to confirm his title to get a valid renunciation, which was the only thing the defender could not do without the pursuer's aid. The pursuer did not thereby give any consideration such as would induce the defender to increase the extent of his liability, since it was to the pursuer's interest to get back the farm so as to be able to re-let it, and accordingly the defender could not be held, either by receiving the consent and accession or by executing the deed of renunciation, to have rendered himself personally liable.—*Kirkland* v. *Sharpe*, March 1, 1833, 6 W. & S. 340, at 351. And yet if the Lord Ordinary were right, the defender would have rendered himself liable for arrears of rent as well as for the rent for the current year.—*Dundas* v. *Morison*, Dec. 4, 1857, 20 D. 225; Ersk. ii. 6, 34; *Ross* v. *Monteith*, Feb. 15, 1786, M. 15,290. Such a claim could not be made, and was not made here, and the defender having done nothing which showed he had absolutely adopted the lease, could not be held liable.—*Kirkland* v. *Cadell*, March 9, 1838, 16 S. 860; *Munro* v. *Fraser*. Dec. 11, 1858. 21 D. 103; *Strathmore's Trustees* v. *Kirkcaldy*, June 21, 1853, 15 D. 752.

Argued for respondent—The cases quoted for the defender were those of a trustee in a sequestration, with statutory rights and duties. Here there was a trustee deriving his rights from a voluntary trust deed, with a deed of accession by the landlord, and of renunciation by himself, and the question must be decided by these deeds. The result of the deeds was to make the defender a tenant. The trust deed had been conceived, not with a view of instant renunciation by the defender, but of his carrying on the lease to its natural termination, and accordingly the question really was more, what were the powers of the defender, than what he actually did.

By the deed of accession the pursuer had given up an actual right, viz., that of suing the tenant for breach of contract in giving up the lease, and had validated the assignation. The defender had possession under these deeds, and had the full benefit of the crop for the year, so there was no hardship in holding him personally liable.

The fact that the pursuer had not sued for arrears did not deprive him of the right to sue for the year's rent.

At advising—

LORD ADAM—[*After narrating the facts*]—It is clear that the assignation of the lease and power of management conferred on the defender were not valid without the consent of the pursuer. But by the document dated 20th May 1895 the pursuer acceded to the trust deed and consented to the assignation of the lease of Hilton therein contained—the accession and consent being on the footing that the lease should be renounced by the defender as from Martinmas then next. Subsequently on 29th June 1895 the defender executed a renunciation of the lease of the farm in favour of the pursuer.

The defender entered into possession of the farm and continued in possession of it until Martinmas 1895. He managed and cultivated the farm during that time, and he reaped the crop of the year.

It appears to me to be clear, on the face of the documents to which I have referred, that he did so as tenant under the assignation granted in his favour by Mr Richmond and consented to by the pursuer.

But it is said by the defender that that was not the character in which he possessed the farm. He avers that in point of fact the pursuer never consented to any beneficial assignation of the lease, but only agreed to the occupation of the farm by the defender till Martinmas 1895 in order that the defender might realise the stock and wind up the tenancy, and that in administering the farm he has done nothing beyond realising the crop of the year 1895 and stock in terms of the trust deed.

It may be, as the Lord Ordinary says, that the defender might have done substantially all that he did towards realising the crop and stock without becoming actual tenant of the farm. I do not know how that may be, but if that was all that was intended it is not easy to understand why the transaction should have taken the form which it did, or why the pursuer's consent to the assignation of the lease in the defender's favour should have been sought and obtained—and the renunciation of the lease by him as tenant stipulated for. I think it is clear that his possession of the farm was under the assigned lease.

It is true that the pursuer acceded to the trust, but it does not follow from that that he was entitled only to a dividend on the rent of the farm for crop and year 1895. If I am right in what I have before said, that rent was not a debt of Mr Richmond's, but was due by the defender himself as tenant of the farm for that period.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Sym—Macfarlane. Agents—Lindsay, Howe, & Co.. W.S.

Counsel for the Defender—W. C. Smith—C. K. Mackenzie. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, October 27.

FIRST DIVISION.

[Lord Pearson, Ordinary.

G. & W. RIDDELL *v.* GALBRAITH.

Bankruptcy — Recal of Sequestration — Account of Concurring Creditor—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 21.

Sequestration was awarded by the Sheriff on a petition in which the concurring creditor had produced an affidavit and relative account in which all

the items were stated as "to goods" without any specification of their nature. *Held* (*aff.* judgment of Lord Pearson, *diss.* Lord M'Laren) that the account was not sufficiently vouched in terms of section 21 of the Bankruptcy Act 1856, and consequently that the award of sequestration must be recalled as incompetent.

Ballantyne v. *Barr*, January 29, 1867, 5 Macph. 330, *followed*.

On 17th June 1896 the Sheriff of Aberdeen, Kincardine, and Banff awarded sequestration of the estates of Alexander Walton, cycle manufacturer, Aberdeen, upon the petition of the bankrupt, with concurrence of John Gordon, cycle warehouseman, Banff, a creditor to the extent of £271.

The account signed as relative to the said concurring creditor's affidavit contained no specification of the articles supplied by him to the bankrupt, but merely stated the items under different dates as "to goods.'

Messrs G. & W. Riddell, manufacturers, Aberdeen, and creditors of the bankrupt to the extent of £24, presented a petition to the Lord Ordinary on the Bills for recal of the sequestration on the ground that the above-mentioned account was not sufficiently specific, and did not satisfy the requirements of the 21st section of the Bankruptcy Act 1856.

Mr Walter Galbraith, C.A., the trustee in the sequestration, lodged answers in which he denied that the award of sequestration was invalid, and maintained that the petitioners were barred from insisting in their application by having acquiesced in the sequestration proceedings, inasmuch as they had voted in the election of a trustee.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 21, enacts that "in all cases the petitioning or concurring creditor shall produce with such petition an oath to the effect hereinafter specified, and also the account and vouchers of the debt as hereinafter provided."

Section 49 enacts that "to entitle a creditor to vote or draw a dividend he shall be bound to produce at the meeting, or in the hands of the trustee, an oath to the effect and taken in the manner hereinbefore appointed, in the case of creditors petitioning for sequestration, and the account and vouchers necessary to prove the debt referred to in such oaths."

On 24th July 1896 the Lord Ordinary (PEARSON) pronounced an interlocutor recalling the sequestration and finding no expenses due to or by either party.

Opinion.—"The affidavit itself is *ex facie* regular, but it describes the debt as 'being the amount contained in an account for goods supplied by the deponent' to the bankrupt, commencing on 21st November 1895, and ending on 30th May 1896. This account, which is duly signed as relative to the affidavit, begins with 48 items under different dates, and of varying amounts; but the only description vouchsafed as to each and all of them consists in the word 'goods.' The words 'to goods' appear opposite the first item, and they are carried down by the usual marks opposite each of the others. Then follows the credit side of the account, which—allowing for four cross entries—results in reducing the amount charged for the 'goods' (£355, 12s. 1d.) to £271, 19s. 10d.

"The statutory requisites are set forth in section 21 of the Bankruptcy Act, thus—'the petitioning or concurring creditor shall produce with such petition an oath to the effect hereinafter specified, and also the account and vouchers of the debt as hereinafter provided; failing which production, the petition shall be dismissed.' The old statute of 54 George III., required production of 'the grounds of debt or a certified copy of the account'; but these words do not occur in the Act of 2 and 3 Victoria, or in the subsisting Act. The requisite now is, production of 'the account and vouchers of the debt as hereinafter provided,' that is (apparently) as provided in section 49, namely, 'the account and vouchers necessary to prove the debt referred to in such oath.'

"Now, in the case of a claim upon an open account for goods supplied, there are no vouchers in the strict sense of that word. But it is the more necessary that the account itself should be specific, not merely as to date and price, but as to the description of the goods supplied. It was pointed out that here the 'goods' were furnished by a cycle warehouseman to a cycle manufacturer; and I was asked to draw the inference that the goods had to do with cycles and their appurtenances. But in my opinion that is not enough. I think that all parties concerned are entitled to more specific information in the account itself, and the tradesman's own books ought to have enabled him to furnish that information. Accordingly, this seems to me not so much a failure to vouch, but rather a failure to lodge a proper account.

"The point seems to me to be decided by the case of *Ballantyne* v. *Barr*, 1867, 5 Macph. 330. There the concurring creditor's account amounted to £57, 10s. It consisted of five items. The first three were unobjectionable. The fourth was £10 for 'cash lent you,' and the fifth was—'June 18. To amount of goods, £17.' The Court held that both these were inadmissible, Lord Neaves saying expressly, 'the £17 which is essential to bring the creditor's claim up to the statutory amount is stated in a form which is quite insufficient and incompetent.'

"This being so, the question is not one of discretion but of competency. The objection is one which appears on the face of the claim, and is not within the rule, applicable to cases where the objection is latent, that the Court may recal the sequestration or not upon general grounds of expediency—*Mitchell* v. *Motherwell*, 1888, 16 R. 122.

"For the same reason I think the plea of acquiescence in the sequestration through Messrs Riddell having voted in the election of trustee must be rejected. This question also arose in the case of *Ballantyne* v. *Barr*, and was so decided by the Court, distinguishing it from *Ure* v. *M'Cubbin*, 1857, 19 D. 758.

"I therefore recal the sequestration. The expenses of the petition itself cannot be allowed—*Smith Brothers & Company*, 1860, 23 D. 140, and with regard to the expenses caused by the opposition, I think that in the circumstances none should be awarded."

The trustee reclaimed, and argued—The case was distinguishable, though doubtless with difficulty, from *Ballantyne* v. *Barr*, January 29, 1867, 5 Macph. 330, because in that case the account was a mixed one. Here "goods" could only mean articles connected with the cycle trade. In any event, the defect did not necessarily invalidate the sequestration, and as the petitioners had acquiesced in the proceedings they were barred from insisting in the recal—*Ure* v. *M'Cubbin*, May 28, 1857, 19 D. 758.

The petitioners' argument sufficiently appears from the opinion of the Lord Ordinary. In addition to the cases there referred to the following case was cited—*Tennent* v. *Martin & Dunlop*, March 6, 1879, 6 R. 786 (*per* Lord President Inglis at p. 788).

LORD PRESIDENT—I agree with the Lord Ordinary. I think with his Lordship that the point is decided by the case of *Ballantyne* cited in the note. It is extremely difficult, as Mr Stewart avowed, to find any distinction; and I do not think, so far as I can satisfy myself, that the distinctions which have been pointed out are substantial. I think they are rather superficial. It seems to me that the view of the Court there was, that inasmuch as an open account cannot be instructed by vouchers in the proper sense of the term, there is the more need for there being such a specification as shall indicate to the body of creditors what is the origin and nature of the claim. Now, in the case there, as here, the use of the general word "goods" does not advance knowledge at all; and accordingly it seems to me that, in reason, the Court had very good ground for holding that that was not an adequate compliance with the rule of the statute, and that they were not furnished with the measure of information which enabled the persons interested to scrutinise and judge of the validity of the claim. Accordingly, treating this as a subject-matter upon which the law ought to be settled by a decision, I for my part am disposed to follow the case of *Ballantyne*, which disposes both of the question of the sufficiency of the account and also of the legal result. For if this be not a claim vouched in terms of the statute, then the sequestration should not have been granted, and it is not a matter of discretion but of right that the sequestration should be recalled.

LORD ADAM—I am of the same opinion. This is a petition for recal of sequestration, and the ground of it is that the statutory formalities were not complied with in this sense, that the statute requires that "the account and vouchers necessary to prove the debt referred to" should be produced. It is said, on the authority of the case of *Ballantyne*, that the account is not an account in the sense of the statute, inasmuch as it gives no information. That seems to have been precisely the point decided in *Ballantyne*, and I confess I have heard nothing at the bar which would lead me to say that there is a difference between that case and this. I therefore agree with your Lordship that this sequestration should be recalled as incompetent.

LORD M'LAREN—My opinion does not affect the decision of this case, but it is right that I should indicate the grounds upon which it proceeds. The statute requires that the petitioning creditor should supplement his affidavit of debt by production of the account and vouchers instructing the claim. That has been, I think, quite correctly interpreted to mean that he must produce the account of his claim, and the vouchers, if any. Of course there could not be any in the case of an account of goods sold. The question therefore is, whether the account is correctly stated. Now, in my opinion the account in this case is a perfectly good account. It is stated in the form in which accounts are usually rendered by one dealer to another, and no doubt it is just a transcript of the account in the creditor's ledger. The objection made is that there is not a description of the goods supplied under each item. I think such description is not necessary to the correctness of a business account, and although there is a case to the contrary decided in the other Division of the Court, I do not think it necessary to suppress my opinion in deference to a single decision. If the question were one of mere form I should say nothing. The decision would only involve the presentation of a new petition for sequestration. But the point is of substance, because one important object of a sequestration is to prevent the acquisition of preferences, and of course such may have been acquired if the existing sequestration is cut down. Now, a bankrupt might be induced to present an application for sequestration on an imperfect account knowing that the other creditors would rely upon it, and a second creditor might in the meantime acquire a preference contrary to the spirit of the bankruptcy laws.

LORD KINNEAR—I agree with your Lordship in the chair and Lord Adam. I think the question is ruled by the case of *Ballantyne* v. *Barr*, and that we are bound to follow that decision. I think this is a branch of law in which it is extremely important that rules of practice once authoritatively laid down should be fixed, and that the Sheriffs of this country would be placed in a difficult position if the decisions of this Court varied from time to time. I think we should follow the decision in *Ballantyne*, and I confess I do not see any ground to doubt the soundness of that decision.

The Court adhered, and found the respondent entitled to expenses from the date of the interlocutor reclaimed against.

Counsel for the Petitioners—Abel. Agent—Alex. Morison, S.S.C.

Counsel for the Respondent—J. G. Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Tuesday, October 27.

FIRST DIVISION.

[Sheriff of Forfarshire.

TOSH *v.* FERGUSON.

Process — Appeal from Sheriff — Proof — Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

Where a cause has been removed from the Sheriff Court into the Court of Session under the 40th section of the Judicature Act, the Court will not send back the cause to the Sheriff Court for trial unless special circumstances appear which render the Sheriff Court a peculiarly appropriate tribunal for ascertaining the facts.

Where an action of accounting had been removed by appeal from the Sheriff Court into the Court of Session, the Court upon this principle *remitted* to a Lord Ordinary to take the proof.

Mrs Martha Ferguson or Tosh, Kirriemuir, raised an action of accounting in the Sheriff Court of Forfarshire against her father William Ferguson, farmer, Glen Prosen, with a conclusion for payment of £480.

The pursuer averred that the defender had had entire control of her money matters, that she had paid over to him all her wages, and that she had handed him certain deposit-receipts, which he had subsequently induced her to endorse, had then uplifted, and had failed to account for.

The Sheriff-Substitute at Forfar (ROBERTSON) allowed both parties a proof of their averments, and the Sheriff (J. C. THOMSON) adhered.

The defender thereupon appealed to the Court of Session, and moved for a proof there.

The Judicature Act 1825 (6 Geo. IV. cap. 120), sec. 40, provides "that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts, it shall be competent to either of the parties, or who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73, enacts that "it shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior Courts in which the claim is in amount above £40, at the time, and for the purpose, and subject to the conditions specified in" the Judicature Act 1825, "and such causes may be remitted to the Outer House."

Argued for the appellant—It was decided once for all in *Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279, that under the 40th section of the Judicature Act the Court was entitled to deal with any cause removed from an inferior Court as if it had originated in the Court of Session. That decision had been followed in *Willing* v. *Heys*, November 15, 1892, 20 R. 34; and the mere fact that the interest at stake was trifling was not in itself sufficient to justify the Court in sending the case back to the Sheriff—*Crabb* v. *Fraser*, March 8, 1892, 19 R. 580; *Willison* v. *Petherbridge*, July 15, 1893, 20 R. 976. There was no special feature in this case to make it peculiarly suitable for the Sheriff Court. Proof should therefore be led in the Court of Session.

Argued for the respondent—The Court had full power to remit to the Sheriff, and had exercised it where the case seemed specially suitable for trial in the Sheriff Court—*Bain* v. *Countess of Seafield*, February 13, 1894, 21 R. 536. It would be putting the pursuer to needless expense to make her bring witnesses to Edinburgh. This was just the kind of case that should be disposed of in the Sheriff Court.

LORD PRESIDENT—My Lords, at this time of day it is, of course, impossible to dispute that the Court has power to send back to the Sheriff Court for trial there a case appealed under the 40th section of the Judicature Act. But then it is necessary to observe that that has only been done where circumstances could be pointed to which rendered the Sheriff Court peculiarly appropriate as a tribunal for ascertaining the facts. Now, in this case I do not think that Mr Reid has succeeded in pointing to any such specialities. It is a substantial case; it has not more local colour than belongs to other questions of disputed fact; and there are no greater facilities in the Sheriff Court for its determination than here. Accordingly, I think that, having regard to the authorities, the proper course is to have a proof in the Court of Session, and I suggest that it should be remitted to the Outer House, and in the Outer House to Lord Kincairney.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to Lord Kincairney to take the evidence.

Counsel for the Pursuers—J. A. Reid. Agents—Reid & Guild, W.S.

Counsel for the Defender—Sym. Agents—Macrae, Flett, & Rennie, W.S.