locutor was issued by the Land Court:— . . . 'Find that the applicant was, on 1st April 1912, in lawful possession as a resident tenant from year to year in and of the holding specified in the application: Therefore repel the objection to the competency of the application founded on the said notice of removal. . . ."

The *questions of law* were—"(1) Whether the applicant was on 1st April 1912 a tenant from year to year within the meaning of the Small Landholders (Scotland) Act 1911, and particularly of section 2, subsections (1) (ii) and (2), and section 32, subsection (1) thereof? And (2) Whether and in respect that the applicant had been served before the said Act passed, with notice to remove from his said holding at the term of Whitsunday 1912, the said application was competently made to the Land Court?"

Argued for appellants—Where, as here, the tenant had received notice to remove before the passing of the Act he was not entitled to the benefits of its provisions.

Counsel for respondent was not called upon.

LORD PRESIDENT—[*After referring to the decision in Clyne* v. *Sharp's Trustees, supra*]—It is argued here that the tenant does not come within the words of section 2 (1) (ii) of the Act because he received a notice of removal at Whitsunday 1912. Doubtless if the law had not been altered the effect of that notice of removal would have been that when Whitsunday came the tenant would not enter upon another year on tacit relocation but would have to go. But then the Act of Parliament was passed which puts the statutory right in front, so to speak, of the landlord's right to let the holding to whom he pleases, and it seems to me that if it had been intended to exclude from the statutory right any tenant who was sitting under notice to quit nothing would have been easier than for the Act of Parliament to say so. The Act, however, does not say so, and I think that that determines the matter.

LORD KINNEAR—I agree.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I agree.

The Court answered the second question in the affirmative, and refused to answer the first question as stated.

Counsel for Appellants—D. M. Wilson. Agents—Duncan & Hartley, W.S.

Counsel for Respondent—W. Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, December 7, 1912.

BILL CHAMBER.

[Lord Hunter.

A *v.* B.

Bankruptcy—Sequestration—Deed of Arrangement duly Confirmed by the Court—Petition for Sequestration by Creditor in Debt Incurred Subsequent to Deed of Arrangement — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 18 *and* 38.

The Bankruptcy (Scotland) Act 1856, sec. 18, provides—"That no sequestration shall be awarded by any Court after production of evidence that a sequestration has already been awarded in another Court and is still undischarged." Section 38 enacts that if the Lord Ordinary or Sheriff is satisfied that a deed of arrangement "has been duly entered into and executed and is reasonable, he shall approve thereof, and declare the sequestration at an end; and such deed shall thereafter be as binding on all the creditors as if they had all acceded thereto; provided always that the sequestration shall receive full effect in so far as may be necessary for the purpose of preventing, challenging, or setting aside, preferences over the estate."

The creditors of A, who had been sequestrated, entered into a deed of arrangement for winding up A's affairs, which was duly confirmed by the Court, and the sequestration was declared to be at an end. B, a creditor of A in a debt incurred subsequent to the deed of arrangement, then took proceedings for sequestration of A's estates, which were objected to by A and by C, the trustee under the deed of arrangement. *Held* (*per* Lord Hunter) that the proceedings for sequestration taken by B were competent.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), secs. 18 and 38, so far as required are quoted *supra in rubric.*

This was a note of suspension and interdict brought by A, and by C, the trustee under a deed of arrangement between A and his creditors, against B, in which A and C sought to interdict B from taking further proceedings in a petition for the sequestration of A's estates.

The circumstances of the case and the contentions of parties appear from the Lord Ordinary's note *infra.*

LORD HUNTER — This is certainly an unusual application. On 30th November 1912 I pronounced the first deliverance in an application for the sequestration of the estates of the bankrupt. The application was made at the instance of a creditor, who in his affidavit and claim stated that the debtor was justly indebted and owing to him £300, being the principal sum contained in an extract registered protest at the instance of the applicant against the bankrupt dated 16th Novem-

ber 1912 and registered in the Books of Council and Session 20th November 1912. No caveat had been lodged by the debtor though he had been charged on 23rd November 1912 to make payment of the sum mentioned in the protest.

On 2nd December 1912 this note of suspension and interdict was presented to me at the instance of the bankrupt and the trustee acting under a deed of arrangement between the bankrupt and his creditors dated 18th, 20th, 25th, 26th September and 9th October 1912, as complainers against the said creditor as respondent, in which the complainers ask that the respondent be interdicted from taking any further or other proceedings in the petition for sequestration of the estates of the complainer, and in particular from advertising or instructing advertisement of the said first deliverance on said petition for sequestration in the "Edinburgh Gazette," and generally from taking any other proceedings in the said petition for sequestration.

From the statement of facts for the complainers it appears that the estates of the complainer were sequestrated on 13th August 1912 by the Lord Ordinary officiating on the Bills under and in terms of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same. The first deliverance in the petition for sequestration was pronounced on 19th July 1912. The meeting of creditors for the election of a trustee or trustees in succession and commissioners on the said sequestrated estate was appointed by said deliverance to be held on 27th August 1912.

At this meeting of creditors it was unanimously resolved that the estates of the debtor should be wound up under deed of arrangement. Application was accordingly made to the Sheriff, who granted an order confirming the deed of arrangement on 19th October 1912. The other complainer is the trustee acting under that deed of arrangement.

The complainers maintain that the petition for sequestration at the instance of the respondent is incompetent in respect that the bankrupt under the sequestration before narrated is completely divested of the whole estate presently belonging to him or that may hereafter be acquired by him prior to the date of his discharge.

They found upon sections 18 and 38 of the Bankruptcy Act 1856. By the first of these sections it is provided that no sequestration shall be awarded by any Court after production of evidence that a sequestration has already been awarded in another Court and is still undischarged.

Section 38 of the Act provides, as regards a deed of arrangement, that if the Sheriff be satisfied that it "has been duly entered into and executed, and is reasonable, he shall approve thereof, and declare the sequestration at an end, and such deed shall thereafter he as binding on all the creditors as if they had all acceded thereto—provided always that the sequestration shall receive full effect in so far as may be necessary for the purpose of preventing, challenging, or setting aside preferences over the estate."

In accordance with the provision in this section, the Sheriff in this case, on 19th October 1912, not only confirmed the deed of arrangement but declared the sequestration of the complainer awarded 13th August 1912 (the first deliverance being dated 19th July 1912) to be at an end. That judgment was duly recorded in the Register of Sequestrations and the Register of Inhibitions.

The complainers, however, maintain that, in view of the proviso in section 38, the sequestration granted on 13th August is undischarged, and that therefore section 18 of the Act precludes another award of sequestration. It was maintained that if an award of sequestration were now to be pronounced there would be two officials managing the same estate, and that the interests of the creditors for whose benefit the estates of the bankrupt are being wound up under the deed of arrangement would be prejudicially affected. The trustee under the deed of arrangement is not however in any sense an officer of Court, and the deed itself is in reality in the nature of a private arrangement between the bankrupt and his creditors sanctioned by statute. As is pointed out by Mr Goudy in his work on Bankruptcy (p. 454) a deed of arrangement is more properly a mode of annulling a sequestration process than of winding up. A creditor in the position of the present respondent, whose debt was incurred subsequent to the date of the former sequestration, takes no benefit under the deed of arrangement. It may of course be said that in any case of sequestration a creditor whose claim has arisen subsequent to the award of sequestration has no claim against the estate of an undischarged bankrupt. In the latter case, however, an undischarged bankrupt who has obtained credit to the extent of £20 without disclosing the fact that he is an undischarged bankrupt, is by the Act of 1884 (47 and 48 Vict. cap. 16) guilty of a crime and offence and liable to a sentence of imprisonment. I do not think that a debtor whose sequestration has been terminated by a deed of arrangement exposes himself to this penalty. By the granting of sequestration the creditor may not derive any immediate benefit because the trustee in the sequestration will, I apprehend, be bound to respect the rights of the creditors under the former sequestration, and the trustee under the deed of arrangement will only be bound to denude subject to such rights as he may have acquired on behalf of those creditors. I cannot, however, hold that this is a ground for refusing an award of sequestration if the statutory requisites are present.

I have expressed my view upon this point because both parties asked me to do so. I am not, however, prepared to affirm that the present is a competent method of staying statutory procedure following upon my interlocutor of 30th November. Assuming competency, I refuse the note on the grounds I have stated.

The Lord Ordinary refused the note of suspension and interdict.

Counsel for the Complainers—D. Anderson. Agents—J. A. B. Horne & Mustard, S.S.C.

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

HIGH COURT OF JUSTICIARY.

Tuesday, May 27, 1913.

(Before the Lord Justice-General, Lord Kinnear, and Lord Johnston.

LEAVACK *v.* MACLEOD.

Justiciary Cases—Procedure—Evidence—Question Addressed by Magistrate to Person not a Witness in the Cause, after Conviction of Accused but before Sentence—Competency.

In the course of the trial of a carter, on a charge of reckless driving, which had resulted incidentally in damage to a tram-car, the Magistrate convicted the accused, but before passing sentence put a question to the tramway manager, who was present in Court, but was not a witness in the case, as to the amount of the damage sustained by the tram-car. The manager in reply mentioned the sum at which he estimated the damage. The Magistrate thereafter imposed a fine of thirty shillings on the accused.

Held, in a suspension, that the question put by the Magistrate was improper and incompetent, and conviction *quashed*.

Question, whether the result would have been the same if the question had been addressed by the Magistrate to the prosecutor in the case.

William Leavack, carter, was charged on 29th January 1913 in the Police Court at Leith at the instance of John Macleod, Burgh Prosecutor, with recklessly driving a horse attached to a lorry contrary to the Burgh Police (Scotland) Act 1892, section 381 (8). The accused pled not guilty, but, after evidence had been led he was found guilty as libelled and fined thirty shillings, and in default of payment sentenced to fifteen days' imprisonment.

The accused brought a bill of suspension, in which he, *inter alia*, stated—"From the evidence it appeared that a tramway car, the property of the Leith Corporation, and the complainer's lorry, had come into collision with one another. Thereafter, when both prosecutor and complainer had closed their proofs, and prior to finding the complainer guilty or passing sentence upon complainer, the Magistrate asked the prosecutor the amount of the damage which had been done to the Leith Corporation's tramway car by the collision with the complainer's lorry. The prosecutor replied that he had no information on that point, whereupon the Magistrate called upon Mr Fitzpayne, the manager of the Leith Corporation Tramways, who had made it his business to be in the Court, but who had not been a witness in the case, and had not been sworn, to tell him the damage that the tram-car had sustained. Mr Fitzpayne replied that the damage in question was about thirty shillings. The Magistrate then found complainer guilty of the offence libelled, and fined him thirty shillings with the alternative of fifteen days' imprisonment."

Answers were lodged for the respondent in which he, *inter alia*, stated—"Explained that on the conclusion of the evidence for the complainer and respondent the presiding Magistrate intimated that he found the accused guilty of the charge. Thereafter, before formally passing sentence, Mr Fitzpayne, manager of Leith Corporation Tramways, who happened to be in Court as a member of the public, stated in answer to a question from the Magistrate that the damage to the car was about 30s. The Magistrate thereafter formally pronounced sentence on the accused, ordaining him to pay a fine of 30s. with the alternative of fifteen days' imprisonment. Explained that when the presiding Magistrate put the before-mentioned question to the said Mr Fitzpayne, and received the answer above referred to, no objection was taken either to the question being put by the Magistrate to Mr Fitzpayne nor to the said answer being given."

The complainer pleaded—"1. The said pretended warrant or conviction and sentence ought to be suspended in respect (1) that it was pronounced upon and pursuant to a statement made to the Court after proof upon the case was closed; (2) that said statement, even although a relevant and competent one if made in the conduct of the case, was made by a party who was not upon oath, and after the evidence in the case had been concluded. 2. The proceedings of the magistrate as condescended on being oppressive, corrupt, and malicious, the said pretended warrant or conviction and sentence ought to be quashed."

Argued for the complainer—The Magistrate's decision as to penalty having been affected by the answer to an incompetent question the conviction was bad. The question was incompetent, both on the ground that the proof had been closed and that it was put to a person who was not a witness on oath and who had been in court during the evidence in the cause. This was clearly distinguishable from the case of a judge putting a question to the prosecutor and eliciting something which was within the knowledge of the accused, and might be denied by him if so advised. Counsel referred to the following cases—*Docherty & Graham* v. *Maclennan*, 6 Ad. 700, 1912 S.C.(J.) 102, 49 S.L.R. 997; *Todd* v. *Anderson*, 6 Ad. 713, 1912 S.C.(J.) 105, 49 S.L.R. 1002; *M'Lean* v. *Skinner*, 5 Ad. 376, 1907 S.C.(J.) 96, 44 S.L.R. 735; *Campbell* v. *Kerr*, 6 Ad. 550, 1912 S.C.(J.) 10, 49 S.L.R. 197.