them upon the security of the estate and the interest which may accrue thereon. Now the pursuers are creditors in a bond and disposition in security granted by the trustees for money borrowed by them, and the question is whether they are entitled to call on these trustees to account for their intromissions with the estate which they administer on account of their being persons mentioned in the second purpose of the deed. This trust is a trust *inter vivos* for the management and administration of the estate of Ballachulish, and the trustees are liable for the fulfilment of their duties to the truster, who could at any time recall the trust and resume possession of the estate. It appears to me that the case cited by the Lord Ordinary does not at all support the contention necessary to sustain the position of the pursuers, and that for these reasons. In the first place, because in the case of the *Bon-Accord Company* there was no discussion on the question of title at all. It seems to have been assumed that the pursuers had a title, and there is no decision by the Court on that subject. In the second place, it appears that the creditors were creditors of the deceased suing his trustees who were his executors; and probably no objection was taken to the pursuers' title for the best of reasons, that the creditors were suing the executors on their legal obligation to make the deceased's estate forthcoming to his creditors. But the trustee under this deed is merely an administrator appointed by living people for their own convenience—he is accountable to them only, and has no duty to their creditors directly at all, although one of his duties to his trusters is to pay their debts as set out in this second purpose. The defender therefore is in quite a different position from an executor or a trustee under a trust for creditors where the trustee and the creditors have a direct relation.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordships. I only wish to add with reference to the passage quoted by the Lord Ordinary from my book on Wills, that while it is possible that the statement with regard to the title of a truster may be expressed in too general terms, it is plain enough from the context that the trusts which are there in view are trusts of the *universitas* of an estate—either trusts of a testamentary nature or trusts for behoof of creditors—because the creditors who are there said to have a title to sue are creditors of the trust-estate. That was the position of matters in the case of the *Bon-Accord Company* to which reference has been made, and while in that case the question of title was not raised, the Court did in effect sustain action at the instance of creditors against trustees who were trustees and executors of a testamentary estate. I can hardly doubt that in such a case the creditors had an excellent title to sue, because there by the first purpose of the trust they had a right over the trust-estate which was preferable to all other rights, and if the estate proved insufficient, it was on them that the loss would fall. They accordingly had an interest to diminish that loss by taking objection to unauthorised acts of administration on the part of the trustees. In the present case the pursuers have no interest whatever. Their right is to obtain payment from their debtor or out of his estate, and that right is in no way affected by a trust which the debtor constitutes for his own benefit or that of his family, because it is a universal rule that no man by creating a trust for behoof of himself can place his estate beyond the diligence of his creditors.

On these grounds I am of opinion that the action falls to be dismissed.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, dismissed the action and decerned.

Counsel for Pursuers and Respondents—Lees — Sym. Agents — A. P. Purves & Aitken, W.S.

Counsel for Defenders and Reclaimers—Comrie Thomson — Guthrie. Agents — Morton, Smart, & Macdonald, W.S.

---

*Thursday, June 30.*

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## MACFARLANE *v.* BEATTIE & SONS.

*Process—Jury Trial—Abandonment by not Proceeding to Trial within Twelve Months of a New Trial being Allowed—A.S., 16th February* 1841, *sec.* 46—*Court of Session Act* 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 40.

The Act of Sederunt, 16th February 1841, sec. 46, provides—"That if it shall be made to appear to the Court that a party has abandoned his suit, or if the pursuer or party appointed to stand as pursuer shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shown for the delay to the satisfaction of the Court."

The Court of Session Act 1850, sec. 40, provides — "That where an issue or issues is or are approved as aforesaid, it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues."

This was an action by Andrew Macfarlane, labourer, against William Beattie & Sons, contractors, Edinburgh, for damages for personal injury sustained by him while in their service. The case was tried before

Lord Kincairney and a jury, and upon 27th May 1891 the jury returned a unanimous verdict for the pursuer, with damages to the amount of £130. The defenders moved for a new trial, which was granted by interlocutor of the Second Division dated 25th June 1891. Nothing was done by either party to bring on the new trial.

Upon 30th June 1892 the defenders, after intimating to the pursuers, moved the Second Division to dismiss the action, to assoilzie the defenders, and to find them entitled to expenses, in respect of the pursuer's failure to proceed to trial within a year and a day after the date of the interlocutor setting aside the verdict and granting a new trial. The motion was made under the provisions of the Act of Sederunt, 16th February 1841, sec. 40.

Case cited—*Baird* v. *Cornelius*, July 16, 1881, 8 R. 982.

The Court *refused* the motion.

Counsel for Pursuer and Appellant — Clyde. Agents—Drummond & Reid, W.S.

Counsel for Defenders and Respondents — Rhind. Agent — D. Howard Smith, Solicitor.

---

*Saturday, July 2.*

## FIRST DIVISION.

[Sheriff of Lanarkshire.

## HENDERSON *v.* JOHN WATSON LIMITED.

*Reparation — Master and Servant — Company as Defenders—Relevancy at Common Law and under Employers Liability Act* 1880 (42 *and* 43 *Vict. c.* 42).

In an action for damages (£500 at common law, or otherwise £210, 12s. under the Employers Liability Act 1880) raised by a miner against a mining company, the pursuer stated that when in the employment of the defenders he had been injured by a runaway bogie which came dashing down an inclined plane. The pursuer averred that the injury had been caused by the bogiemen "skiting the rope" *i.e.*, allowing the haulage rope to run in the groove of the shears attached to the bogie, instead of making the shears grip the rope tightly, and he further averred that this practice was known to and authorised by the defenders and their manager and oversman.

A general issue in the usual terms with a schedule claiming £500 damages *approved*, and a motion of the defender to dismiss the action so far as laid at common law and reduce the damages in the schedule to £210, 12s., *refused*.

*Remarks* by Lord M'Laren on the effect of the Employers Liability Act.

*Opinion* by Lord Kinnear that the action was relevant at common law.

James Henderson, miner, Hamilton, raised an action of damages in the Sheriff Court of Lanarkshire at Glasgow against John Watson Limited, coalmasters, Glasgow, and owning and working Earnock Colliery, Hamilton, in which the pursuer craved the Court to grant decree against the defenders for payment to him of the sum of £500, or otherwise for payment to him of £210, 12s. or such other sum as might be found to be due to the pursuer under the Employers Liability Act 1880.

The pursuer averred—"(Cond 2) On or about 30th September 1891 the pursuer was engaged in the defenders' employment in the main coal seam, Earnock Colliery, as a miner's pointsman. (Cond. 3) At or about nine o'clock a.m. on the last-mentioned date, the pursuer, while engaged at his ordinary occupation of a miner's pointsman at the foot of an inclined plane in said main coal seam, where his work lay, sustained frightful injuries through being crushed or jammed against the wall by a runaway bogie, which came dashing down the inclined plane . . . (Cond. 5) The said inclined plane is several hundred yards long, and is worked by a system of engine haulage, which is known as the 'endless rope' system, established by defenders in said main coal seam. When a rake of empty hutches has to be taken down the inclined plane, a bogie is coupled on to the front of the hutches. To the bogie itself is attached a mechanical contrivance called 'shears,' the purpose of which shears is to lay hold of the haulage rope, and through the medium of which the load is dragged along a level or up an incline, and through the medium of which also the speed of hutches descending the incline is controlled and regulated. At the other end of a descending 'rake,' and attached to the last hutch thereof, there is another mechanical contrivance or brake which acts as an auxiliary to the shears, and by means of which the speed of the descending rake is also controlled. . . . (Cond. 7) The bogiemen and others who attended to the haulage on the said incline mentioned in article 3 were in the practice (and defenders knew and authorised the practice) of what is termed by the miners 'skiting the rope,' which means this, that by the application of a screw the hold of the shears is somewhat relaxed and the rope is allowed to 'skite' or run in the groove of the shears. This practice is highly dangerous to the miners who are necessarily engaged in or about the said inclined plane, and there have been many accidents at this place in consequence. . . . (Cond. 8) On the day in question, after the bogiemen had started a rake, he uncoupled the bogie from the rake of hutches behind it, and began to 'skite the rope,' that is to say, by means of the relative screw he loosened the catch of the shears upon the rope, with the object of letting the bogie run down the hill faster than the hutches, which were kept going behind it at a slower rate by the brake attached at the last hutch. In some way or other the rope had fallen altogether out of the shears, and