

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—  
Constable, K.C. — Mackenzie Stuart.  
Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender (Reclaimer) —  
Hunter, K.C.—D. Anderson. Agents—  
Skene, Edwards, & Garson, W.S.

Tuesday, October 26.

FIRST DIVISION.

CHERRY AND ANOTHER v. PATRICK.

Trust—Trustee—Removal—Nobile Officium  
—Action by Trustee against Trust Estate  
—Refusal to Resign.

A trustee raised an action against his co-trustees and himself in which he sought payment of a certain sum out of the trust estate. The claim involved a charge of personal dishonesty against the truster. The trustee having refused to resign, the Court on the petition of two out of the other three co-trustees removed the trustee from his office.

Mrs Alice Adamson or Cherry, widow of James Cherry, and the Reverend Alexander Copland, two of the four testamentary trustees of the said James Cherry, presented a petition to the Court for the removal from office of Hugh Patrick another trustee. The fourth trustee was a Mr Robert Paton. The truster had been interested to the extent of one-third in a public-house business at 362 Main Street, Bridgeton, Glasgow, the remaining two-thirds interest belonging to Mr Patrick.

The petitioners, *inter alia*, averred—“For some time after the trust came into existence matters proceeded smoothly, but latterly there has been much friction among the trustees, and the affairs of the trust have now been brought to a standstill. In January 1909 Mr Patrick made a claim against the trustees in connection with the late Mr Cherry's management of the business at 362 Main Street, Bridgeton, Glasgow. This claim, which was originally for £500, was put later at £306, 3s. 9d., and in an action at present pending in the Court of Session by Mr Patrick against the trustees it is stated at £283, 18s. 6d. A print of the record in this action, showing the nature of the claim, is herewith produced and referred to. [From this it appeared that the claim involved a charge of dishonesty against Mr Cherry.] No details of the claim have ever been submitted to the trustees. The petitioners consider that Mr Patrick ought not to take part in the consideration of this claim, both because it is a claim made by himself against the trust estate, and also because it involves a charge by him of personal dishonesty against the late Mr Cherry. They have, accordingly, asked him to resign office as a trustee before consideration of the claim

is taken up. He declines to do so, however, and in this attitude he is supported by Mr Paton, so that there is a deadlock in the administration of the trust.”

Answers were lodged for the respondent in which he stated, *inter alia*—“The respondent has always been willing and anxious to perform his duty as a trustee under the said trust-disposition and settlement, and there is no ground for the demand made by the petitioners that he should resign or for his removal. There is no antagonism between his interest as a trustee and as an individual, and the respondent is quite able and willing to perform his duties as trustee without any prejudice being suffered by the said trust estate.”

Argued for the petitioners—The position of the respondent suing the trust made it impossible for him to remain as trustee.

Argued for the respondent—No deadlock had occurred and no charge of dishonesty or fraud was made against the respondent. In these circumstances there was no good ground and no precedent for removing him from office.

LORD PRESIDENT—This is a petition at the instance of two of the trustees of a deceased publican, and prays for the removal of another trustee. The deceased publican died and left behind him practically nothing except certain interests in public-house businesses. He left four trustees—his wife and a clergyman, the petitioners; one trustee who is an insurance agent; and the respondent, who is a wine and spirit merchant. This wine and spirit merchant was associated with the deceased truster in some of his businesses, but not in all. Now the only relevant averment made by the petitioners is this, that the respondent has raised an action against the body of trustees, of whom he is one, in which he seeks payment of a sum of between £200 and £300, upon the allegation that this sum is due by the trust estate in respect of what really—I need not mince my words—in respect of what really comes to a charge of falsehood and fraud on the part of the deceased truster. This action the petitioners naturally feel a wish to resist; and I confess that the moment the facts are stated it seems to me perfectly impossible for a person to occupy at one and the same moment the position of being the pursuer against the trust estate upon the ground that the truster had cheated him, and at the same time be one of the body of trustees whose business it is to defend the action. Of course this is a supervening disability, because no such action was mooted at the time of the truster's death, and I am not giving any opinion on the merits of this matter, of which I know nothing. I am willing to assume that the respondent thinks it his duty to himself to raise this action. So be it. Mr Sandeman has said that there is no precedent for such a petition, but I do not think that any precedent is needed, but only a little common sense. As there is nothing said against the gentleman except that he is in this impossible position, we

should be perfectly willing to allow him to resign, and I put that to his counsel, but his counsel says he has instructions to give no such undertaking, and I am afraid, therefore, there is nothing for us to do but to remove him.

LORD KINNEAR—I think the respondent has taken an action which is incompatible with his performance of the trust duties, and therefore he must either resign or be removed. The two positions of pursuer of an action of this kind against the trustees and defender of that action in the character of trustee are absolutely conflicting, and in my opinion the respondent cannot be allowed to continue in the trust.

LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court granted the prayer of the petition.

Counsel for the Petitioners—Morton. Agent—John N. Rae, S.S.C.

Counsel for the Respondent—Sandeman, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Thursday, June 24.

## OUTER HOUSE.

[Lord Salvesen.

### ABERCROMBY AND OTHERS v. BADENOCH AND OTHERS.

*Valuation Roll—Finality—Erroneous Entry in Roll—Action in Court of Session for Relief from Assessment—Reduction of Entry in Roll—Competency—Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 30.*

The Valuation of Lands (Scotland) Act 1854, sec. 30, enacts—"No valuation of any lands or heritages contained in any valuation roll under this Act shall be rendered void or be affected by reason of any mistake or variance in the names of such lands or heritages, or in the Christian or Surname or Designation of any proprietor or tenant or occupier thereof, and no valuation roll which shall be made up and authenticated in terms of this Act, and no valuation which shall be contained therein, shall be challengeable, or be capable of being set aside or rendered ineffectual, by reason of any informality, or of any want of compliance with the provisions of this Act, in the proceedings for making of such valuation or valuation roll."

A body of trustees were entered in the valuation roll as proprietors, tenants, and occupiers of salmon fishings, and on appeal to the magistrates the entry in the roll was sustained. They brought an action in the Court of Session concluding for reduction of the

entry in the roll, and also for declarator that they were not liable to assessments in respect thereof, and for interdict to restrain any proceedings against them for recovery.

*Held (per Lord Salvesen, Ordinary)* that the action was competent as regards the conclusions for declarator and interdict. *Sharp v. Parochial Board of Lathron*, July 12, 1883, 10 R. 1163, 20 S.L.R. 771, *followed*.

*Observations* as to the competency of the reductive conclusion of the summons.

*Valuation Roll—Subjects Entered—Persons "in the Actual Receipt of Rents and Profits of Lands and Heritages"—Mid-Superior of Salmon Fishings who has Imposed Restriction on Method of Fishing by His Donee—The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 42.*

The Valuation of Lands (Scotland) Act 1854, sec. 42, enacts—" . . . The word 'proprietor' shall apply to life-renters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages. . . ."

The proprietor of certain salmon fishings in the sea, disposed them by feu-disposition to trustees, who by feu-disposition disposed them to a third party, but under burden of a restriction prohibiting such third party from fishing with net and coble. The trustees were entered in the valuation roll as proprietors of fishings.

*Held (per Lord Salvesen, Ordinary)*, in an action of declarator and interdict, that the trustees were not proprietors of fishings within the meaning of the Valuation of Lands (Scotland) Act 1854, and were not liable to be assessed in respect thereof.

This was an action at the instance of Sir George William Abercromby of Birkenbog and Forglie, Bart., and others, as trustees on behalf of the riparian proprietors of the river Deveron, acting under a deed and declaration of trust executed by them, and dated 1st, 2nd, 5th, and 7th November 1907, against (1) John A. Badenoch, assessor of the burgh of Banff, (2) James Morrison, solicitor, Banff, clerk and treasurer of the District Board of the river Deveron, for himself and as representing the District Fishery Board, (3) the Parish Council of Banff, (4) C. W. Cosser, collector of poor and school rates of the parish of Banff, (5) the Provost, Magistrates, and Councillors of the Royal Burgh of Banff, and (6) Alexander Simpson, burgh collector.

The summons concluded (1) for reduction of an entry in the valuation roll of the burgh and parish of Banff for the year ending Whitsunday 1907, whereby the pursuers were entered as proprietors, tenants, and occupiers of "salmon fishings in sea *ex adverso* of burgh of Banff," (2) for declarator that the pursuers were not proprietors,