

the first mandatory desired to retire, another mandatory would necessarily have been sisted in his place, and it would not vary the result that the second mandatory becomes liable for the whole expenses from the first. What the mandatory really undertook was liability for the expenses of process during the time that he acted in that capacity. He can prevent himself incurring liability for future expense by withdrawing from the process, but he cannot by so withdrawing escape liability for the expenses incurred while he acted as mandatory.

**LORD DEAS**—I never heard it doubted that a mandatory was liable for the expenses incurred up to the date of his withdrawing from the action.

**LORD MURE**—I agree with your Lordships in holding that the mandatory must be held as liable conjunctly and severally with his principals for all expenses incurred during the time that he remains a mandatory, and that he cannot be freed from this liability merely by lodging a minute and withdrawing from the cause.

**LORD SHAND**—If the mandatory had only undertaken to represent his principals at such times as their presence might be necessary, or at the close of the case, then there might have been a good deal of force in Mr Dickson's argument; but a mandatory really becomes a party to the cause, and although he can retire if he so desires, he still remains liable for the expenses incurred during his connection with the case.

Counsel for Mandatory—Dickson. Agent—R. C. Gray, S.S.C.  
Counsel for Defenders—Keir. Agent—John Gill, S.S.C.

Thursday, March 1.

## FIRST DIVISION.

[Sheriff of Forfarshire.

FLEMING v. JAFFRAY.

*Process*—*Cessio bonorum*—*Bankruptcy*—*Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22), sec. 11.*

Where the Sheriff had, in the exercise of the discretion given him by the above Act, granted the benefit of *cessio* to a bankrupt, a creditor appealed to the Court of Session for the purpose of having the benefit of *cessio* refused and sequestration awarded. *Held* that the statute had vested in the Sheriff a discretionary power, and no good reason had been shown for the interference of a Court of Appeal in the circumstances.

The Bankruptcy and Cessio (Scotland) Act 1881 provides by section 11—“If in any proceedings under the Cessio Acts, where the liabilities of the debtor exceed the sum of £200, it shall appear to the Sheriff that it is expedient, having regard to the value of the debtor's estate, and the whole circumstances of the case, that the distribution of the estate should take place under the provisions of the Bankruptcy Acts, he shall have power forthwith to award sequestration of the estates

which then belong, or shall thereafter belong, to the debtor.”

John Wright Jaffray, engineer, Albert Square, Dundee, presented a petition in the Sheriff Court of Forfarshire at Dundee praying the Court “to grant warrant for the requisite intimation or citation, and thereafter on resuming consideration of the petition, and advising the whole cause, to find that the pursuer is entitled to the benefit of the process of *cessio bonorum*, and to grant decree accordingly, and to appoint such person as the Court shall think proper to be trustee.” . . . This petition was presented by the bankrupt at the request of George Worrall, Dundee, at whose instance he was made notour bankrupt, and at the request also of other creditors.

The petitioner pleaded—“The pursuer being notour bankrupt within the meaning of the Debtors (Scotland) Act 1880, is entitled to the decree of *cessio bonorum* prayed for.”

The Sheriff-Substitute (CHEYNE) granted warrant to cite the creditors of the petitioner, and ordained him to appear for public examination, and to lodge a state of his affairs, all in terms of the statutes.

The state of affairs showed the liabilities to be £647, and the assets (deducting preferable claims) £501.

On 19th December 1882 the Sheriff-Substitute, after examining the pursuer, and considering the whole process, and in respect that no objection was offered, granted him the benefit of *cessio bonorum*, and assigned and adjudged his whole moveable property to Daniel M'Intyre, accountant in Dundee, as trustee for behoof of the creditors.

One of the creditors given up in the petitioner's statement of affairs was the firm of Anderson & Co., who held a promissory-note for £36. Mr A. G. Fleming had in September 1882 guaranteed this sum, and he subsequently paid the debt. Anderson & Co. were given up as creditors in the list lodged by the bankrupt, but not Fleming, the bankrupt not being aware that Fleming had paid it. Fleming appeared in the proceedings subsequently to the date of the interlocutor of the Sheriff-Substitute, and on 27th December 1882 appealed to the Sheriff against the interlocutor granting *cessio*.

On 15th January 1883 the Sheriff (TRAYNER) issued the following interlocutor:—“The Sheriff having considered the reclaiming petition, together with the whole process, adheres to the interlocutor appealed against, and dismisses the appeal.

“*Note*.—The prayer of the reclaiming note is that I should refuse *cessio* and grant sequestration. Looking to the extent of the bankrupt's estate, as shown on the state of affairs, I think it would be extremely unfair to subject the bankrupt and his creditors to the expenses of sequestration when the same practical benefit can be obtained by all concerned under the less expensive process of *cessio*. I have accordingly refused to grant the reclaimer's motion. The reclaimer complains that he was not called as a party to the petition for *cessio*, and I think this would have been a serious matter if the petitioner had known that the reclaimer was a creditor when the petition was presented. It is not said, however, that he knew this, and from his petition it appears that he gave up William Anderson & Co. as his credi-

tors for the debt in respect of which the reclaimer now claims to be a creditor. The reclaimer seems to have guaranteed and subsequently paid that debt, and while the petitioner knew that the reclaimer had guaranteed the debt, it does not appear, and it is not averred, that the petitioner knew that the reclaimer had paid it, and was in respect thereof his creditor (instead of Anderson & Co.) when the petition for *cessio* was presented."

Mr Fleming appealed to the Court of Session, and argued—That *cessio* should be refused, and sequestration granted, as by this means a fuller disclosure would be made of the bankrupt's state of affairs. It was contemplated by the statute that when the liabilities exceed £200 sequestration and not *cessio* should be granted. Here, therefore, there should be a sequestration, as the liabilities amounted to £647, while the assets only reached £501. Besides, in sequestrations *acquirenda* go to the creditors, while in *cessio* they do not.

Argued for the trustee, and for several concurring creditors who compared by minute—The motion to grant sequestration should be refused, as the process of *cessio* which had been granted by the Sheriff-Substitute was much cheaper. No greater powers were obtained under the one than under the other, and, besides, by the statute founded upon, a discretionary power had been given to the Sheriff, and no good reason had been alleged for interfering with that discretion. There was really no material difference between the two processes.

LORD PRESIDENT—As I do not entertain the smallest doubt that the Sheriff has exercised rightly the discretion with which he has been vested by this statute, I see no reason for interfering, and am therefore for adhering to his interlocutor.

LOKDS DEAS, MURE, and SHAND concurred.

The Court refused the appeal.

Counsel for Appellant—Rhind—Watt. Agents—Sutherland & Clapperton, W.S.

Counsel for Respondents—Pearson—Moody Stuart. Agents—Henderson & Clark, W.S.

Friday, March 2.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

THE CLYDESDALE BANKING COMPANY v.

M'LEAN.

Bank—Bank Cheque—Right of Drawer to Countermand.

M. drew a cheque on the Bank of Scotland in favour of C., for his accommodation, to enable him to reduce an overdraft on his account with the Clydesdale Bank. C. paid the cheque into his account the same day, and it was placed to his credit, and the overdraft was *pro tanto* reduced. Two days afterwards M. stopped payment of the cheque at the Bank of Scotland.

Held that having given the cheque for the purpose of being used as cash in reducing C.'s balance with the Clydesdale Bank, he was not entitled in a question with that bank to stop payment of it, and was liable to make good its amount to that bank.

On Saturday the 14th January 1882 John M'Lean, wine and spirit merchant, Main Street, Gorbals, Glasgow, granted a cheque on his account with the Bank of Scotland for £265, 2s. 6d., crossed blank, in favour of D. B. Cotton, bonded storekeeper, West Campbell Street, Glasgow, or his order. The cheque was endorsed by Cotton to the Clydesdale Bank, Limited, the same day (Saturday), and the amount was placed to the credit of his account at the Argyle Street branch of that bank. His account was at the time largely overdrawn, and the cheque was applied in reduction *pro tanto* of the overdraft. On the cheque being presented by the Clydesdale Bank to the Bank of Scotland payment was refused on account of M'Lean's instructions. This was an action in the Sheriff Court of Lanarkshire at Glasgow, at the instance of the Clydesdale Bank against M'Lean, to recover payment of the amount contained in the cheque, on the ground that the bank had suffered loss and damage to the amount thereof.

The defender (as the record stood after an amendment allowed in the Sheriff Court) averred that Mr Hugh Laird, the agent of the pursuers at their Argyle Street branch, was in the habit of allowing Cotton to overdraw his account on the understanding that the account should be squared every Saturday, and that on the occasion in question Mr Laird had fraudulently and in collusion with Cotton represented to him that the overdraft would be allowed to Cotton on the Monday as usual, and had induced him, as an accommodation both to Cotton and Laird himself, who was desirous of squaring the accounts for exhibition at the head office, to grant the cheque in question, which to the extent of £250 was without value. He further averred that on the Monday the promised overdraft was not allowed, but Laird was suspended by the officials of the bank. Further, he averred that the pursuers were not onerous holders of the cheque, since they did not pay the amount of it to Cotton.

After a proof had been led, the Sheriff-Substitute (LEES), on 14th July 1882, pronounced this interlocutor:—"Finds that on Saturday, 14th January last, the defender granted to the witness W. B. Cotton a crossed cheque drawn in his favour on the Bank of Scotland for the sum of £265, 2s. 6d., said cheque being to the extent of £250 an accommodation to Cotton, granted to enable him to reduce the balance at his debit with the pursuers, and in the expectation that, on the following Monday, Cotton would be allowed, as he frequently had been, to overdraw his account, and with the overdraft repay the defender and other friends who had accommodated him with cheques on the Saturday: Finds that Cotton, on receipt of the defender's cheque, endorsed it to the pursuers, and gave it to them as cash, and the contents being put to his credit, the balance at his debit was thereby reduced to £28, 15s. 6d.: Finds that on Monday forenoon the pursuers passed the cheque through the clearing-house—that is to say, one of their clerks, in conjunction with a clerk of the Bank of Scotland, ascertained