankrupts to implement the obligations in the lease. (2) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons against the defender, as trustee or as an individual. (3) The defender not having adopted or acted upon the said lease, he did not become liable under the obligations founded on."

The Lord Ordinary (Craighill) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record, and more particularly on the second and third of the pleas in law for the defender, and having considered the debate and whole process—Finds that the lease founded on by the pursuer has not, upon the averments set forth by the pursuer on the record, been adopted by the defender so as to render him, or the bankrupt estate under his administration, liable to the pursuer for payment in full of such damage as may be shewn by the pursuer to have been sustained through delay in fulfilment of the clause of the said lease, but this without prejudice to the right of the pursuer to constitute in this action her claim for damages in the premises, that she may be ranked therefor with other creditors of the bankrupts in the sequestration; and so far, but no further, sustains the said pleas: Appoints the cause to be enrolled, that parties may be heard as to further procedure; and meantime reserves all questions as to expenses of process."

The pursuer reclaimed and argued—The defender, as trustee, necessarily took over all the obligations of the bankrupt. In most cases he satisfied these by a ranking, but if there were continuing contracts which might be beneficial to the estate, the trustee by taking them over to the effect of deriving the benefit from them that the bankrupt would have derived, necessarily came under all the obligations that they imposed, this being the difference between him and a singular successor. The trustee could not help adopting the lease, except by repudiating the estate, and he had taken over the estate and the lease by the very fact of selling the estate.

If there had been no trustee the seller would have been liable for past obligations and the buyer for future, and the question was, Was there any difference with a trustee? The trustee was liable for the past prestations of the contract. The trustee by selling the estate had taken benefit from all the rents that ever could be derived from it.—*Walker* v. *Masson*, July 18, 1857, 19 D. 1099 (Lord Curriehill). It was quite possible that there should be a good claim against the trustee, although there should not have been one against a singular successor, for the latter could have said—"I cut the claim into two, for past prestations against the cedent, for future against me"—*Nisbet & Co.'s Trustee*, M. 15,268. The obligation to put the subject in tenantable repair was inherent in a lease. No doubt some of the *dicta* in *Harvie* v. *Haldane* (*infra*) were contrary to pursuer's view, but what was actually decided was not.

Authorities—*Cuthill* v. *Jeffrey*, Nov. 21, 1818, F.C.; *Kirkland* v. *Cadell*, March 9, 1838, 16 S. 860; *Harvie* v. *Haldane, &c.*, July 2, 1833, 11 S. 872; *Balfour* v. *Cook*, May 20, 1817, Hume 771.

Argued for respondent—The mere fact of selling did not imply any liability—*Anderson* v. *Hamilton & Co.*, Jan. 22, 1875, 2 R. 355; *Stead* v. *Cox*, Jan. 20, 1835, 13 S. 280. The trustee could not here be held personally liable, for the result would be that no trustee in bankruptcy could take up any heritable estate without making himself liable to any and all claims, of whatever nature, against the former owner of the heritable estate in connection with it. This would be absurd, but it is only on this footing that the action could stand, for if it was a claim against the bankrupt estate this was not the proper process for it. To this extent the Lord Ordinary's interlocutor was objectionable inasmuch as it reserved right to the pursuer in this action to constitute her claim of damages against the bankrupt estate. On the first question the case of *Harvie* v. *Haldane*, quoted above, was decisive.

At advising—

Lord Justice-Clerk—This question might in some circumstances raise a difficulty. It all turns on the nature of the legal character of a trustee in a sequestration.

A trustee is nothing but a factor or mandatory for realising and paying the bankrupt estate. If he acts in any other capacity, as for example, if he continues the bankrupt's business or trades with his money, he may become liable for the bankrupt's obligations, but not otherwise. In this case the trustee has done nothing but sell the estate and divide, he did not keep it a day longer than he could help, and he derived no profit from it. In these circumstances, I am clearly of opi-

nion that no liability such as is claimed lies upon him.

The claim at the instance of the tenant is a valid claim in the sequestration, but I think it is nothing more. I have been at a loss to understand the language used at the debate in reference to the trustee "taking up" or "taking over" property. He has not taken up; he was bound to realise the estate to the best advantage, and he has done so.

The case of *Harvie* (quoted *supra*) settles that even in a case where a trustee has taken up and adopted a contract of lease, so as to put himself in the bankrupt's place, in this case the trustee would only be responsible to the extent to which he drew the rents.

Lord Ormidale—I am of the same opinion. The case of *Harvie* was a much stronger case for the pursuer there than this case is for this pursuer, and it is conclusive. But further, surely the trustee in the circumstances of this case could sell the estate without making himself or the creditors liable for all the bankrupt's obligations connected with it. The sale was the only thing relied on in argument by the pursuer, and I am quite clear that the Lord Ordinary is right on this point, and that the trustee is not liable.

It is another matter altogether as to ranking on the estate.

Lord Gifford—I am of the same opinion, and with no difficulty. I am anxious only to say that to my mind the idea that a trustee on a sequestrated estate represents in any respects the personal obligations of the bankrupt is out of the question. He is just there because he does not so represent them. The estate is taken out of the bankrupt's hands and given over to the trustee, in order that he may realise it and pay it to the creditors. He may take up the estate or any contract if he likes, but if he does not there is no liability.

This is enough for the decision of this case, and therefore I am of opinion that, on the relevancy, the pursuer has no case against the trustee or against the creditors.

The Court pronounced the following interlocutor:—

> "Recal the said interlocutor: Find that the lease founded on by the pursuer has not, upon the averments set forth by the pursuer on the record, been adopted by the defender David Rattray, so as to render him, or the bankrupt estate under his administration, liable to the pursuer for payment in full of such damage as may be shown by the pursuer to have been sustained through delay in fulfilment of the clause of the said lease quoted in article 3 of the condescendence, and therefore assoilzie the said David Rattray from the conclusions of the action so far as directed against him personally, and dismiss the same so far as directed against him as trustee on the sequestrated estates of the defenders M'Ewen & Nelson, but this without prejudice to the right of the pursuer to claim in the sequestration for damages in the premises that she may be ranked therefor with the other creditors of the bankrupt, and decern: *Quoad ultra* remit the cause to the Lord Ordinary," &c.

Counsel for Pursuer (Reclaimer)—Kinnear—Brand. Agent—Adam Shiell, S.S.C.

Counsel for Defender (Respondent)—Asher—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, November 19.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

CHALMERS *v.* WALKER.

Prescription—Triennial Limitation under Stat. 1579, *cap.* 83—*Written Obligation.*

A tradesman gave a written estimate for the erection of a gate, &c., at a house which was in course of building, and the work was admittedly executed in conformity therewith, but there was no written acceptance. In an action brought for payment after the lapse of three years from the date of the account, *held* that the Triennial Limitation Act 1579, cap. 83, applied, and that, there being no writing by the debtor, the contract did not fall under the exception of a written obligation as recognised by the statute.

Observations (*per* Lord Shand) on the case of *Blackadder* v. *Milne*, March 4, 1857, 13 D. 820.

This was an action under "The Debts Recovery Act 1867," brought in the Sheriff Court of Aberdeenshire, in which James Chalmers, smith and ironmonger, Greenock, sued Robert Stewart Walker, Belhelvie, for the sum of £40, "per account produced." The account produced was as follows:—

"Greenock, 1877.

"Robert Stewart Walker, Esq.

"To James Chalmers, smith and ironmonger, Greenock.

1870.				
July 6.	To 146 ft. wall rail.			
	,, 296 ,, balusters.			
	,, 8 gate posts.			
	,, 4 iron gates.			
	,, 7 dead locks.			
	,, fitting up do., &c., as per offer,	£30	0	0
1877.				
August 16.	To interest at 5 per cent., restricted to	10	0	0
		£40	0	0'

The defence pleaded was—(1) Prescription of the account, and (2) payment.

The pursuer founded on the following offer addressed to the defender's factors, and dated March 18, 1870:—

"Messrs Alex. Agnew & Co.

"Gent.,—I hereby offer to supply and fit up, at Mr R. S. Walker's new house, Finnart Street,