and think that we have no alternative but to pronounce the judgment proposed.

The Court repelled the defender's objection.

Counsel for the Pursuer—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Counsel for the Defenders—M. P. Fraser. Agent—M. J. Brown, S.S.C.

Tuesday, May 27.

SECOND DIVISION.

[Sheriff Court of Renfrew and Bute at Greenock.

CONSTANT *v.* KINCAID & COMPANY.

Bankruptcy—Effect of Bankruptcy—Claim against Bankrupt for Breach of Contract—Assignation by Trustee of Bankrupt's Claim against Sub-Contractor—Contract—Breach of Contract—Damages—Measure of Damages—Breach of Contract by Sub-Contractor—Principal Contractor Bankrupt—Sub-Contractor Liable for Whole Loss or only Dividend.

A contracted with B for two tug-steamers, and B sub-contracted with C for the engines and boilers. The machinery and the tugs were in turn delivered and paid for. After the tugs were delivered the boilers were found to be defective, and had to be replaced by A. It was admitted that B had committed a breach of contract for which he was liable to A in damages, and that this breach of contract was due to a breach of contract on the part of C. Before any payments of damages were made B became bankrupt, and the trustee on his sequestrated estate assigned his claim of damages against C to A, and A discharged his claim against B's estate. A then, as the trustee's assignee, sued C for the amount of the loss he had sustained through having had to replace the defective boilers. It was admitted that the amount of the loss so sustained by A was £1350. *Held* that the fact that B's estate would have been unable to pay the damages in full, and that he had received the full price for the tugs, and had made no cash payment of damages, did not affect the trustee's right to claim the full amount against C, and that A was entitled to recover that amount as the assignee of the trustee.

This was an action of damages for breach of contract at the instance of Joseph Constant, shipowner, 11 Billiter Square, London, as the assignee of the trustee on the sequestrated estate of Carmichael, Maclean, & Company, shipbuilders, Greenock, against John G. Kincaid & Company, engineers, Greenock.

In August 1897 Carmichael, Maclean, & Company agreed to build for Constant two tug-steamers with their engines, and Carmichael, Maclean, & Company sub-contracted with Kincaid & Company for the engines and boilers. Kincaid & Company sub-contracted again for the boilers, but it is not necessary further to notice this sub-contract.

Kincaid & Company in their contract agreed to relieve Carmichael, Maclean, & Company from all responsibility in connection with a six months' guarantee on their part for faulty material or workmanship so far as the machinery and boilers were concerned.

Kincaid & Company and Carmichael, Maclean, & Company in turn made delivery under their contracts, and the contract price in each case was paid.

Shortly after delivery of the tugs the boilers were found to be defective and had to be replaced by Constant, to whom Carmichael, Maclean, & Company thus became liable in damages, having themselves a corresponding claim against Kincaid & Company.

Before any payments of damages had been made Carmichael, Maclean, & Company became bankrupt, and a trustee was appointed on their estates, who granted to Constant an assignation of his claim against Kincaid & Company in exchange for a discharge by Constant of his claim against the bankrupt estate.

Constant then raised the present action in the Sheriff Court at Greenock, in which the defenders Kincaid & Company pleaded as follows—"(5A) The pursuer, as assignee of the trustee on Carmichael, Maclean, & Company's sequestrated estates, if entitled to claim to any extent against the defenders (which is denied) damages in respect of the alleged breach of contract, is not entitled to claim for more than the sum of any dividend or dividends which may be paid out of the sequestrated estates on the sum of such damages when and as the same may be lawfully ascertained. (8) The pursuer's cedent not having at the date of the alleged assignation suffered loss at the hands of the defenders, or of anyone for whom the defenders are responsible, the alleged assignation conferred on the pursuer no right which he can enforce against the defenders, and the action, so far as laid on the alleged assignation, is therefore irrelevant and unfounded. (11) No loss or damage in respect of the boilers in question having in point of fact been sustained by the pursuer's cedent, this action, so far as at the pursuer's instance as assignee foresaid, is unfounded, and none having been sustained by the pursuer in his individual capacity, or at all events in respect of any default of the defenders, or of any person for whom they are responsible, the action is unfounded, and the defenders are entitled to absolvitor."

A minute of admissions was lodged for the parties, in which it was admitted, *inter alia*, as follows—"(2) The defenders admit that the boilers which were supplied to the screw tugs 'Lady Jackson' and 'Empress of India' by Carmichael, Maclean, & Company in pursuance of the contract between the pursuer individually and Carmichael, Maclean, & Company . . . were disconform

to that contract, and that Carmichael, Maclean, & Company thus committed a breach of said contract for which they became liable to the pursuer in damages, which breach of contract and damages the defenders admit were due to breach of contract on their part . . . of the contract between them and Carmichael, Maclean, & Company. (3) The parties admit that no payment for or in respect of said claim of damages has been made by Carmichael, Maclean, & Company, or by anyone representing them, or by the trustee on their sequestrated estates, and that the estates of Carmichael, Maclean, & Company were sequestrated on 12th December 1899. (4) The pursuer admits that no claim in said sequestration has been lodged by or for him for or in respect of said damages, and that he agreed to accept the assignation mentioned in the petition in full of his claim against the estate. (5) The parties further admit that a first dividend of one shilling per pound was declared in the said sequestration on the claims as ranked of the ordinary creditors therein, and was payable on 24th January 1901, but no further dividend has been declared. The parties, however, agree that for the purposes of judgment in the present action it shall be assumed and held (*first*) that a further and final dividend of three shillings per pound on the said claim will be declared, and will be payable on the date of the Sheriff-Substitute's judgment in this action; (*second*) that £1350 sterling is the sum for which, but for the foresaid transaction between him and the trustee in said sequestration mentioned in article 4 of this minute, the pursuer would be entitled to claim and to rank for dividend as an ordinary creditor of Carmichael, Maclean, & Company in their said sequestration, it being admitted that the state of the boilers was such that the pursuer had right to replace them with new boilers, at a loss of £1350, which sum Carmichael, Maclean, & Company, if solvent, would have had to pay to the pursuer as the damages due by them, and which, in that event, and on such payment being made by Carmichael, Maclean, & Company, the defenders would have had to pay Carmichael, Maclean, & Company as the damages due to them by the defenders."

On 10th December 1901 the Sheriff-Substitute (GLEGG) pronounced an interlocutor whereby after sundry findings in fact he found in law—"(1) that the pursuer as assignee of the trustee has the same right against the defenders as Carmichael, Maclean, & Co. had at the date of their bankruptcy; (2) that the defenders were then indebted to Carmichael, Maclean, & Co. in the sum of £1350;" and repelled the pleas-in-law for the defenders, and granted decree in favour of the pursuer for the sum of £1350.

Note.—"Joseph Constant ordered from Carmichael, Maclean, & Co. two steam tugs fully equipped. Carmichael, Maclean, & Co. sub-contracted with the defenders Kincaid & Co. for the boilers, and they in turn sub-contracted with Neilson & Sons for the same. The boilers were delivered and paid for by these parties in turn, but after being in use they were found to be defective and had to be replaced by Constant at an expense of £1350. It is admitted that the defects constituted a breach of the contract between Constant and Carmichael, Maclean, & Co., and also of the contract between them and Kincaid & Co., and that in consequence of said breaches Carmichael, Maclean, & Co. became liable to pay to Constant £1350, and that in the ordinary course Kincaid & Co. would be liable in the same sum to Carmichael, Maclean, & Co. Before any payments of damages were made, however, Carmichael, Maclean, & Co. became bankrupt, and a trustee was appointed on their estates. Constant then, instead of claiming in the sequestration, accepted an assignation of the trustee's rights against Kincaid & Co. in full of his claim against the bankrupt estate. It is as such assignee that Constant now sues the present action, and as the effect of the assignation in operating a complete transfer of the trustee's right was not questioned, I regard the action as one at the instance of the trustee.

"At the hearing of the case the defenders intimated that they departed from their pleas, except 5*a*, 8, and 11, and stated that their contentions were (*first*) that no sum was due by them, and (*secondly*) and alternatively that only £270 was due. This latter sum is equal to 4s. per £ on the £1350, which is the rate of the dividend the bankrupt estate is expected to produce.

"No argument was offered in support of the first contention, and I do not see how it can be sustained.

"On the second head it was argued that the defenders' liability to the bankrupt estate was limited to the amount of actual payments made to the purchaser of the boilers, or that, in other words, the amount of the dividends paid to the purchaser being the amount by which the bankrupt estate was depleted by the defenders' breach of contract, they repaired the breach by replacing that amount. In the present case, the dividend being assumed for the purposes of this case to be 4s. in the £, the defenders say that they are liable to pay only that proportion of the £1350, making £270. In my opinion this argument is unsound in principle and contradicted by authority. In the first place, it seems to make the amount of the dividend payable to the creditor of the bankrupt estate depend on the amount contributed by the debtor, and at the same time to determine the amount to be contributed by the debtor in accordance with the amount of dividend payable to the creditor. Several anomalous cases may be figured as the result of adopting this principle, of which the following may be taken as illustrative:—Suppose, for the sake of argument, that Kincaid & Co. had become insolvent and could pay only 10s. in the £. They could then pay only £135 instead of £270, and the estate of Carmichael, Maclean, & Co. would then have to pay a smaller dividend than 4s. per £, consequently the sum demandable from Kincaid & Co. would be less that £270, and as they

could only pay a dividend on this smaller sum the difficulty would be again renewed. 'Now,' in the words of Lord President Inglis, 'that is one of those absurd results which is a very good test of the unsoundness of the doctrine of which it is a result' (*Cunningham* v. *Macgregor*, 6 R. 1333, 1338). Although in the present case, on account of the admission of parties, the difficulty in fixing the amount of the dividend does not arise, that admission does not seem to me to entitle the defenders to ask judgment in their favour if the principle on which they ask it is not generally applicable. In the next place the defenders' contention seems to me opposed to the doctrine that the creditors of a bankrupt are entitled to demand implement of a contract obligation undertaken to the bankrupt. 'The obligation under the contract,' says Bell Com. (7 ed.), i. 471, 'may be made available to the purchaser's bankrupt estate either if the price has already been paid, or if the creditors are willing to pay the stipulated price; for the solvent party has no further interest than to demand full performance of the bankrupt's obligations.' There has here been full performance of the bankrupt's obligation, but the defenders have failed to perform their obligation to an extent valued at £1350. The boilers were, in fact, worth less by that amount than the sum paid by the bankrupt, and the defenders were overpaid to that extent. It is true, since the claim is now stated as one of damages, that if Carmichael, Maclean, & Co. had been able to settle with the purchaser for £270, no more could now be demanded of the defenders, but (disregarding the assignation as above explained) that has not been done, and the obligation of Carmichael, Maclean, & Co. is to pay the full sum of £1350. The fact of bankruptcy does not annul the obligation, but only excuses performance to the extent of the inadequacy of the estate.

"If, again, the position of a trustee in bankruptcy with reference to a debtor to the estate is regarded—and this is probably the most satisfactory way of disposing of the case—a result adverse to the defenders is also reached. The right of the pursuer in this case is that which was vested in the trustee by his act and warrant. The claims competent to Carmichael, Maclean, & Co. at the moment of bankruptcy were thereby transferred to the trustee. The amount of their claim against the defenders at that time seems to me to have been £1350. It is true that Carmichael, Maclean, & Co. had not paid the amount, and that it was not constituted; but there is now an admission that it was due to Constant by them, and that the same sum would have had to be paid by the defenders to Carmichael, Maclean, & Co. if the latter had remained solvent, since they would have had to pay it to Constant. The position is therefore the same as if Constant had held a decree against Carmichael, Maclean, & Co. for the amount of his debt. Carmichael, Maclean, & Co. could then, even without payment, have sued the defenders, and they could have had no answer to the claim. The effect of their contention therefore is that the trustee in bankruptcy took up a less right than there was in the bankrupts in the matter. On this point there is authority, and it is adverse to the defenders. According to Bell's Com. (7 ed.) ii. 335, a trustee in bankruptcy is entitled 'to recover any debt due to the bankrupt and to maintain action in the same way as the bankrupt might have done if his estate had not been sequestrated.' The only authority cited against this statement as I am using it is an observation of Lord Chancellor Westbury in the case of *Ewart* v. *Latta*, 3 Macph. (H.L.) 36, at p. 42; but there is nothing in the decision contrary to the view here adopted, and I read the observation as agreeing with the construction I put on the sentence in Bell. I understand it to mean that the trustee is in the same position as the bankrupt would have been in if he had remained solvent; that the accident of bankruptcy does not affect the position of the parties as it existed at the date of the bankruptcy; and that no change takes place in the liability of the debtor because of the insolvency of the creditor. This view is supported by English authority. In *Ashdown* v. *Ingamells*, L.R., 5 Ex. Div. 280, the trustee in the liquidation of a trader who had transferred his business to another on condition, *inter alia*, that the transferee should pay a creditor of the trader, was found entitled to recover the whole amount of the debt from the transferee. There, as in the present case, the trustee was suing on breach of contract between the bankrupt and his debtor, a contract to which the bankrupt's creditor was not a party, and the amount recovered from the debtor was not to go to the particular creditor but to be divided generally. In the course of his opinion, Bramwell, L. J., said (p. 284):—'If the liquidating debtor had not become insolvent, he clearly would have been entitled to recover by way of damages the sum which the defendant ought to have paid but did not pay. That being the position of the parties, how can it be possible that the trustee in liquidation is not entitled to recover the sum which the defendant omitted to pay? The plaintiff, who is the trustee in the liquidation, must have a right to the same amount as the liquidating debtor would have been entitled to if he had continued solvent and had brought an action for breach of contract.' See also *Carr* v. *Roberts*, 5 B. and Ad. 78; *Hill* v. *Smith*, 12 M. & W. 618; *Eddiston Insurance Co.* v. *Western Insurance Co.* (1892), 2 Ch. 472.

"The case of *Cunningham* v. *MacGregor*, 6 R. 1333, which was founded on by both parties, decided that a mandatory was entitled to relief from his principal when called on to meet a liability incurred for the principal, and thus differs in some respects from the present case. I do not think, however, that in any view of it the defenders can claim it as an authority in their favour; and it benefits the pursuer to this extent, that it was held that the debtor was not relieved of his obligation under contract with his creditor because the creditor was unable fully to implement

a corresponding obligation to another party. The flaw in the defenders' argument appears to me to be that it regards the ability of the creditor to fulfil his obligation, and not the extent of the obligation, as the measure of his right against his debtor for breach of an ancillary contract."

The defenders appealed to the Court of Session, and argued—Under their contract with the pursuer's cedents the defenders were only liable to relieve them of any loss sustained under their guarantee; but the cedents had received the full contract price, and had made no payments under their guarantee, therefore they had sustained no loss and the defender's obligation to relieve had not emerged. In any case, Carmichael, Maclean, & Company could only have recovered from the defenders the amount of the loss they had sustained, but the claim against them had been discharged, therefore they had sustained no loss. Assuming, however, that the assignation sued upon carried with it a claim against the defenders, the measure of that claim was the extent to which the pursuer's claim would have depleted his cedent's bankrupt estate, and it would only have done so to the extent of 4s. in the pound; therefore the defenders were in no case liable to the pursuer in more than 4s. in the pound. The line of authorities followed by the Sheriff-Substitute, of which *Ashdown* v. *Ingamells* (1880), 5 Ex. Div. 280, and *Carr* v. *Roberts* (1833), 5 B. & Ad. 78, were examples, did not stand uncontradicted—*Porter* v. *Vorley* (1832), 9 Bing. 93.

Counsel for the respondent were not called upon.

LORD TRAYNER—I agree with the Sheriff-Substitute, and think this is a clear case. The facts are few and simple. Constant, the pursuer, contracted with Carmichael, Maclean, & Company for two tug steamers fully equipped with engines and boilers. Carmichael, Maclean, & Company did not make the engines and boilers themselves, but sub-contracted for them with Kincaid & Company, the defenders. It is now admitted that Carmichael, Maclean, & Company failed to fulfil their contract with Constant, and that their failure resulted in a loss to Constant of £1350. It is also admitted by the defenders Kincaid & Company that it was failure on their part that brought about the failure on the part of Carmichael, Maclean, & Company, and that damage was thereby occasioned to the extent above stated. Carmichael, Maclean, & Company having become bankrupt, Constant was unable to make effectual his claim against them.

But Carmichael, Maclean, & Company having a good claim against the defenders for £1350 (the amount of the pursuer's claim), the trustee on the sequestrated estate of Carmichael, Maclean, & Company thought it for the advantage of the creditors to enter into a compromise with Constant, the pursuer, to the effect that if he would abandon and discharge all claim against the bankrupt estate, he, the trustee, would assign to Constant his claim against Kincaid & Company, the defenders. Constant agreed, and is now suing the present action as the assignee of the trustee in Carmichael, Maclean, & Company's sequestration.

Let us assume there had been no bankruptcy. It appears to me that on the admissions now made Kincaid & Company could have had no answer to Carmichael, Maclean, & Company's claim for damages, nor any better answer to Constant as Carmichael, Maclean, & Company's assignee, because by the assignation he was vested with all the rights which belonged to his cedents.

Now, I think that the bankruptcy of Carmichael, Maclean, & Company does not make any difference. Their trustee had a good claim against the defenders, and why should his assignee's claim be any less? The argument put forward against it is this, that Carmichael, Maclean, & Company had merely a claim of relief against Kincaid & Company, and that as Carmichael, Maclean, & Company had paid nothing to Constant (who had discharged his claim) there was nothing to be relieved of. No question of relief really arises in this case. The suggestion that the defenders are only liable in a claim of relief arises from a clause in their contract whereby they undertook to relieve Carmichael, Maclean, & Company from their obligations to Constant to maintain the engines and boilers in good order for six months. That is a clause which does not modify Kincaid & Company's obligation under their original contract, but assumes that the original contract has been fulfilled. By that clause, in addition to the obligation to provide engines and boilers as stipulated for, Kincaid & Company undertook that if the engines and boilers went wrong within six months they would put them right. That clause assumes an obligation to make adequate and proper delivery in the first place, and that obligation was never fulfilled. The question is not one of relief, but of substantive liability for non-performance of the original contract between the parties. Have Carmichael, Maclean, & Company suffered nothing? They have suffered to the extent of £1350, for which they became liable to Constant. No doubt Constant has discharged that claim, because Carmichael, Maclean, & Company became bankrupt and could only pay four shillings in the pound. But that is a thing with which Kincaid & Company, the defenders, have no concern. If there had been no assignation Carmichael, Maclean, & Company's trustee would have recovered £1350 from the defenders, but instead of that the trustee has got a discharge from the pursuer of a claim of equal amount, which has gone to the full extent to benefit the general body of Carmichael & Company's creditors. The pursuer in exchange for the discharge has got an assignation to the claim which Carmichael, Maclean, & Company had against the defenders.

It is enough to say that at the date of the sequestration Carmichael, Maclean, &

Company had a good claim for £1350 against the defenders, that that claim has never been discharged, and that the right to it is now vested in the pursuer.

LORD YOUNG — I concur. After I had read the judgment of the Sheriff-Substitute I thought that judgment was so clearly right that the contrary was not arguable. I remain of that opinion now after having attended carefully to the only argument that could have been stated against it by Mr M'Clure, and I agree with the Sheriff-Substitute and with the opinion of Lord Trayner.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer and Respondent —Salvesen, K.C.—Hunter. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Appellants—Johnston, K.C.—M'Clure. Agents —Murray, Beith, & Murray, W.S.

Wednesday, May 28.

SECOND DIVISION.

REES *v.* HENDERSON.

Expenses—Taxation—Jury Trial—Fees to Counsel.

In taxing the account of the successful party in an action which had been tried before a jury, the trial lasting one day, the Auditor taxed off fifteen guineas and seven guineas respectively from fees of thirty guineas to senior counsel and twenty guineas to junior counsel for attendance at the trial. The pursuer consented to the fees being reduced to twenty-five guineas and fifteen guineas respectively but objected to the Auditor's report in so far as it reduced the fees below these sums. *Held* (*diss.* Lord Young) that the fees as so reduced of consent were appropriate, and objections *sustained.*

Opinion (*per* Lord Trayner) that it is not part of the Auditor's duty to fix counsel's fees.

In an action at the instance of George Henry Rees, 4 Parkside Terrace, Edinburgh, against John Young Henderson, Winncote, Aldrington Road, London, S.W., which was tried before a jury, the pursuer was successful, and the defender was found liable in expenses.

In the pursuer's account of expenses, fees of thirty guineas to senior counsel and twenty guineas to junior counsel were charged for attendance at the trial, which lasted one day. The Auditor taxed off fifteen guineas from the former and seven guineas from the latter. The pursuer consented to the fees being reduced to twenty-five guineas for senior counsel and fifteen guineas for junior counsel respectively, but objected to the Auditor's taxation in so far as it reduced the fees below these sums.

Argued for the pursuer—It was not within the province of the Auditor to make any deduction from the fees sent to counsel, but assuming that it was within his province he had disregarded the decisions of the Court in the mode in which he had exercised his discretion in the present case. According to the decisions the fees which the pursuer sought to charge against his opponent were such as the Court had approved in similar circumstances — *Mackie & Company* v. *Gibb*, October 26, 1899, 2 F. 42, 37 S.L.R. 36; *Wilson* v. *North British Railway Company*, December 13, 1873, 1 R. 304, 11 S.L.R. 155; *Hubback* v. *North British Railway Company*, June 25, 1864, 2 Macph. 1291; *Cooper & Wood* v. *North British Railway Company*, December 19, 1863, 2 Macph. 346.

Argued for the defender—The Auditor was the proper judge of the fees that could be charged as between party and party, and the Court would not interfere with his discretion.

LORD JUSTICE-CLERK—We have here an objection to the Auditor's report on an account of expenses. The objection is that the Auditor has in taxing reduced the fees sent to counsel for the successful party. Now, the propriety of the fees sent to counsel cannot depend on what actually takes place at the trial, because according to our practice fees are sent to counsel before the trial begins, but apparently it has been fixed that the fees sent here were ordinary fees in a case of this kind. The objector is willing to consent to a reduction of £5, 5s., making the Solicitor-General's fee £26, 5s. I am of opinion therefore that we should sustain the objection to the extent now maintained by the pursuer.

LORD YOUNG—I think the Auditor, as the experienced taxing officer of the Court, is the judge of what are the proper fees in the particular case before him. I assume that he knows the particular case before him when he taxes the whole account. Now, unless we are prepared to make a scale of fees with a maximum and a minimum, or to fix an ordinary fee which the Auditor is to allow in all cases unless he sees reasons for making an exception in a particular case, I think we should not interfere with the discretion of the Auditor in any particular case either by increasing or reducing the fee which he has allowed. He may have allowed what appears to us a large fee, but I do not think it would be convenient or for the public interest that we should hear an argument with a view to reducing it. And the same consideration applies when we are asked to increase the fees allowed by the Auditor.

LORD TRAYNER—I agree with your Lordship in the chair. I do not think that it is part of the Auditor's duty to fix counsel's fees. I think that the proper point of view