

a slope up to the tramway. It has been in this condition for forty years, and apparently no accident has happened. I do not think that this was a danger against which the Magistrates were bound to provide.

On the whole matter I think we must affirm the judgment appealed against.

LORD YOUNG—In all towns some streets from their lie are attended with more danger to the people using them than others. We are all quite familiar with the existence of such streets, and no instances are more familiar than streets formed on ground sloping upward or sloping to one side. Forth Street seems to be on ground of that kind. The question we have to decide is this—Are the public authorities at fault in allowing this street to be there, because it may be attended with danger to those using it for traffic or to children playing on it at “kick-the-bucket?” To say so would be ridiculous. No actionable fault or wrong was committed either by private individuals or by the public authorities in allowing such streets to be constructed and used.

If there had been no tramway in Forth Street, as might easily have been the case, and this accident had happened by reason of a carter driving his horses in the same line as the tramway runs, it was not suggested that there would have been any case against the Magistrates. But because forty years ago it had been thought prudent to put a tramway in this street in order to ease the burden of horses going up the street, and because the Commissioners of Police had not altered the street since they took it over, it was said that they were liable. I must say that appears to be a ridiculous proposition. It was a question for consideration upon which side of the street that tramway might have most efficiently been constructed, and there might be conflicting views as to which was the best side for its position in order that it might ease the traffic, but it did not seem to be suggested that the Magistrates had erred in the exercise of their judgment. There were a great many considerations besides the primary one of easing the horses as to the side on which the tramway should be. One side might have more houses and shops on it than the other. The middle of the street might seem to some as the best place for the tram lines, but I am not going to determine such a question. I am satisfied that there is no ground whatever for attributing the accident to the fault that the tramway was there.

On the whole matter, and without any doubt, I am satisfied with the findings in fact and law of the Sheriff-Substitute.

LORD RUTHERFURD CLARK—I am satisfied that no blame has been proved against the defenders, and that therefore the defenders should be assolizied.

LORD TRAYNER—That is my opinion also. I think that no fault at all has been proved against the defenders.

The Court refused the appeal.

Counsel for the Pursuer—Shaw—Sym. Agent—Robert Stewart, S.S.C.

Counsel for the Defenders—Lees—Ure. Agents—Campbell & Smith, S.S.C.

Wednesday, January 31.

FIRST DIVISION.

SYMINGTON v. CAMPBELL.

Title to Sue—Action of Damages—Title of Party Purchasing Ship to Sue in respect of Damage done Prior to Purchase—Title to Sue of Assignee to Claim of Damage where Assignment Executed after Service of Summons.

Held (1) that the purchaser of a ship had no title to sue in respect of damage done to the vessel prior to the date at which he became the owner; and (2) that the defect in his title was not remedied by an assignation to the claim of damages executed in his favour by the previous owner after the summons had been served.

This was an action of damages at the instance of Joseph A. Symington, “for his individual interest, and also as assignee of Robert Symington,” against James Campbell of Jura.

The summons was signeted and served upon 28th June 1893.

The pursuer made averments to the following effect—“The pursuer is the owner of the vessel ‘Alarm,’ which he purchased in May 1893 from its former owner Robert Symington, who had purchased the vessel in June 1890 from James M’Allister and James Nelson.” The defender raised an action of interdict and damages against James M’Allister and James Nelson, the summons in which, containing the usual warrant to arrest on the dependence, was signeted on 31st January 1893. Robert Symington was called for his interest, but no conclusions were directed against him. About the same date the defender obtained the authority of the Lord Ordinary to put the warrant of arrestment into execution. The vessel was, by the defender’s instructions, seized on 3rd February. The warrant to arrest contained no authority to arrest Robert Symington’s vessel, and the seizure was illegal. The defender was aware before the date of the arrestment that the vessel was the property of Robert Symington. The defender having seized the said vessel, had since detained it in his possession. After seizure the messenger-at-arms employed . . . proceeded to dismantle the vessel . . . The process of dismantling was carried through negligently and without reasonable care and skill. Further, instead of keeping the vessel in safe harbour and taking reasonable precautions for its safety, as the defender, or those acting for him, were bound to do, the vessel was allowed to drift, and was ultimately run aground on the open beach, where it still remained,

with the result that it had become unseaworthy. A record had been made in the said action by the present defender against the said James M'Allister and James Nelson, but after discussion in the procedure roll M'Allister and Nelson had been assoilzied with the consent of the pursuer, the present defender, and it had been subsequently found by the Lord Ordinary, by interlocutor which had become final, that it was incompetent to proceed with said action against Symington to the effect of pronouncing any decree against him in terms of its conclusions, in respect he was only called for his interest.

In article 7 of the condensation the pursuer averred—"Serious loss and damage has been suffered by the pursuer and his author through the said illegal and wrongous action. The said vessel, when seized, was in course of a trading voyage between Belfast and Stranraer. Further, by the detention of said vessel, there has been lost the trading season which was just beginning when its seizure was effected, and to repair the vessel will take some considerable time . . . The said Robert Symington has assigned to the pursuer all claims competent to him in respect of the illegal arrestment or detention of the said vessel, and of the damage done to said vessel by the fault or negligence of the defender, or those for whom he was responsible."

The assignation granted to the pursuer by Robert Symington was dated 29th June 1893.

The defender pleaded *inter alia* that the pursuer had no title to sue.

By interlocutor dated 20th December 1893 the Lord Ordinary (KINCAIRNEY) reserved the defender's plea of no title to sue, so far as it related to the pursuer's claim of damages on account of the alleged illegal and unwarrantable arrestment of the vessel named the "Alarm"; *quoad ultra* repelled the defender's plea of no title to sue, and before further answer, and under reservation of the pleas of parties, allowed parties a proof of their respective averments, with the exception of certain averments made, in answer to which it is unnecessary to refer.

The defender reclaimed, and argued—*On the question of title*—The pursuer had no title to sue either in his own right or as assignee of Robert Symington. In the first place, the damage averred was caused prior to the date at which the pursuer purchased the vessel, and as purchaser he could have no right to claim compensation therefor. Secondly, the assignation on which the pursuer founded was dated subsequent to service of the summons, which was the commencement of the action. A pursuer's title to sue was to be judged of as at the date of service of the summons. If his title were defective at that date, the defect could not be cured by a subsequent assignation—*Malcolm v. Dick*, November 8, 1886, 5 Macph. 18; *Wall's Trustees v. Drynan*, February 1, 1888, 15 R. 359; *Stewart v. North*, July 14, 1890, 17 R. (H.L.) 60; per Lord Watson, 63. Stair's *dictum* quoted for the pursuer applied only to cases where

the action was at the instance of a party having a substantial right, but whose title was not formerly completed, e.g., an executor suing prior to confirmation.

Argued for the pursuer—*On the question of title*—The pursuer purchased the vessel before the action was raised, and as owner of the vessel he had an independent title to vindicate his purchase and claim damages for injury previously done to it apart from his right as assignee. Further, any defect in the pursuer's title had been cured by the assignation in his favour—*Stair*, iv. 38, 18; *M'Andrew v. Reid, &c.*, July 11, 1868, 6 Macph. 1063. The assignation had been lodged before closing of the record, and no objection had been taken till the present discussion. The pursuer was the only person having a title to sue in respect of the claim of damages made in the action, and the defender's interests were reasonably protected by the assignation although it was executed after the raising of the action.

Arguments were also submitted on the relevancy, but it is unnecessary to refer to these, as the case was disposed of on the question of title.

At advising—

LORD PRESIDENT—I see no answer to the objection raised by the defender to the pursuer's title. At the date when the summons was signeted and served—both things being done upon the same day—the pursuer had no assignation from Robert Symington, and accordingly, so far as regards the injury alleged to have been inflicted upon the owner of the vessel during the ownership of Robert Symington, this pursuer had no title to sue, and valid objections have been raised to the action going on. This is not the case of a person having at the time of raising the action a substantial right requiring only formal competition. The title of the pursuer here depends on a bargain of sale which he does not say had been good at all before the action was raised. The whole transaction took place after the summons had been served. This sweeps away, on the pursuer's own showing, his title to nearly all that he is suing for. It is clear that a man who buys a ship does not thereby buy all previous claims for damages connected with the ship, and therefore the pursuer's claim for damages, so far as rested on what took place before he became owner of the ship, goes by the board, and I go further, and say that there is no averment on this record of any injury having been inflicted upon the owner of the ship after May 1893, when the pursuer bought it. The latest incident averred is that the vessel was allowed to drift away owing to the defender's carelessness, and in consequence got into unseaworthy condition. Now, all this occurred before the 17th May 1893. There is, it is true, a suggestion by the pursuer as to damage having been suffered by him owing to the non-delivery of the vessel by the defender, but his averments upon this point are of too shadowy and unsubstantial a character to be worthy of consideration,

and are irreconcilable with his account of the hopeless condition of the ship at and prior to the date in question. I am of opinion that the defender has stated a good objection to the pursuer's title, that the Lord Ordinary's interlocutor should be recalled, and the action dismissed.

LORD ADAM—I am of the same opinion. The pursuer here alleges that he has a good title to sue upon two grounds—1st, That he is the purchaser of the ship; 2nd, that he is the assignee of all claims for damages connected with the ship.

The facts with regard to the second of these two propositions are as follows:—The summons in this action was served upon the 28th of June, which according to the authorities cited to us is the date of the raising of the action. The assignation is dated June 29th, the day after the raising of the action. The question before us is, whether at the date of raising the action the pursuer had a title to sue. I think he had not, and that suspecting this, he procured the assignation next day in order that he might have a good title. It has been suggested that this case is like that of executors who have been held able to sue competently before getting confirmation, and that in consequence it is competent for the pursuer here to sue. But the difference between the cases is that the executors had a good title at bottom which they only required to have formally made absolute, while the pursuer here had absolutely no title till the assignation had been entered into. "But," says the pursuer, "I have a title *qua* purchaser." This title he obtained in May 1893, but all the damage to the vessel was done before that date, and the mere fact of becoming the proprietor of a ship will not give the purchaser the right to claims for damages sustained before his purchase. The pursuer tried to remedy this defect by procuring the assignation, but he did so too late for the purposes of this action.

I am therefore of opinion that the pursuer has no title to sue.

LORD M'LAREN and **LORD KINNEAR** concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Pursuer—**N. J. D. Kennedy**—Forbes. Agent—**W. R. Mackersy**, W.S.

Counsel for the Defender—**Guthrie**—Chree. Agents—**John C. Brodie & Sons**, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Lord Low, Ordinary.]

WATSON'S TRUSTEES v. HAMILTON.

Succession—Vesting—Substitution—General Disposition—Special Destination.

A died leaving a holograph settlement entitled "Notes of intended settlement," by which he gave the life-rent of his whole estate, heritable and moveable, to his widow. By the said deed he also left to his nephew B his estate of Bankhead, but wished it to be expressly understood that in the event of B dying without leaving any lawful male heir of his body, then and in that event the lands of Bankhead were to revert to his nephew C.

B survived A, and died leaving a widow, but without issue. By his trust-disposition he conveyed to trustees for the purposes therein mentioned "all and sundry the whole means and estate, heritable and moveable, real and personal of every kind and description, and wherever situate, at present belonging or that may belong to me at the time of my decease.

Held (diss. Lord Young) that the fee of the estate of Bankhead had vested in B at A's death, and had passed to the trustees under his trust-disposition, and that the clause of return in favour of C in A's settlement was not any higher than a simple substitution, and had been evacuated by B's trust-disposition.

Walter Whyte died on 16th September 1880 leaving a holograph settlement entitled "Notes of intended settlement by Walter Whyte of Bankhead, dated 19th June 1873, and recorded 22nd September 1880, in the following terms:—"First, I life-rent my wife Mrs Margaret Pollok or Whyte in my whole estate, both heritable and moveable burdened with an annuity of £300 Stg Three hundred pounds Sterling a year to my Sister Mrs Jane Macnish Whyte or Hamilton Widow of the late James Hamilton Writer in Glasgow should my wife survive me—at the death of my Wife said Annuity to cease, In place thereof I leave to my said Sister Mrs Jane Macnish Whyte or Hamilton in life-rent only and to my nephew John Hamilton Writer in Glasgow in fee my pro indiviso half of the lands of Kenmuir situated in the parish of Old Monkland & County of Lanark, likewise my pro indiviso half of the lands of Shettleston situated in the Barony parish of Glasgow & said County of Lanark—To my nephew James Hamilton I leave my lands of Cuthill & Newmill of Brieck &c situated in the Parish of Whitburn & County of Linlithgow subject to the life-rent of his mother the said Mrs Jane Macnish Whyte or Hamilton I also leave to my nephew James Frances Watson presently residing at Ardmore House in the Parish of Cadross, Dumbartonshire, my Estate of Bank-