would be warranted in passing the note, except upon caution in common form."

The suspender reclaimed.

BLACK for reclaimer.

GIFFORD, for respondent, was not called on.

The Court unanimously adhered.

Agent for Complainer—L. Mackersy, W.S.

Agents for Respondent—Thomson, Dickson, & Shaw, W.S.

Tuesday, May 19.

MACANDREW, PETITIONER.

Trusts (Scotland Act) 1867—*Scheme for Administration of Charitable Endowment—Report by Lord Ordinary.* A petition by a judicial factor on a trust-estate for authority to make an interim division of the residue of the trust-estate among certain charitable institutions, according to a scheme suggested to the Court, *held* not to be a scheme for administration of a charitable or other permanent endowment falling to be reported to the Court by the Lord Ordinary under the 16th section of the Act 30 & 31 Vict., c. 97.

This was a petition presented by James Maclean Macandrew, judicial factor on the estate of the late John Mackenzie. Mackenzie died in Edinburgh in 1852, leaving a trust-disposition and various codicils, conveying his whole means and estate to trustees, who were directed, *inter alia*, to pay certain legacies to certain specified charitable institutions, "and the remainder of the residue of my said estate I appoint my trustees or quorum to pay to the charitable institutions of Edinburgh, or such of them as they shall think proper (other than those specified in the codicil of date 26th May 1849, subjoined to said trust-deed), equally and share and share alike, or in such proportions as they may deem to be right and useful; of all which my said trustees or quorum are hereby constituted sole and only judges." On the death of the sole surviving trustee, the petitioner was appointed judicial factor, and he now applied to the Court for powers in reference to interim distribution of the realised funds of the trust-estate, submitting a scheme of division for approval by the Court. The petitioner set forth the 16th section of the "Trusts (Scotland) Act 1867, 30 & 31 Vict., c. 97, which provides "that when, in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to Her Majesty's Advocate, who shall be entitled to appear and intervene for the interests of the charity, or any object of the trust, for the public interest." The petitioner craved, after intimation and service and advertisement, and answers by parties interested, for approval of the scheme suggested, and warrant to distribute the sum of £3000 in terms of the scheme. The Lord Ordinary (MURE) reported the petition on 13th March last, when the Court, after hearing counsel, indicated a doubt as to whether the petition came properly within the Act, and continued the case for further argument.

The case came again before the Court..

CLARK and THOMS for petitioner.

Their Lordships held that the petition was not a case of settling a scheme for the administration of a charitable or other permanent endowment falling to be reported under the Trusts Act 1861, and remitted the petition to the Lord Ordinary.

MUIRHEAD, for the Lord Advocate, craved the expenses of appearing, but the Court refused the motion.

Agent for Petitioner—D. J. Macbrair, S.S.C.

Tuesday, May 19.

SECOND DIVISION.

CROMBIE *v.* CROMBIE.

Husband and Wife—Aliment—Adherence—Separation—Incompetency—Expenses. In an action of aliment at the instance of a wife, which contained neither a conclusion for adherence nor separation, a sum allowed by the Lord Ordinary to the pursuer to meet the expenses of the case, pending the trial of the question of the competency of the action, *sustained.*

This was an action of aliment brought by a wife against her husband, and unaccompanied by any conclusion either for adherence or separation. The defender pleaded that, in respect of the absence of such conclusions, the action was incompetent; and, at all events, that the ground of action was extinguished by an offer made by the defender in his defences, to receive his wife and aliment her in his house.

The Lord Ordinary having appointed a debate on these questions, he decerned *ad interim* against the defender for £20 to meet the pursuer's expenses.

The defender reclaimed.

PATTISON and MACKAY for him.

STRACHAN in answer.

The Court adhered to the Lord Ordinary's interlocutor, holding that the absence of a conclusion for adherence on the one hand, or separation on the other, did not necessarily make the action incompetent, and that the question whether that was the result was one of some difficulty.

LORD BENHOLME expressed an opinion that no such conclusion was necessary in a case of this sort.

Agent for Pursuer—Andrew Beveridge, S.S.C.

Agent for Defender—Thomas Wallace, S.S.C.

Wednesday, May 20.

FIRST DIVISION.

STIVEN *v.* THOMAS.

Bankrupt—Cessio—Pursuit—Prescription—Bar. R. raised a *cessio* in 1858, and T., who was entered by R. in his state of debts as one of his largest creditors, was appointed trustee. T. litigated as trustee and as creditor for several years, for the purpose of ingathering R.'s estate, and, in an action at his instance, a jury found, in 1866, that T. was a creditor of R. for the amount set forth by R. in his state of debts. In 1867 the estates of R., who died in 1859, were sequestrated. T. claimed on the said debt, but the trustee in the sequestration rejected the claim as prescribed. *Held* that the trustee was barred in the whole circumstances

from pleading prescription. *Question*, Whether the proceedings in the *cessio* obviated the plea of prescription?

This was an appeal against a deliverance of the trustee on the sequestrated estate of the late David Robertson, builder in Dundee, who died in 1859. In 1858 Robertson became insolvent, and a meeting of his creditors was held, at which Thomas was present and acted as preses. In the state of liabilities submitted by Robertson there was entered a debt of £546 due by him to Thomas. No settlement being then effected, Robertson petitioned for *cessio*, giving up a state of debts, including that due to Thomas, and deponing on oath to its accuracy to the best of his belief. Decree of *cessio* was pronounced in favour of Thomas as trustee for behoof of the insolvent creditors. Thomas found difficulty in recovering the estate, and first sued Thomson, Robertson's cautioner, for payment of a sum alleged to be due by him to the estate, and then brought a reduction of a disposition and of a promissory-note granted by Robertson to Thomson. The reduction was sent to a jury in 1866, the first issue putting the question whether the pursuer Thomas was a creditor of Thomson in the debt above-mentioned. A verdict was returned for Thomas, the pursuer, on that issue. In 1867 Robertson's estates were sequestrated, and Stiven was appointed trustee. Thomas claimed his debt above-mentioned, but the trustee rejected the claim as prescribed. Thomas appealed, and the Lord Ordinary (MURE) found that the claim of the appellant did not fall within the operation of the Statute of 1579; repelled the plea of prescription, and sustained the appeal. His Lordship was of opinion that the questions for decision were, "first, whether the plea of prescription is obviated by the proceedings under the *cessio*; and, second, whether the trustee, in respect of what then took place between the bankrupt and his creditors, is barred from maintaining that the Statute applies.

"With reference to the first of these questions, the Lord Ordinary has come to be of opinion that the plea of prescription has been obviated. It has, as he conceives, been conclusively established that, in order to comply with the requirements of the Sexennial Prescription Act, or of the Act 1579, c. 83, that all 'actions of debt' 'be pursued within three years,' it is not necessary that there should be actual pursuit by the creditor, as pursuer of a libelled action. It will be sufficient for the creditor to show that he has within the three years taken steps in a competent process, and that, whether pursuer or defender in an ordinary action, or as a party in a process of competition to make good his debt; *Douglas, Heron, & Co.*, Nov. 26, 1784; *National Bank*, Dec. 5, 1837; *Sloan and Birtwhistle*, June 1, 1827, 5 Sh. 742; *Dunn* v. *Lamb*, June 14, 1855. In the last of these cases it was held that the production of an account, not by the creditor, but by a debtor-defender, in order to bring it into discussion in a question of accounting, was sufficient to save that account from prescription when an action was afterwards raised upon it; and the result of the opinions of the Judges in that case seems to amount to this, as explained by Lord Ivory, that the meaning of the words 'actions,' 'pursuit,' 'follow forth,' used in the Acts is the same. 'They all mean taking steps for making the claim effectual.' And it was distinctly laid down by Lord Rutherfurd that if it can be shown that such steps have been taken in a competent action in which the claim might have been recovered, that would be a demand competent to obviate the operation of the Statute, although nothing had been actually recovered in the process in which it was made.

"Now it humbly appears to the Lord Ordinary that a process of *cessio* falls within the rules upon which these decisions proceeded. For the object of that process is not only to provide for a debtor's liberation, and protect him from imprisonment, but also to make over to his creditors as the condition of his obtaining this protection, his whole estate with a view to its distribution among them in proportion to their claims. So much is this distribution of the estate one main object of the process, that it is, by section 15 of the Act 6 & 7 William IV., cap. 56, expressly provided that, in the event of any bond granted in the matter of interim liberation being forfeited, its amount shall be divided among the creditors. And it seems for long to have been settled that creditors in a *cessio* cannot proceed with diligence against after-acquisitions of their debtor, until it is shown that they have properly exhausted the effects assigned over to them by the decree; *Lamb*, 16th May 1798, D. 6576; *M'Kissack*, 10th Feb. 1814. A process of *cessio*, therefore, is, as the Lord Ordinary conceives, one in which creditors are brought into competition to receive a rateable dividend on their debts, and is thus substantially a judicial demand on the part of each creditor who appears to have payment made to him of his debt out of the estate which is, for that express purpose, assigned over to a trustee.

"In the present case all this took place. The appellant was duly cited as a creditor in the debt now claimed on. While, as shown by the proceedings, other creditors opposed the bankrupt's application, the appellant appeared, and, in respect of that debt, assented to decree of *cessio* being pronounced. His debt was given up as a just debt in the state of affairs signed by the bankrupt, and sworn to by him as correct. And in respect of the appellant's position as creditor in that debt, he was elected trustee, and the whole moveable estate of the bankrupt was by the decree of *cessio* assigned over and adjudged to him for distribution among the creditors called. And although it does not appear that any dividend was actually made, that arose from the circumstance that the appellant was obliged to embark in litigation for recovery of the estate, which only ended shortly before the sequestration, and is not, the Lord Ordinary apprehends, of itself sufficient to deprive the proceedings of the effect otherwise due to them. They were still, it is thought, proceedings taken upon the debt, in which a portion, at all events, of it might have been recovered; and so, in the words of the Statute, an 'action of debt,' 'pursuit within the three years,' in the sense in which those words have been judicially explained."

On the second point his Lordship held that the trustee was barred, in respect of the proceedings in the *cessio*, from pleading the Statute.

The trustee reclaimed.

SHAND and WATSON for reclaimer.

CLARK and BALFOUR in reply.

LORD PRESIDENT—My Lords, I am quite satisfied that the result at which the Lord Ordinary has arrived is, in the circumstances, the right one; but I am not prepared to adopt the terms of his interlocutor in so far as he "finds that the claim made by the appellant does not fall within the operations of the provisions of the Statute 1519, c. 81." I don't say I doubt the soundness of that finding, but

I am quite prepared to repel the plea of prescription, and that is all that is necessary for the appellant.

It appears to me that the proceedings in the *cessio* are of very great importance. They occurred in 1858, and were preceded by a meeting of the creditors of Robertson, at which it appears that almost all the creditors of Robertson were present, including Thomas, against whose claim this plea is now urged. Thomas was appointed chairman by a unanimous vote of the meeting, and though that may be taken as meaning no more than that he was regarded as one of the creditors, and a leading one, that is of no small importance in this case.

But in the *cessio* which followed, you have a state of affairs by the bankrupt, in which Thomas' claim is entered as second in importance, and, indeed, as the only large claim except that of the bankrupt's brother-in-law, and that claim is entered without any unfavourable observation. It does not appear that in the proceedings which followed any suggestion was ever made by any one that Thomas' claim was not a good one, and it would have been a strange thing if, his claim being open to any objection, he had been made trustee for the other creditors. And yet he was appointed trustee, and by decree in the *cessio* the estate of the bankrupt was assigned to him as trustee. If the *cessio* had gone on, the natural course of events would have been that the creditors would have claimed, and that the debtor's moveable estate would have been realised and divided, and there would have been an end to this plea. What was there to prevent that? It was simply the difficulty interposed in the way of Thomas, as trustee, in recovering the estate. That difficulty arose from a conveyance by Robertson to Thomas, and also a promissory-note granted by him for the full amount of his debt. Thomas raised an action of reduction of that conveyance, and that in two characters. In the first place, he brought the action as trustee in the *cessio* for the creditors. That was found to be a bad title, but before he could raise that action in that capacity, he must have had the authority of those creditors to sue, and in raising the action he represented all the creditors who claimed in the *cessio*. Ultimately, he came to use, for their behoof, his other title of creditor, but it was for their behoof as well as his own, for it was to enable him to ingather the estate. His claim as a creditor was disputed by the defender, and substantially the whole parties interested in that estate were represented in that action; and in that action Thomson, having denied that Thomas was a creditor at all, an issue was sent to the jury in these terms:—"Whether, on the 20th January 1854 and the 17th February 1858, the pursuer was and now is a creditor of David Robertson, builder in Dundee?"

It is said by the respondent that that was not seriously disputed. Why, in the first place, it was used as a defence, and if it had been successful, the action would have been dismissed: and, in the second place, it was insisted in at the trial, and on looking to the notes of the evidence, I find six pages occupied in proving the pursuer's debt. I am aware that after that, after it was clear that the pursuer could prove his claim, the defender gave up that point, and a verdict was returned affirming that the pursuer was, at the date specified and still continued to be, a creditor of the bankrupt for that very debt which was proved by his own evidence, and on which he claimed. After that came this sequestration, and the very same creditors, and none other, appeared in the sequestration. Stiven was made trustee, and he maintains that all the claims are prescribed but Thomson's, but that Thomson's is not prescribed, the effect of which would be that Thomson would secure to himself the whole estate. It is difficult to see how Stiven, as trustee, representing these parties claiming under the *cessio*, can say that this claim is prescribed, looking to the whole history of this matter, and the way in which the claim has been dealt with as a good claim. I think the difficulty is insuperable, and that the trustee is barred from maintaining the plea under the Statute.

It is not necessary to go into the more difficult question whether the raising of the *cessio*, or the appointment of Thomas, as trustee, constituted an interruption of prescription. I do not say it did not, but the ground of bar is so conclusive that I prefer to rest my judgment on that ground, and therefore I am for adhering to the interlocutor of the Lord Ordinary in so far as it repels the plea of prescription.

Lord Curriehill concurred in the ground of judgment stated by the Lord President, and in the sufficiency of that ground for disposing of the case, and gave no opinion on the other question.

Lord Deas—I come to the same conclusion. The clear ground of judgment is, that here we have an admission, under the hand of the debtor, of the debt, within the three years. Mr Shand admitted that an extrajudicial admission within the three years would be enough, and his only objection is, that it is made after the debtor had become insolvent, and in a process of *cessio*. I do not think that is a sufficient objection. The debtor brings the *cessio* within three years, and gives up a list of debts, and enters the name of Thomas as a creditor for £546, 2s. 6d. In his deposition in October 1858, he swears that his statement is a true and correct statement to the best of his knowledge and belief. Therefore you have here a written admission under the hand of the debtor of the subsistence of this debt within the three years, and a confirmation of that upon oath. What is his objection to that? Merely that he was insolvent by that time. But insolvency did not disqualify him from making that admission, or from deposing on oath. If there had been ground for suspecting fraud, the case might have been different, but that is not suggested here. All that took place in 1858, and it was not till 1866 that the sequestration took place. Not only so, but all the creditors who appeared in that *cessio* in place of challenging that claim of Thomas, may be said virtually to have concurred in it by appointing him trustee, and giving him the whole property of the bankrupt in respect of his being a creditor in that debt. The distance of time before the sequestration and the concurrence of the creditors then and afterwards takes away the only objection I can conceive.

Lord Ardmillan—I take the same view of the case. I give no opinion on the effect of the Statute. That is a very nice question, and I shall only say that at present my opinion is rather with the Lord Ordinary. But it is not necessary to go into that matter. Looking to the whole matter this trustee is barred from insisting on the plea of prescription

Agent for Reclaimer—James Webster, S.S.C.

Agents for Respondent—Hill, Reid, & Drummond, W.S.