In that case it is true that the husband, who lived apart from his wife and family, contributed on an average about £5 a year towards their support. But the question raised was not whether the wife was partially dependent upon him—that was admitted—but whether she was wholly dependent upon him. The Court held unanimously that she was wholly dependent on her husband. The argument for the respondents in that case, which was unsuccessful, was that the wife was not wholly dependent on her husband because she was supported by occasional employment and contributions from her relatives. That argument was negatived by the judgment of the Court, and I need only refer to the opinions of the Judges, including my own. I am still of opinion that that case was well decided, and further, that it decided the very point before us now. Because although the husband apparently gave the wife an average yearly dole of £5, he did not support her, and her living was eked out by precarious employment and charitable contributions from friends and relatives.

As I have already indicated, I do not think the judgment we are about to pronounce in any way conflicts with the judgment in *Turners* v. *Whitefield* Indeed, this case is just such a one as was contemplated by Lord Kinnear in the second last sentence of his opinion, 41 S.L.R. 633.

I am therefore prepared to answer the question put to us in the affirmative, and dismiss the appeal.

LORD JUSTICE-CLERK — This case has seemed to me to be attended with great difficulty, particularly as the cases which were quoted present some conflict. Your Lordships have come to the conclusion that the decision of the Sheriff is right, and that the respondent in the appeal is entitled to compensation, holding that the case is not ruled by the case of *Turners*, and that the case of *Cunningham* is in point. That disposes of the case, and although I have hesitated to concur in that result I feel that this being a case under a remedial statute, and the Courts having given it very wide application in favour of compensation, I am not called upon to express a dissent, although I still have doubt as to the soundness of the decision.

LORD TRAYNER was absent.

The Court answered the question of law in the affirmative.

Counsel for the Pursuer and Respondent —Watt, K.C.—Lippe. Agents—Erskine, Dods, & Rhind, S.S.C.

Counsel for the Defenders and Appellants —Hunter—Moncrieff. Agents—W. & J. Burness, W.S.

*Friday, July* 15.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## JOPP *v.* JOHNSTON'S TRUSTEE.

*Agent and Principal—Agent's Bankruptcy —Funds of Principal Mixed with those of Agent without Authority — Estate of Principal Taken out of Agent's Sequestration—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 104.

On 19th November 1900, A, a law-agent, without authority, sold stock belonging to a client B, for whom he acted under a factory and commission. For the stock sold, together with £45 of revenue collected for B, A received £1239, 19s. 3d., and he paid that sum into his own bank account, in which there was at that date £439, 17s. at his credit, and to which he paid a further sum of £155, including £139 belonging to another client, on 21st November 1900. On the latter date he drew a cheque for £1500 on his own account and received in exchange seven deposit-receipts, one for £300 and six for £200 each, two of which, the one for £300 and one for £200 he uplifted in April and May 1901 and applied to his own purposes. A died in July 1902, having in the interval between November 1900 and his death uplifted several deposit-receipts of later date than those referred to, five of which for £200 each remained undisturbed. A died insolvent and his estate was sequestrated. B presented a petition under section 104 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), to have the five deposit-receipts for £200 each taken out of the sequestration, claiming that they represented the proceeds of the stock sold by A on 19th November 1900.

*Held* (*aff.* judgment of Lord Pearson) that the proceeds of B's stock were sufficiently indentified, and prayer of the petition *granted.*

On 10th July 1903 Mrs Margaret Mackenzie or Jopp, 5 Norwood Terrace, West Park Road, Dundee, presented a petition under section 104 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79) to have certain funds taken out of the sequestration of the estate of the deceased Robert Fleming Johnston, W.S., Edinburgh.

A similar petition was presented by Mrs Charlotte Hawtrey Thwaites or Drummond, with which it is unnecessary to deal for the purposes of this report. The two petitions were conjoined.

Answers were lodged by the trustee on Mr Johnston's estate.

The following narrative is quoted from the opinion of the Lord Ordinary (PEARSON):—"This dispute has arisen in consequence of the sequestration of the estates of the late R. F. Johnston, W.S., who died on 12th July 1902. Mr Johnston carried on business under the firm name of Richardson

& Johnston, but during the whole of the transactions now in question he was the sole partner of the firm.

"On Mr Johnston's death his affairs were found to be embarrassed. On the application of his widow a judicial factor was appointed on his estates under section 164 of the Bankruptcy Act; and in January 1903 the factory was superseded by the sequestration of his estates at the instance of his creditors.

"Among the assets which came into the factor's hands were five deposit-receipts with the Commercial Bank of Scotland in favour of Mr Johnston's firm, for the sum of £200 each, all dated 21st November 1900. These the judicial factor uplifted, and renewed in his own name as factor, with the interest added.

"Two of the bankrupt's clients, Mrs Jopp and Mrs Drummond, now present those petitions under section 104 of the Bankruptcy Act, claiming right to the deposit-receipts and their contents or part thereof, and praying to have them taken out of the sequestration in whole or in part. They maintain that the sums in the deposit-receipts include moneys belonging to them which found their way into the hands of Mr Johnston as their law-agent and factor; and that the trustee in the sequestration, acting for the general body of creditors, has no right to retain and distribute the money as part of the bankrupt's assets. On the main facts of the case there is very little difference between the parties though they differ widely as to the inferences to be drawn and as to the legal principles to be applied.

"I take first the case of Mrs Jopp, leaving over in the meantime the claim made by Mrs Drummond. In 1895 Mrs Jopp appointed Mr Johnston, who was agent on her deceased husband's trust, to be her own agent, and she granted a factory and commission in his favour, and handed over to him her papers, including the certificates of 150 shares of the North of Scotland Bank, Limited, of which she was the owner. In 1897 twenty-five of these shares were sold by Mr Johnston on the instructions of Mrs Jopp. In November 1900 the remaining 125 shares were sold by him without her knowledge or instructions, and she was not aware that he had sold them until after his death. Mr Johnston kept a current account in his firm name with the Commercial Bank, and did his business chiefly through the Haymarket branch. Into this account he paid on 19th November 1900 a sum of £1239, 19s. 3d., consisting of (1) £1194, 19s. 3d., being the net proceeds of the sale of the 125 bank shares, and (2) £45, being the half-year's rent of a property in Aberdeen belonging to Mrs Jopp, which he was in use to collect for her. A sum of £439, 17s. or thereby already stood at credit of the accounnt, and this payment in on 19th November raised the credit balance to £1679, 16s. 3d.

"It appears that Mr Johnston had certain heritable property of his own which was heavily bonded, and that he had been apprehensive that a second bond of £1330 secured on it might be called up. It was, however, allowed to remain, and the suggestion is, that having provided ready money by selling the bank shares, which turned out not to be required, he was desirous of putting the amount on deposit-receipt meanwhile until he could get a trust investment for it. We do not know what his ultimate intentions in the matter were, but what he did was to pass a cheque on the current account (dated 21st and debited 22nd November) for £1500, in exchange for which he got from the bank seven deposit-receipts in name of his firm, one for £300 and the other six for £200 each. Of these he afterwards uplifted two, the receipt for £300 and one for £200. The other five for £200 each were extant at his death, and are the five receipts above referred to, the contents of which form the fund now in dispute. I may add that at Mr Johnston's death there was also a credit balance of £738, 13s. 7d. on his current account, which was uplifted by the judicial factor.

"Between the payment in of the £1239, 19s. 3d. and the drawing out of the £1500 the current account had only altered to this extent, that certain small sums amounting to £27, 18s. 6d. had been drawn out, and a sum of £155 had been paid in. The result was that after deducting the amount of the £1500 cheque the account still showed a credit balance of £306, 17s. 9d. And as the credit balance did not in the interval fall below the sum of £1239, 19s. 3d. paid in it is plain that that sum, or a great part of it, was taken out of the account-current by the £1500 cheque and put into the deposit-receipts."

The contentions of parties are disclosed in the opinion of the Lord Ordinary, who on 8th April 1904, after a proof, pronounced the following interlocutor—"In the petition at the instance of Mrs Jopp, Finds that in respect of £1194, 19s. 3d., being proceeds of the sale of bank shares, the petitioner had right to the sums contained in the five deposit-receipts for £200 each, dated 21st November 1900, which were extant at the date of the death of the late Robert Fleming Johnston, with the interest accrued thereon, and is entitled to have the same taken out of the sequestration, and decerns and ordains the respondent forthwith to deliver over to the said petitioner the deposit-receipts which were substituted therefor, duly endorsed, with all interest accrued thereon."

*Opinion.*—[*After the narrative above quoted, his Lordship proceeded*]—"How much of it was so treated depends upon the view taken of the intermediate entries in the account, and of the balance of £439, 17s. which stood at credit immediately before the payment in on 19th November. If these are all to be regarded as entries in which Mr Johnston alone was concerned, then neither he nor the trustee for his general creditors could challenge the proposition that Mrs Jopp's money was taken out of the account and transferred to the deposit-receipts. To allow them to do so would be to enable them to benefit by his breach of the trust relation in which he

stood and to force a settlement with her on the footing that his money was preserved in the deposit-receipts, while hers was left at risk in the account-current to be operated on by him in further breach of his duty. The true principle is the opposite one, namely, that the trust property comes first—see *per* Sir George Jessel in the case of *Hallett* (1879, Law Rep. 13 Chan. Div. 696, at p. 719), where he quotes Lord Hatherley to the effect that 'if a man mixes trust funds with his own the whole will be treated as the trust property except so far as he may be able to distinguish what is his own.' I am leaving out of account at this stage the claim of the other petitioner Mrs Drummond, who claims to be interested in the additional credit of £155 on 21st November to the extent of £139, and to be entitled to follow that sum into the deposit-receipts and to have it now taken out of the sequestration. I am considering Mrs Jopp's claim in a question with the bankrupt and his trustee, and unless they can show that the money now claimed, or part of it, has been otherwise made good to her, she is, in my opinion, entitled to vindicate what I regard as her money.

"No doubt the deposit-receipts and their contents did, *prima facie*, fall within the assignation of bankruptcy, because they were taken in favour of the bankrupt's firm. That is why a petition is necessary to take them out of the sequestration. But I cannot accept the respondent's argument that the case must be solved in his favour by distinguishing between the position of a trustee properly so called and of one who holds a fiduciary relation to another as factor or agent. It was suggested that a trustee can never become the owner of the trust-estate, and that his disqualification to do so, even if he invests it in his own name, is implied in his trust title, while a factor or agent purchasing or investing contrary to his duty in his own name acquires the property, and is only liable to a claim of damages. The distinction is an obvious one, and it may sometimes be important where the rights of *bona fide* onerous purchasers are concerned. But the trustee in bankruptcy and the general creditors cannot in this matter be regarded as third parties, and this being so, I cannot hold that it makes any difference that the bankrupt was a person who held a fiduciary position towards Mrs Jopp without being trustee for her in the ordinary sense. It is well settled in English law that the distinction cannot be maintained in such a case as this, and I do not think that the passages to which I was referred in our institutional writers (Stair, i, 12, 16; Ersk. iii, 3, 34; 1 Bell's Com. 285-7) are really to the contrary. The matter was discussed and decided in the case of *Hallett* above cited, where the Appeal Court affirmed that there was no such distinction between an express trustee and an agent or collector of rents or anybody else in a fiduciary position.

"The real question is, whether and how far the proceeds of the bank shares can be traced or identified. Certainly the passing of the money through the agent's current account or deposit account will not prevent this result—see *Macadam* v. *Martin's Trustee*, 1872, 11 Macph. 33, and the English case of *Pennell*, 4 De Gex, M. & G. 372, as explained in the Lord President's opinion in *Macadam*. The requirements of the law as to the property or money claimed remaining distinguishable will be found fully stated in Bell's Com. i, pp. 286 and 287; it must be 'capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt.' I may be allowed to refer to the opinion of Lord Justice Thesiger in the case of *Hallett* above referred to, at p. 723, where he states the rule in terms which, though he speaks of a specific chattel being the subject of the trust, seems to me equally applicable to bank share certificates, and he adds that all the cases where it has been held that money mixed and confounded but still existing in a mass cannot be followed, 'may be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which these moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts—in other words, that they were cases where the relationship of debtor and creditor had been constituted instead of the relation either of trustee and *cestui que trust*, or principal and agent.' In the present case the relationship of client and agent or factor undoubtedly continued, and it would, in my opinion, have been an additional breach of his specific duty to Mrs Jopp if he had uplifted all the deposit-receipts and used them for his own purposes. This consideration furnishes the true answer to the respondent's further observation, that Mr Johnston's practice in handling his bank accounts was not to treat sums of capital separately and put them on deposit-receipt as such, but was simply to pass cheques on his current account when it was large enough and again to uplift the deposit-receipts and pay them in to the current account as it became depleted. I do not think the trustee in bankruptcy is entitled to avert an adverse decision by founding on the mode in which the bankrupt was accustomed to manipulate his bank accounts as regards sums which should never have entered there at all.

"I have hitherto treated Mrs Jopp's claim as a whole, without reference to the fact that the sum of £1239, 19s. 3d. paid in on 19th November, consisted in part (namely, to the extent of £45) of the half-year's rent of an Aberdeen property belonging to her. It was only the balance, £1194, 19s. 3d., which represented the bank shares sold, and the question is raised by the trustee whether the £45, which is of the nature of income, has not already been paid to Mrs Jopp. This is apparently not capable of exact demonstration, but it does appear that her accruing income, so far as

it reached Mr Johnston's hands, as her factor, continued after the sale of the bank shares to be treated in the same way as it had been treated before. Mr Johnston continued until his death to pay to her or for her behoof out of his bank account sums in name of income, and although no doubt he was indebted to her at his death he would be presumed to make the payments out of the income in his hands in the order in which the items of income had reached him. As it happens, however, this part of Mrs Jopp's claim stands in this peculiar position, that in a question with the trustee it is immaterial whether she succeeds in it or not. The fund *in medio* is the £1000 contained in the five extant deposit-receipts, with interest, and if Mrs Jopp's claim is sustained, as I think it must be, to the extent of the proceeds of the bank shares—namely, £1194, 19s. 3d., with interest—that will exhaust the fund in a question with the trustee, who plainly cannot compete with her upon it."

The respondent reclaimed, and argued—The money placed on deposit-receipt by Johnston was in the same position as if he had placed it to credit of current account. The petitioner had no better claim than any other creditor whose money had been placed on deposit-receipt—*Knatchbull* v. *Hallett* (1879), 13 Ch. D. 696. The present case differed from *Macadam* v. *Martin's Trustees*, November 5, 1872, 11 Macph. 33, 10 S.L.R. 30; there the money in question was distinguishable and specified. All that the petitioner could do was to constitute a claim—Stair, i, 12 and 16; Ersk. iii, 3-34. The deposit-receipts were in the same position as goods bought for another in the purchaser's name, and to such goods the purchaser's creditors would be preferred—*Baylstoun* v. *Robertson & Fleming*, 1672, M. 15,125.

Argued for the petitioner—The case of *Macadam* v. *Martin's Trustees*, *cit. sup.*, was not distinguishable. The bankrupt having mixed his own money with that which he held in trust, whatever was left was to be presumed to be the latter—*Pennell* v. *Deffell*, 1853, 4 De G. M. & G. 372. The deposit-receipts in question could never have existed but for the sum realised from the sale of the petitioner's stock. The respondent could have no higher right than the bankrupt would have had, and he would have had no answer to the petitioner's present claim.

At advising—

LORD JUSTICE-CLERK—The facts out of which this case has arisen are these. The late Mr Fleming Johnston, Writer to the Signet, died in July 1902, leaving his affairs in an embarrassed state, and investigation showed that they had been embarrassed for some time. He had a client, Mrs Jopp, from whom he held a factory and commission. Under that factory and commission he sold a number of shares belonging to her of the North of Scotland Bank without consulting her, and paid £1194, 10s. 3d. into his own bank account, being the price of these shares. They were paid by a cheque in his favour, and so had to pass through his account. There was an additional sum of £45 of rent due to Mrs Jopp paid in, and at the time there was a sum of £439, 17s. in the account, so that the total sum was £1679, 16s. 3d.

The evidence seems to show that Mr Johnston was anticipating the calling up of a bond for £1330 on a property belonging to him, and that he intended to utilise the price of the shares to meet the sum in the bond, and to grant a new bond in favour of Mrs Jopp. As it turned out, his creditor did not call up the bond, and he proceeded in the same month in which the price of the shares was realised to draw out £1500 from his bank account, and to obtain for the money seven deposit-receipts—one for £300, and six for £200 each. Two of these, the £300 one and one of £200, he uplifted. The remaining deposit-receipts were in his possession at the time of his death.

Only small sums, amounting in all to £27, 18s. 6d., had been drawn from his account between the time of the £1239, 14s. 3d, being paid in and the £1500 being drawn out to be exchanged for deposit-receipts. It is quite certain therefore that as there remained in his account a sum of £306, 17s. 9d. after the draft for the deposit-receipts, these deposit-receipts could not have been obtained except by the use of at least a large part of the money belonging to Mrs Jopp. The respondent in the petition admits that whatever view be taken as to the matter, at least £433 of the amount was necessarily Mrs Jopp's money.

Now, there can be no doubt whatever that throughout the whole time during which the price of these shares was dealt with Mr Johnston stood in a fiduciary relation to Mrs Jopp. When he received the price of the shares he held it with responsibility to hold it for her and for no one else. The question in the case is whether when Mr Johnston after receiving the money drew a cheque and obtained these deposit-receipts, he must be held to have done so for behoof of Mrs Jopp, and when he dealt with other sums in his account, taking money and using it, he must be held to have done so with his own money and not with hers. I agree with the Lord Ordinary when he says that the former is the sound view, and that to allow the creditors of Mr Johnston to succeed in maintaining the opposite view would be to enable them to benefit by Mr Johnston's breach of the trust relation in which he stood, and to force a settlement with Mrs Jopp on the footing that his money was preserved in the deposit-receipts and hers left in the ordinary account to be dealt with by him as if it was his own. I have no difficulty in holding with Sir George Jessell in the case of *Hallett* that, as he quoted from Lord Hatherley, "if a man mixes trust funds with his own the whole will be treated as trust property, except in so far as he may be able to distinguish what is his own." It is no doubt true that Mr Johnston was not in the strict sense of the word Mrs Jopp's trustee. He was undoubtedly, while he held the

money, under the obligations of trust, the obligation to hold it for another and to deal with it solely for that other's interest. Can this be got rid of by his passing it into his bank account or obtaining deposit-receipts for it. There is nothing in that to cause what is held in a fiduciary relation to merge into general debt as in a question between debtor and creditor. As Lord Justice Thesiger expressed in *Hallett's* case, the cases where moneys mixed cannot be separated "resolve themselves into cases where, although there may have been a trust with reference to the particular chattel which these moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves, beyond the ordinary duty of a man to pay his debts; in other words, that there had been cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent. Now here whatever Mr Johnston did the fiduciary relation of agent undoubtedly subsisted, and to have uplifted the whole of these deposit-receipts and used the contents for his own purposes would undoubtedly have been an absolute breach of his duty and the fiduciary position in which he stood. And I cannot hold that the trustee in Mr Johnston's sequestration is entitled to found on the mode in which Mr Johnston dealt with his bank account, seeing he dealt with them in a way which he should not have done if he was to do his duty by his client. Here, as in *Macadam's* case, Mr Johnston got the money into his hands for a definite purpose—I think plainly for investment in a bond to replace the one which he expected to be called up. There is no other explanation consistent with his honesty to account for the sale of the shares, and he so represented the matter in his letter as being for an investment. As in *Macadam's* case again, the proposed investment did not take effect, the bond not being called up, and so the money was in his hands, as it was in Mr Martin's hands, owing to delay of investment. The words of Lord Ardmillan in *Macadam's* case seem distinctly applicable here. "When he died he was bound to fulfil, and appeared able to fulfil, the trust," which was to invest the money. . . . Since his death it has been discovered that he was insolvent. And the Court held that the trust adhered to the sum so deposited, and indicated that Martin's trustee could not claim the money which it would have been a breach of trust and fraud for Martin to have applied to his own purposes. The Lord President in concurring referred to the English case of *Pennell*, quoting with approval Mr Lewin's statement that the Court in such a case will disentangle the account." The opinions in that case, which I have read, are very emphatic and instructive, and all tend to the same conclusion.

Upon the whole matter I concur in the opinion of the Lord Ordinary, and would move your Lordships to affirm his interlocutor.

LORD YOUNG—I concur in the result, and generally in the views stated by the Lord Ordinary and by your Lordships. I think that the question here is really one of fact to be determined on the evidence before us. I cannot say that the question is free from difficulty, but on the whole I think this money is identified, or to use a very appropriate expression, is earmarked, as the money of the client. On that ground, that the money is on the evidence sufficiently identified or earmarked as the money of the client, I concur in the judgment proposed by your Lordship.

LORD MONCREIFF—The Lord Ordinary's interlocutor is right. On 19th November 1900 Mr Johnston, without authority, sold 125 shares belonging to his constituent Mrs Jopp, for which, together with £45 of interest, or rents collected, he received £1239, 19s. 3d., which he paid into his account-current with the Commercial Bank. There was at that date standing at his credit on his own account a sum of £439, 17s. On 21st November he paid in a sum of £155, including £139 income due to Mrs Drummond. After deducting certain small sums drawn out there stood at his credit on 22nd November £1806, 17s. 9d. On the same day he passed a cheque on his current account for £1500 and received in exchange seven deposit-receipts, six for £200 each, and one for £300. Of these deposit-receipts five for £200 each remained extant at Mr Johnston's death in July 1902, two and a-half years later, and these are the deposit-receipts which the petitioner Mrs Jopp now claims to be taken out of the sequestration under section 104 of the Bankruptcy (Scotland) Act 1856.

Before proceeding further I may state what I understand to be the law which is recognised and illustrated in the English and Scottish decisions to which the Lord Ordinary refers.

*First*, where a trustee or agent, with or without authority, sells trust property and lodges the proceeds of the sale in bank in his own name, the money so lodged can be followed and vindicated by the truster provided it can be traced with reasonable certainty.

*Secondly*, this holds good not only as between the truster and the trustee but also as between the truster and the trustee's trustee or assignee in bankruptcy acting for the general body of his creditors.

*Thirdly*, the proceeds of the sale can be vindicated although they may have been blended with moneys belonging to the trustee. And

*Fourthly*, if after the proceeds of trust property are so lodged and blended with the trustee's own funds, the trustee, for his own purposes, draws out part of the mixed funds he will be held to have drawn out his own funds and not those which represent the proceeds of the trust estate.

Now, I do not think that I misrepresent

Mr Horne's able and candid argument for the reclaimer when I say that he disputes one and all of these propositions.

I shall afterwards have something to say upon the authorities, but before doing so I shall proceed to ascertain what were the funds with which the seven deposit-receipts were purchased? Taking the most unfavourable view for Mrs Jopp, it is clear to demonstration that those deposit-receipts which cost £1500 in all were purchased, at least to the extent of upwards of £900, with the proceeds of Mrs Jopp's 125 shares which Mr Johnston on 19th November sold without her authority. I do not admit that that is the limit of Mrs Jopp's claim, and the question is so far simplified by the fact that Mrs Drummond, whose claim was rejected by the Lord Ordinary, has not reclaimed against his decision. She now lays no claim to any part of the five deposit-receipts, and the question therefore lies entirely between Mrs Jopp and Johnston's trustee in bankruptcy.

Now, when the deposit-receipts were purchased, Mr Johnston had standing at his credit in an account-current £1806, 17s. 9d., which consisted to the extent of £1239, 19s. 3d. of money belonging to Mrs Jopp. Therefore, apart from Mrs Jopp's money, he had, counting everything, only £566, 18s. 6d. which could be held to have entered the deposit-receipts amounting to £1500 in the most unfavourable view for Mrs Jopp. Therefore, deducting £566, 18s. 6d. from £1500, we find there remains a balance of £933, 1s. 6d. which must have been made up of Mrs Jopp's money.

But not content with docking the £1500 at one end to the extent of £566, 16s. 6d., the reclaimer endeavours to cut down Mrs Jopp's interest at the other end in this way. He points out that on 23rd April and 3rd May 1901 respectively Mr Johnston cashed two of the deposit-receipts amounting together to £500, and he maintains that it must be presumed that the money so drawn out was Mrs Jopp's money, and that therefore the most that she can possibly claim, although he does not admit that she is entitled to it, is £433, 1s. 6d. It seems to me that this contention is entirely against all equity, principle, and decision. But fortunately there is ample authority both in the law of England and Scotland to lead to the rejection of the defender's contention. The result of those authorities is, that in such a case where a client's money has in a certain sense been mixed with that of the trustee or agent it can be traced and disentangled, and that if in the meantime the trustee or agent has drawn money out of the mixed fund it is to be presumed that the money which he has drawn is his own.

The identification of the proceeds of the 125 shares is in this case greatly simplified by the fact that Mr Johnston allowed five of these deposit-receipts which were lodged on 21st November 1900 to remain extant until his death in July 1902, although in the interval he uplifted several deposit-receipts of a later date. The reasonable inference is that, whatever may have been Mr Johnston's original intention as to the use to which the proceeds of the shares should be put, he desired, so far as possible, that at least to the extent of £1000 they should remain ear-marked.

I go further. In my opinion the reasonable inference from the evidence is that Mr Johnston put the whole of Mrs Jopp's money, amounting to £1239, 19s. 3d., into the deposit-receipts. It is true that in April and May 1901 he drew out and applied to his own purposes two deposit-receipts representing £500. These Mrs Jopp does not seek to follow; but there remain five deposit-receipts, amounting in all to £1000, which I think unquestionably represent the proceeds of her shares.

The Lord Ordinary has gone so fully into the authorities that I do not propose to detain your Lordships by a detailed examination of them. They were all cases in which the question was between the truster or *cestui que trust* and the assignees in bankruptcy of the trustee or agent. One of the most important of these cases is *Pennell* v. *Deffell* (1853), 4 D. M. and G. p. 372. I refer particularly to a passage in the judgment of Lord Justice Knight Bruce on pp. 383-384:—"When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent* it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on one hand and the trust on the other. Whether the *cestuis que trustent* are bound to take to the debt—whether the deposit was a breach of trust—is a different question. This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own."

The opinion of Lord Justice Turner is to the same effect.

That part of the decision was approved and followed on this point in the leading case *in re Hallett's Estate* (1879), L.R., Ch. Div. 696, in which the Master of the Rolls, Sir George Jessell, emphatically endorsed the views expressed by Lord Justice Knight Bruce in *Pennell's* case; see also 1 Bell's Com. pp. 286-7.

The only other decision to which I think it necessary to refer is a Scottish decision of the First Division of the Court—*Macadam* v. *Martin's Trustees*, November 5, 1872, 11 Macph. 33. This decision, which was delivered after *Pennell* v. *Deffell*, and before the decision *in re Hallett's Estate*, was given in a case between the clients of a law-agent and the trustee on the law-agent's bankrupt estate. As here, the client applied under the 104th

section of the Bankruptcy Act 1856 to have a sum of £1000 which had been given to the law-agent to be invested in a heritable security and which he had paid into his own bank account, taken out of the bankrupt estate. The Lord Ordinary, whose judgment was adhered to, found that the petitioners had right to the £1000, and that the same must be taken out of the sequestration of the deceased law-agent.

The Lord President held that the point had been expressly and rightly decided in the case of *Pennell* v. *Deffell*.

For a concise statement of the law of England, which was recognised in *Macadam's* case to be the same as the law of Scotland, I may refer to the 10th Edition of Lewin on Trusts, ch. 31, sections 2-5, pp. 1095-97.

I am therefore of opinion that the Lord Ordinary's judgment should be affirmed.

LORD TRAYNER was absent.

The Court adhered.

Counsel for the Petitioner and Respondent—Salvesen K.C.—D. Anderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent and Reclaimer—Mackenzie, K.C.—Horne. Agents—J. & R. A. Robertson, W.S.

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*Saturday, July* 16.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.

## BROWN *v.* J. & J. CUNNINGHAM, LIMITED.

*Master and Servant — Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1) *and First Schedule* 1 (*b*)—*Limit of Employer's Liability — Amount of Compensation — Average Weekly Earnings — Weekly Wages Fixed by Contract.*

Where there is a contract between an employer and a workman for a fixed weekly wage and the contract is fulfilled over one week, the fixed weekly wage is the true basis for determining the amount of compensation payable under the Workmen's Compensation Act 1897.

A workman was engaged by his employer on Saturday 20th February at a wage of £1 per week. He worked on that day and during the whole of the succeeding week. He was injured by an accident in the course of his employment on Thursday 25th February but continued in his employment till Saturday the 27th, when his engagement was terminated by his employer, who paid him at the rate of £1 per week for the period of his employment.

Total incapacity for work having resulted from the injury, the workman claimed compensation from his employer under the Workmen's Compensation Act 1897.

*Held* that his average weekly earnings within the meaning of section 1 (*b*) of the First Schedule to the Act amounted to £1, being the rate at which he was employed and paid.

The Workmen's Compensation Act 1897, First Schedule (1), enacts—"The amount of compensation under this Act shall be—. . . (*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding 50 per cent. of his average weekly earnings during the previous twelve months if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed £1."

This was an appeal upon a stated case from the Sheriff Court at Edinburgh in an arbitration under the Workmen's Compensation Act 1897, between William Brown, Tolbooth Wynd, Leith, pursuer and respondent, and J. & J. Cunningham, Limited, Leith, defenders and appellants, in which the pursuer claimed compensation from the defenders at the rate of 11s. weekly from 17th March 1904.

The Sheriff Substitute (GUY) held the following facts proved or admitted—"(1) That the appellants carry on trade at Bowling Green Street, Leith, as manufacturers of artificial manures and oil-cake. (2) That in the premises occupied by them at Bowling Green Street aforesaid, mechanical power, namely, machinery driven by steam, is used in aid of the manufacturing process. (3) That the said premises are a factory within the meaning of the Workmen's Compensation Act, 1897. (4) That on Saturday, 20th February 1904, the respondent was employed by the appellants to assist in the removal from one part of said premises to another, certain locust beans and crushed bones. (5) That the appellants contracted and agreed to pay to the respondent £1 a-week for his labour. (6) That the respondent worked on Saturday, 20th February, and thereafter on Monday 22nd, Tuesday 23rd, Wednesday 24th, and Thursday 25th February, on which date one of the fingers of his left hand was penetrated by a portion of one of the bones he was engaged in removing. That the respondent continued to work after his said injury on the day on which he received it and on the two followings days, on the latter of which (Saturday, 27th February) the appellants terminated his employment, and paid him in one sum at the rate of £1 per week for the whole period of his employment, together with a small sum for overtime. (7) That blood poisoning resulted from said injury, necessitating the amputation of the finger. (8) That total incapacity for work resulted from the injury. (9) That the respondent is a workman and the appellants are the undertakers within the meaning of the said Act."

The Sheriff-Substitute further stated—"In these circumstances I held in law that