LORD LOW—I concur.

LORD ARDWALL—I am of the same opinion. The Railway Company were "undertakers" as regarded the work of fish porterage performed by the deceased, in respect of their contract with Maclean, the fish stevedore, in whose employment the deceased was at the time of his death; but the deceased was in the Railway Company's employment only for a limited purpose, viz., the unloading of fish trains at Gushetfaulds Station. He had accordingly no business except at that station; he had no right, duty, or business to be on the line of rails where he was run down by an engine and killed; he was in an entirely different position from an engine-driver or a pointsman, whose ordinary employment frequently necessitates their presence on the railway line; accordingly the present case is easily distinguishable from that of *Goodlet* v. *The Caledonian Railway Company*, 4 F. 986. The deceased was not at the time and place he met with his death really in any different position from that of an ordinary member of the public, and the accident from which he died did not in my opinion arise out of or in the course of his employment. I have therefore no hesitation in holding that the question submitted in the case should be answered in the negative.

The Court answered the question in the negative.

Counsel for the Appellant—Orr, K.C.—Mitchell. Agents—M'Nab & M'Hardy, S.S.C.

Counsel for the Respondents—Blackburn, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, March 20.

SECOND DIVISION.

[Sheriff Court at Airdrie.

SMELLIES *v.* WHITELAW.

Process—Proof—Proof or Jury Trial—Appeal for Jury Trial—Action of Damages for Slander—No Ground for £40 Verdict—Issues Disallowed—Remit to Sheriff for Proof—Expense of Appeal—Judicature Act (6 Geo. IV, cap. 120), sec. 40—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73.

Two pursuers raised an action for damages for slander in the Sheriff Court, each claiming £100, and appealed to the Court of Session for trial by jury. The Court, being of opinion that neither pursuer could reasonably be entitled to a verdict of more than £20, *refused* issues, *remitted* to the Sheriff to allow a proof, and *found* the pursuers liable in the expenses of the appeal.

Sharples v. *Yuill & Co.*, May 23, 1905, 7 F. 657, 42 S.L.R. 538, *followed.*

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73, enacts:—"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 40th section of the Act 6 Geo. IV, cap. 120, and such causes may be remitted to the Outer House."

The Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 40, contains this proviso:—"But it is hereby expressly provided and declared 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 (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session, by bill of advocation, which shall be passed at once without discussion and without caution. . . ."

Miss Mary Smellie and Miss Jeanie Smellie brought an action in the Sheriff Court at Airdrie against John Whitelaw, in which each claimed £100 sterling as damages for slander.

They averred, *inter alia*—"(Cond. 2) For some years prior to October last the pursuers carried on business as drapers and milliners at 54 Bank Street, Langloan, Coatbridge, under the firm name of M. & J. Smellie, of which firm they were the sole partners. (Cond. 3) On 3rd October 1906 the stock and fittings in the shop at 54 Bank Street were sold by the pursuers to the defender, and were taken over by him on the same date, on which date the firm of M. & J. Smellie was dissolved. Defender also entered into possession of the premises on that day. (Cond. 4) Thereafter the defender, on 6th October 1906, exhibited on the front window of the said premises facing Bank Street, Langloan, a large bill containing the following words, viz.—'Smellies' and another bankrupt stock have been purchased at enormous reductions and will be sold at less than cost price.' (Cond. 5) The words 'Smellies' and another bankrupt stock,' occurring in the before-mentioned bill, plainly stated, or at least clearly implied, that the pursuers and their firm of M. & J. Smellie were bankrupt or insolvent and unable to pay their debts or the debts of their firm. The bill was read or interpreted by the public as having that meaning, and report to that effect was very common among pursuers' friends and many others. (Cond. 6) As soon as it was known to the pursuers that this bill was being exhibited, they on 9th October 1906 drew the defender's attention to it by letter from their law agents, and demanded that it be instantly taken down. Instead of doing so, the defender, on the following day, caused the letters 'nother' of the word 'another' to be cut out or obscured, a blank being left in the wording of the bill where these letters had occurred. It was not till 12th October that the bill was taken down, and a new and unobjec-

tional bill substituted therefor. (Cond. 7) The aforesaid statement or implication is false and calumnious, and in consequence of the widespread publicity given to the report that they and their firm were bankrupt, the pursuers have each been occasioned grievous mental anxiety and pain, and their private and business reputation and financial credit have been seriously injured, and are likely to be injured in the future."

The Sheriff-Substitute having allowed a proof, the pursuers appealed to the Second Division of the Court of Session, and proposed issues for the trial of the cause by jury.

Argued for the defender—(1) The action should be dismissed, as the record disclosed no relevant ground of action. The members of a dissolved firm could not sue for damages for slander of the firm. (2) At any rate the case should be remitted to the Sheriff for proof, as it did not disclose a claim which could reasonably be entitled to a verdict of even £40—*Sharples* v. *Yuill & Co.*, May 23, 1905, 7 F. 657, 42 S.L.R. 538.

Argued for the pursuers—(1) The case was relevant enough, for, although the firm was dissolved, all the partners were suing. (2) They were entitled to trial by jury, as it was impossible to say, looking to the pleadings, that the pursuers could not possibly recover £40—*Duffy* v. *Young*, Nov. 3, 1904, 7 F. 30, 42 S.L.R. 40. This was not a case of some trifling physical injury, the extent of which was readily ascertainable, but a case of attack upon two traders' financial soundness which might have far reaching effects. All the previous cases where jury trial had been refused were cases of the former description.

LORD JUSTICE-CLERK—In this case the members of a dissolved firm sue the defender for slander, because in advertising a sale of the stock which belonged to the firm he coupled the announcement of Smellies' stock being for sale with the words "and another bankrupt stock." The case is one in which difficult legal questions may require to be decided. It is a case of individual partners of a firm which has ceased to exist complaining as individuals of a statement which by implication—as they say—associated the word "bankrupt" with the firm's stock which was offered for realisation sale. It is therefore clear that if there could be held to be any damage caused by the form of the announcement of sale to the pursuers as persons and not as a firm, it must be damage in prospect should they engage in business again as individuals or form a new firm to carry on business. For the statement in condescendence 5 that the notice implied that the pursuers were bankrupt is plainly not sound, there being nothing in the notice referring in any way to the individual but only to the business of the firm. Further, according to the pursuer's own condescendence, the bill was at once corrected on the matter being called to the defender's attention. Further, the averment of damage is entirely vague and hypothetical. No facts are stated indicating any actual damage caused, although the summons was only raised three months after the alleged slander.

I have considered the question whether in these circumstances this case should be allowed to be tried in the Court of Session, or whether in the exercise of our discretion it ought not to be sent back to the Sheriff Court. It appears to me that on the face of the case the idea of the case resulting in a verdict—which would stand—going above or even nearly up to the minimum sum held in law to be suitable for investigation in this Court cannot be entertained. I would therefore move your Lordships to refuse the appeal and remit the case back to the Sheriff Court for further procedure.

I may add that had this case originated in the Court of Session, and the Lord Ordinary had allowed a proof and declined to send the case to jury trial, I would have held that his discretion was properly exercised.

LORD STORMONTH DARLING—In this case the two individual partners of the now dissolved firm of M. & J. Smellie, drapers and milliners in Coatbridge, complain of a bill which is quoted in condescendence 4, and is said to have been exhibited on 6th October 1906 in the window of the shop where the pursuer's business was carried on till they sold the stock and fittings to the defender on 3rd October 1906. The pursuers aver that the terms of this bill plainly implied that they and their firm were bankrupt or insolvent and unable to pay their debts or the debts of their firm. They also admit that the objectionable part of this bill was removed by the defender on 10th October 1906, although it was not taken down and a new bill substituted till two days later.

I agree that during these four days the original bill was couched in such terms as to be capable of the calumnious meaning which the pursuers seek to affix to it, and that they may be entitled to some redress. Indeed, the defender acknowledges this by tendering on record £7, 10s. But looking to the whole circumstances I am clearly of opinion that each pursuer could not reasonably be entitled to a verdict amounting to more than £20, and therefore, following the rule laid down in the case of *Sharples* (7 F. 657), I agree with your Lordship that we should disallow the two issues proposed by the pursuers and remit to the Sheriff-Substitute of new to allow a proof.

LORD LOW concurred.

LORD ARDWALL was absent when the case was heard.

The defender asked for the expenses of the appeal.

The pursuers asked that expenses should be reserved.

The Court remitted to the Sheriff-Substitute to allow a proof, and found the pursuers liable to the defender in the expenses of the appeal.

Counsel for the Appellants—G. Watt, K.C.—R. C. Henderson. Agent—H. H. Macbean, W.S.

Counsel for the Respondent—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Wednesday, March 20.

SECOND DIVISION.

[Sheriff Court at Perth.

BELL'S TRUSTEE *v.* BELL'S TRUSTEE.

Succession—Legitim—Election—Discharge—Implied Discharge—Legitim Claimed by a Bankrupt's Trustee.

In an action for payment of legitim brought by the trustee on the sequestrated estate of a bankrupt against the testamentary trustee of the bankrupt's father, twelve years after the father's death, *facts* and *circumstances* which the Court *held* to imply that the bankrupt had discharged his claim to legitim and accepted his conventional provisions.

William Finlayson, trustee on the sequestrated estate of John Wanliss Bell, Inveravon Bank, Perth, in September 1905 brought an action in the Sheriff Court at Perth against Henry Jameson, solicitor in Perth, as the sole accepting trustee and executor of the late William Bell, for the sum of £200, or such other sum as should be ascertained to be the legitim or bairn's part of gear falling to John Wanliss Bell as one of the lawful children of William Bell, who had died on 3rd September 1893, with interest from the 3rd of September 1893 till payment.

John Wanliss Bell, the bankrupt, had never claimed legitim, and the only question in the case was whether at the date of the action it was still open to him to make such a claim. It was not disputed that if this question was answered in the affirmative the claim could be now successfully made by his trustee in bankruptcy, although the bankrupt himself had no desire to make it.

The *facts* of the case (which are also briefly summarised in Lord Stormonth Darling's opinion *infra*) are fully set forth in the following findings of the Sheriff-Substitute (SYM), pronounced after proof and subsequently adopted by the Sheriff and the Second Division:—"(1) That the late William Bell died on or about 3rd September 1893, leaving his wife and six children, of whom John W. Bell, the bankrupt, is one, him surviving; (2) that John W. Bell, who is not the eldest child, was then about twenty-three years old, and had already been engaged in training a few young horses, and had had a few small live stock transactions, but that he did not begin business till 1894, as after set forth; (3) that said William Bell's estate was entirely or almost entirely moveable; (4) that it amounted, according to the inventory given up for confirmation, to about £2632, 4s. 11d.; (5) that William Bell left a settlement in the form of a mutual settlement by him and his said wife which bore to dispose of the whole estates of the spouses at the death of the predecessor; (6) that no special mention of the legal rights of children is made therein, and that those had not been excluded by an antenuptial contract of marriage; (7) that these rights are not alleged to have been anticipated by gifts or advances to account of legitim in the case of any child; (8) that under the settlement the widow had the income of the whole estate, she maintaining those children who were in family with her, which is, and has ever since the said William Bell's death been, the case of John W. Bell; (9) that the settlement provided for equal distribution among the children surviving at the widow's death; (10) that, assuming John W. Bell to reside with the widow and to be alimented in her house (as has been the case), the provisions for him in the settlement were on the whole better for him than the taking of legitim, unless he had required an immediate capital sum, but that this superiority of the testamentary provision was not very great; (11) that no careful comparison of the testamentary provision with the right of legitim with a view to a definite election took place at the father's death in the case of John W. Bell, and no definite declaration of election was called for by the trustee of the settlement; (12) that no definite election was absolutely necessary at the time, and that in the case of those children who were still under full age a definite election might have been premature and have been inexpedient to the trustee to have asked; (13) *separatim*, that no written statement of election and discharge of the vested right of legitim was ever granted by John W. Bell; (14) that the questions whether the doctrine of equitable compensation would be applicable to the father's estate in the event of John W. Bell taking legitim, and whether, if so, it would be a good thing for him to take legitim on the footing that his action would not be forfeiture of testamentary provisions, but involve only compensation to the other interests affected, were not raised or considered by him or by the trustee of the settlement, and that he received no legal advice upon the subject from any solicitor in his own interest; (15) that the knowledge of John W. Bell upon the subject of legitim seems to have been simply that he had an interest, according to the number of his father's children, in one-third of his father's moveable estate if he insisted on taking it, but that that would affect (prejudicially, as he understood) the interests of his mother and his sisters; (16) that he was on friendly terms with the trustee of the settlement, who is a solicitor, and had conversations with him about the estate, and that this was the state of matters as it appeared to both; (17) that his wish at the time of his father's death was not to go into that matter at all, but to live on with his mother and sisters, the former having the undisturbed income of the whole estate, according to his father's