were increasing, and what they should do with the same. In the removal from Fernbank to Ballinard in 1878 this private cash-book was mislaid. The book was found sometime before the truster's death, but he was then seriously ill, and did not make any further entries in it." Such was the nature of the account, and as to the deceased's intention with regard to the sums entered in it I do not see that there can be much room for doubt.

Besides, for eighteen years these entries were regularly made, and I see in that circumstance quite sufficient evidence of an intention to make a donation *mortis causa*. Accordingly, I am for answering the first question in the affirmative, and the second question in the negative.

LORD SHAND—I am of the same opinion, and do not consider this to be a case attended with any great difficulty. The settlement of the late Mr Smith was dated 10th March 1875, and in it he made certain provisions for his wife which he considered reasonable, but no mention was made in it of the sum which is the subject of this Special Case.

There was no marriage-contract between the parties, but it appears that Mr Smith took charge of his wife's property, and kept an account of the various sums which she received as the interest both of her heritable and moveable property, and that he entered the sums thus received in an account headed "Mrs James Smith." The question which we have to decide is, whether Mrs Smith has made out that at the date of her husband's death he was debtor to her in the amount standing at her credit in the pass-book? or otherwise, whether the sum is to be viewed as a donation *inter virum et uxorem*.

Now, the entries in this cash-book show it to have been a carefully kept account, and the sums thus entered appear to have been the interest periodically falling due upon Mrs Smith's heritable and moveable estate. Besides entries under Mrs Smith's name various sums are noted under the names of the different children, and such entries would only be made, I think, as a record of debt. But we have it stated, as part of the facts of the case, that the existence of this cash-book was well known to the different members of the family, and it is a fair supposition, I think, that this information was communicated to them by their father. Had the book been in Mrs Smith's possession the present question would not, I presume, have been raised. What, then, is to be the effect of this book being found in Mr Smith's repositories after his death? The entries in the book, and the heading or note which is prefixed to it, are of importance in considering the question of delivery in a case of this kind. The sums themselves are the fruits of the wife's property, and the book begins with an acknowledgment of debt in these terms—"Note of Sums due by me to Mrs Smith and my family as stated in each of their accounts;" and this is signed by Mr Smith. In such circumstances I do not think that the absence of delivery can affect Mrs Smith's claim. Her husband was undoubtedly the proper custodier of her writs, and taking it that there is no presumption of delivery either on one side or the other, I consider this book to be in the position of a delivered writ which the deceased held for behoof of his wife and family. The note at the beginning of the book is, to my mind, conclusive of the matter. I therefore consider the sum claimed by Mrs Smith as a donation to her by her husband unrevoked, and therefore effectual.

I accordingly agree with your Lordship that the first question should be answered in the affirmative, and the second in the negative.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

LORD DEAS was absent.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for First Party—Mackintosh—Baxter. Agents—Stuart & Stuart, W.S.

Counsel for Second Parties — Keir — Shaw. Agent—George Andrew, S.S.C.

Wednesday, November 26.

SECOND DIVISION.

[Sheriff of the Lothians.

SCOTT *v.* ROY.

Process—Sequestration—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 146 *and* 170.

Held that an application by a trustee under section 149 of the Bankruptcy Act 1856 to have a portion of a pension enjoyed by the bankrupt taken by the trustee for the purpose of paying the bankrupt's debts must be intimated to the bankrupt.

In March 1884 the estates of James Gibson Scott were sequestrated under the Bankruptcy Act 1856, and W. G. Roy, S.S.C. was appointed trustee. At the time of his sequestration Scott was in receipt of a pension of £46 a-year from the Post Office.

The Bankruptcy Act 1856, section 149, enacts that "the . . . Sheriff may order such portion of the . . . pension of any bankrupt as on communication from the . . . Sheriff to . . . the chief officers of the department to which such bankrupt may belong, or have belonged, . . . they respectively may . . . consent to, in writing, to be paid to the trustee in order that the same may be employed in payment of the debts of such bankrupt." . . .

On 7th May 1884 Mr Roy presented a petition in the Sheriff Court at Edinburgh, reciting the 149th section of the Bankruptcy Act and praying the Sheriff to recommend the Postmaster-General to consent to the half or some other proportion of Scott's pension being paid to him as trustee, and on receiving such consent to order such portion to be paid as aforesaid. The petition was not served on the defender, nor was any intimation made to him of the intended procedure under it.

On 8th May the Sheriff-Substitute (HAMILTON) issued an interlocutor recommending to the Postmaster-General to make payment of one-half of the pension as craved

On 2nd June the Surveyor-General of the Post Office wrote to Messrs Richardson & Johnston, W.S., the agents in the sequestration, stating

that the Rostmaster-General would not consent to a deduction from Scott's pension to be paid to his trustee of more than £10 a-year.

On 9th June the Sheriff-Substitute ordered the £10 a-year to be paid to the trustee.

Scott appealed to the Court of Session, and appeared in person in support of his appeal He argued that there having been no service or intimation the procedure was incompetent, and the Sheriff's interlocutors should be recalled.

Replied for the trustee—Neither service nor other intimation was prescribed by the Bankruptcy Act under which the proceedings were taken, and they were quite regular.

At advising—

LORD JUSTICE-CLERK—I think the proceedings here are utterly indefensible. There is neither precedent nor authority for a trustee proceeding in this manner where the party is not present, and without service or something equivalent to service on him. And therefore whatever proceedings this trustee may think proper to take in the future, I think we should dismiss this petition and recal all the interlocutors in the Court below.

LORD CRAIGHILL—I am of the same opinion. I think there is no warrant for taking away a man's pension, as has been done here, because he is under sequestration, without any service or intimation to him.

LORD RUTHERFURD CLARK—I am also of the same opinion. The trustee in a sequestration ought to remember, that while he is trustee for the creditors he is at the same time trustee for the bankrupt. And I must add, that I cannot conceive how such procedure as this could have taken place in any Sheriff Court at the instance of any trustee in a sequestration.

LORD YOUNG was absent.

The Court recalled the Sheriff-Substitute's interlocutors and dismissed the petition.

Counsel for Trustee—Nevay. Agents—Richardson & Johnston, W.S.

Tuesday, December 2.

FIRST DIVISION.

[Lord Lee, Ordinary.

CONVERY *v.* THE SUMMERLEE IRON COMPANY.

Mines and Minerals—Lordships—Obligation to Work—Jus tertii.

In 1870 B. let to H. & D. a coal-field extending to 17 acres for twenty-five years from 1866, at a fixed rent of £1500, or, in the lessor's option, a lordship of 1s. 1d. per ton of one kind and 15d. per ton of another kind of coal. B. had already let in 1868 to W. & Co. a larger mineral field adjoining, one portion for twenty-seven years from 1865, the other portion for twenty-six years from 1866, with breaks in the tenant's favour in 1871 and every fifth year thereafter. By minute of alteration in 1871 it was provided that there should be yearly breaks in the tenant's favour for the period of six years from 1870 on giving six months' notice. The tenants were taken bound to pay a fixed rent, or in the option of the landlord certain lordships. W. & Co. were taken bound to work the minerals in a regular, systematic, and proper manner. In 1871, B., H. & D., and W. & Co. entered into an agreement by which H. & D., with consent of B, renounced their lease of the 17-acre field, and B. let the same to W. & Co. for the period, and (with certain exceptions) subject to the whole terms of the said lease of the adjoining field. The exceptions were, that as the coal was to be worked through pits on W. & Co.'s lands, they were to be at liberty to fill them up, and were not to be bound to leave the roads and connections in good working order. Then followed this clause, "but they are nevertheless to be bound to otherwise work out the whole of the coal hereby let in terms of the said lease and minute of alteration." The tenants bound themselves to pay to B. lordships of 10d. per ton of the one kind, and 6d. per ton of the other kind of coal. Of the same date H. & D. and W. & Co. entered into an agreement by which, on the narrative that H. & D. had renounced their lease of the 17-acre field on condition that W. & Co. should pay them certain lordships, W. & Co. bound themselves to make payment to H. & D. of 3½d. for each ton of coal output from the said ground. The lordships payable to H. & D. were to be paid at the terms on which the lordships payable to B. fell to be paid, and H. & D. were to have the same power as B. in checking output. In 1884 a person in right of H. & D. raised an action against the successors of W. & Co., to have it declared that under the terms of the two last-mentioned deeds W. & Co. were bound to work out the whole coal prior to the expiry of their lease, or at least to output as large quantities of coal as were capable of being obtained by due diligence. *Held* that there was no such obligation imposed upon them.

By lease dated 13th February 1869 and 18th June 1870, D. C. R. C. Buchanan of Drumpellier let to Henderson & Dimmack, Drumpellier Iron Works, Langloan, a coal-field extending to 17 acres, for twenty-five years from Whitsunday 1866, at the yearly fixed rent of £1500, or in the option of the lessor, a royalty of 1s. 1d. per 22½ cwts. for the Pyotshaw main and splint coal, and of 10d. per same quantity of coal raised from the other seams.

In 1868 Walter Neilson and Hugh Neilson, ironmasters, Summerlee, then carrying on business as Wilsons & Co., had obtained a lease from D. C. R. C. Buchanan of the coal and ironstone in the part of the lands of Drumpellier adjoining the 17-acre field just mentioned. One portion was let for twenty-seven years as from Whitsunday 1865, and the other for twenty-six years as from Whitsunday 1866, with breaks in favour of the tenants at Martinmas 1871 and at Martinmas in every fifth year thereafter, upon their giving six months' notice. The tenants were taken bound to pay a