cannot assent to the proposition that by the mere retention of the composition bill the pursuer is barred from insisting in his full claim. Such a doctrine would be followed by very serious consequences. The creditors are asked, not in pursuance of any trust-deed granted by the insolvent, nor even of any writing such as a minute of a meeting of creditors, but simply on the motion of the debtor himself, to accept a composition. The creditors decline, but offer to accept a larger composition; then the defender sends them a bill for a smaller composition, payable by instalments, which the pursuers neglect to return for about twelve months. Is that sufficient to bar the pursuers from insisting for the whole amount of their debt? I am certainly of opinion that it is not. Therefore, while the defence is relevant, I think that it is not proved, and what I should propose to do is to remit to the Sheriff to allow a proof.

Lord Mure and Lord Curriehill concurred.

Lord Deas and Lord Shand were absent.

The Court recalled the interlocutors complained of, and remitted to the Sheriff to allow a proof.

Counsel for Appellants (Pursuers)—M'Kechnie. Agents—J. Campbell Irons & Co., S.S.C.

Counsel for Respondents (Defenders)—Young. Agents—Millar, Robson, & Innes, S.S.C.

Wednesday, February 2.

FIRST DIVISION.

[Sheriff of Fifeshire.

SELKIRK *v.* SIMPSON.

Sheriff—Process—Debts Recovery Act 1867 (30 *and* 31 *Vict. c.* 96)—*New Plea after Case Decided.*

Held that the defender in an action under the Debts Recovery Act 1867, who did not appear by agent, but who was in circumstances to have done so, was not entitled, after the case had been decided by the Sheriff-Substitute and appealed to the Sheriff-Depute, to have another plea added to that originally stated by him.

This was an appeal from the Debts Recovery Court of Fifeshire. The pursuer J. L. Selkirk, as executor-dative of the late Rev. G. S. Jack, St Andrews, sued the defender James Simpson for the sum of £50, "being the restricted amount of an account for board, washing, &c., for his son, and for money advanced for and on his behalf as per account produced." The account produced, in addition to board and washing, was for college fees and tradesmen's accounts. The accounts were incurred during the sessions 1872-73 and 1873-74. The summons was dated 14th June 1880. At the first calling of the case the defender pleaded "The debt is paid." The Sheriff-Substitute (Lamond) noted this plea in terms of the Debts Recovery Act, and appointed the case to be tried next Court-day. At the trial the Sheriff-Substitute granted decree with expenses, the "defender having failed to prove by competent evidence that the debt has been paid." At both diets before the Sheriff-Substitute the defender appeared personally, without the assistance of a law-agent. He, however, appealed to the Sheriff (Crichton) by his agent, the following authorities being noted on the appeal—*Murray* v. *Mackenzie*, April 21, 1869, 4 J. 394, 1 Coup. 247; *Gunn* v. *Taylor*, Sept. 20, 1873, 2 Coup. 491. The defender now sought to plead that the account sued for was prescribed.

The Sheriff dismissed the appeal, adding this note:—"At the discussion which took place before the Sheriff the defender moved that he should be allowed to add a plea that the account sued for was prescribed, and that the case should be remitted back to the Sheriff-Substitute to be proceeded with, having regard to the provisions of the Act introducing the triennial prescription. He founded on the cases noted on the appeal, which were cases under the Small Debt Act. Looking to the opinions of the Court in the case of *Cumming* v. *Spencer*, 21st Nov. 1868, 7 Macph. 156, the Sheriff is of opinion that the defender's motion cannot be granted."

The defender appealed to the Court of Session.

At advising—

Lord President—It is not very easy for a Judge sitting in this Court to place himself in the position of a Sheriff sitting in the Small Debt Court or in the Court called the Debts Recovery Court, and I daresay one's first inclination is to think that the Sheriffs go too fast and do not give sufficient indulgence to the parties. I am always inclined, whenever there is the least appearance of a litigant having been taken up too sharply, to restore him if possible to his rights; and certainly there is at first sight the appearance of undue haste here in the case of a man defending himself without legal advice. If it had appeared that the appellant was so poor a man as not to be able to afford legal advice, that would have made the case the stronger. But nothing of that sort appears here. We must assume that the appellant is a man of means, for he has sent his son to school at a considerable cost. He was surely able to employ a law-agent. But he did not choose to do so, until after the case had been decided against him; and the question is, whether there has been such injustice done that we can upset the Sheriff's judgment? I am not inclined to think that there is. If an account in the Small Debt Court appears on the face of it to be prescribed under the statute, I am of opinion that it is the duty of the judge to give effect to the objection whether it is pleaded or not, because in that Court parties are not entitled to the protection of an agent against their own ignorance of law. But that is not the case in the Debts Recovery Court, for there parties can have law-agents, and, as I said before, the appellant here was able to employ an agent. I think, therefore, he must take the consequences of his own neglect. And I am the more ready to come to this conclusion from the consideration that it appears to me that it would be very difficult to sustain the plea of prescription which the appellant now puts forward. There is one item indeed—for board and washing—which is subject to prescription, but as regards the others they appear to be small cash advances, as to which it is, to say the least, doubtful whether they are prescribed.

On the whole matter, therefore, I think that we

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