

Friday, November 13.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

ROSS & DUNCAN v. BAXTER & COMPANY AND OTHERS.

Ship—Lien for Work Done—Possession.

Held (1) that engineers might have such possession of a ship, though she was lying in a public harbour, as would entitle them to a right of lien over the ship for work done and materials supplied in fitting in her engines; but (2) upon the construction of a written agreement between the shipowners and the engineers, and after parole evidence had been led, that the engineers had not had the requisite possession of the ship, and therefore had no right of lien.

On or about 26th January 1883 Messrs D. Baxter & Company, shipbuilders, Sunderland, entered into a contract with Messrs Groves, Fenwick, & Company to build for them a screw-steamer, the price of which was to be £18,100, payable in instalments.

On 27th February 1883 Messrs Baxter entered into an agreement with Messrs Ross & Duncan, engineers, Glasgow, by which the latter agreed to make and fit up on board the steamer compound engines and boilers, &c., as per specification. The price of the engines was fixed at £4325, payable in four instalments.

By the memorandum of agreement it was provided—"The engines, boilers, &c., shall be held to be the property of the second parties [Ross & Duncan] until the full price is paid to the second parties in cash, but shall be subject to the absolute lien of the first parties thereon for all moneys or bills paid by them to the second parties."

By the specification it was, *inter alia*, provided—"The vessel to be brought to the crane at Leith for the purpose of having the machinery put on board, and remaining at the disposal of the engineers for that purpose for the necessary period. Vessel to be removed by shipbuilders after receiving her machinery, the engineers providing men to work the machinery. Vessel to be throughout in charge of the shipbuilders."

On 26th December 1883 the vessel, which was named "The Greetlands," was sent to Leith in charge of a master (named Dover) appointed by Messrs Baxter, and placed at the disposal of Ross & Duncan for the purpose of having her engines fitted in. The evidence in regard to the possession of the vessel at Leith is given in the opinions of the Judges *infra*.

Messrs Ross & Duncan proceeded to fit in the engines, and had almost completed the work, when on 2d February 1884 Messrs Baxter became bankrupt. At that date the bankrupts had only made payment of £250 to Messrs Ross & Duncan, and had failed to make payment of several instalments which were past due.

This was an action at the instance of Messrs Ross & Duncan against D. Baxter & Company, the shipbuilders, and the trustees on their bankrupt estate, Messrs Lambton & Company, who had made advances to the builders on the security of the ship, and Messrs Charlton & Johnson, the representatives in bankruptcy of the purchasers,

Groves, Fenwick, & Company. The action concluded for (1) payment of the sum of £4306, 0s. 9d., being the price of the engines and the cost of other work done; (2) declarator that the pursuers had a valid and effectual lien or retention over the "Greetlands" until they were paid the said sum of £4306, 0s. 9d.; and (3) declarator that the pursuers were entitled to sell the "Greetlands" in order to make their lien or right of retention effectual.

The pursuers pleaded that in virtue of their possession of the ship they had a right of lien or retention. The defenders denied that the pursuers ever had possession, and, *separatim*, averred that if they ever had possession they had parted with it.

The Lord Ordinary (M'LAREN) on 2d June 1885 pronounced this interlocutor:—"Finds that the pursuers made and fitted up on board the steamship 'Greetlands,' presently lying in the Edinburgh Dock, Leith, the compound engines and boilers, &c., as set forth in the record: Finds that the pursuers and defenders are mutually interested in the said steamship 'Greetlands,' and that the same ought to be sold as concluded for in the libel, and the price thereof divided between the pursuers and the defenders in proportion to the amount of the respective prices of the hull of the ship and of the said engines, &c.: Therefore appoints the said steamship 'Greetlands,' as she presently lies in the said dock at Leith, to be exposed to sale by public roup after due advertisement, on a day to be afterwards fixed, and that within the rooms of the Chamber of Commerce, Corn Exchange, Leith, at an upset price to be agreed upon by the pursuers and the defenders, David Baxter and his trustee, failing such agreement at such upset price as shall be fixed by Mr Christopher Salvesen, shipbroker, Leith, to whom remits for that purpose, the proceeds of the sale to be lodged in the Clydesdale Bank, Limited, on a deposit-receipt to be lodged in process, taken payable to abide the orders of Court, and decerns: Appoints the pursuers to lodge in process the draft articles of roup proposed by them for the sale of the vessel; and remits to George Shield, D.C.S., to adjust the same with the parties, and to report: Finds the defenders entitled to expenses, subject to modification: Appoints an account of these expenses to be lodged; and remits the same to the Auditor to tax and report: *Quoad ultra* absolves the defenders from the conclusions of the action: Grants leave to reclaim.

"*Opinion.*— . . . If there had been no agreement varying the pursuers' right, it appears to me that, according to custom and the best authorities in our law, the pursuers would have had a clear right of lien over the vessel for the unpaid price of their engines. The 'Greetlands' was sent down from the Tyne to the docks at Leith for the purpose of receiving her engines, and was then delivered over to the pursuers to remain in their possession until the fitting of the engines was completed. I attach no importance to the words used, or the circumstances attending the transfer of the possession of the ship. The right of lien is a right arising from the fact of possession given for the purpose of adding to the value of the subject by the application of labour and material to its repair or construction; and it would be an unsatisfactory state of the law if such a right were to depend on the expressions

used by the foreman or representatives of the respective parties at the time of the transfer. Their expressions are not intended to settle anything regarding lien; and in the present case neither the builders' foreman nor the engineers' foreman had authority from their employers to make any arrangement on that subject. But they had authority respectively to give and to take delivery of the ship for the purpose specified; and it is this delivery, lawfully given, with the execution of the work by the person who gets delivery, which rears up a lien such as is claimed in the present action.

"In the argument for the pursuers I was not referred to the clause in the agreement between the shipbuilders and the engineers which is said to alter the rights of the latter. But the defenders' counsel rested his argument mainly on this clause, and I heard the pursuers' counsel in reply on this point. The agreement is dated 27th February 1883, and is between Baxter & Company, the shipbuilders, first parties, and the pursuers Ross & Duncan, the second parties. The material words are: 'The engines, boilers, &c., shall be held to be the property of the second parties until the full price is paid to the second parties in cash, but shall be subject to the absolute lien of the first parties therein for all moneys on bills paid by them to the second parties.' If this clause is to receive effect according to its terms, its effect is to extinguish or exclude the pursuers' lien by substituting a right of a different description, namely, a right of property.

"In a proper case of lien the foundation of the right is that an addition is made to the ship for the benefit of the owners. But according to this agreement, although the value of the ship is increased by the addition of the engines, that is not an addition or annexation for the owners' benefit, because the engines are to remain the property of the maker until the price is paid. I cannot understand how a maker can have a lien over anything for the price of engines which are his own property; and therefore if this is an effective agreement it is an agreement excluding the pursuers' lien.

"Against the validity or efficacy of the agreement it may be said that marine engines are made to fit the ship for which they are intended, and that after they are fitted they become by annexation a part of the ship. In this suggestion I concur so far, that I think that the ship and engines are an indivisible subject, and that the pursuers would not be entitled to remove the engines after they were irrevocably annexed to the ship. For obvious reasons, it would not be for the pursuers' advantage that this should be done. But here the annexation of the engines to the ship was made with the consent of the respective owners, and upon an agreement that each should retain the property in his part of the indivisible subject. It is an unusual agreement, but it is subject to any legal objection? I know of none; and the result of my opinion is, that the shipbuilder and the engineer become *pro indiviso* proprietors to the extent of the respective values of the hull and the engines, but that the engineer will be divested by accepting the price of his engine according to the agreement.

"The case is further complicated by the appearance made for Lambton's Bank, who had made advances to the builders on the security of

the ship; and for Charlton & Johnson, the representatives in bankruptcy of the purchasers. As regards Lambton's Bank, I am of opinion that the security granted to that company had no further effect than to vest in them all the right which Baxter & Company, the shipbuilders, had in the ship. Baxter's assignment did not, in my view, create a security over the engines or their value, because these were makers' property, and no cedent can create in an assignee a right of property which he himself does not possess. As regards Charlton & Johnson, it appears that their constituent granted certain acceptances for the price of the ship, which were dishonoured, and they can have no claim in competition with the unpaid builders and engineers.

"Mr Strachan, for Lambton's Bank, did not object to the sale of the vessel, and I therefore propose to grant decree of sale, and make an order for the division of the price between the pursuers and the defenders in the proportions of the respective prices of the engines and hull.

"I am asked by pursuer's counsel to note that they only conclude for a sale of the ship on the footing that they have a lien. I quite understand that such is their position, but as I have held that the ship and engines constitute an indivisible subject, and as the builders' creditors are not bound to engage in the partnership with the makers of the engines, I see no other way of explicating the rights of the parties except through a sale. The defenders have all along admitted that there ought to be a sale, and I think that I ought not at this stage to allow the pursuers to withdraw their conclusions for sale, and thus involve the case in further delay by compelling the defenders to bring a new action of division and sale."

Messrs Ross & Duncan reclaimed, and argued—All parties were agreed that the Lord Ordinary's judgment should not stand. It was possible to acquire a right of lien over a ship for work done, though the ship was in a public harbour and had not been taken into a private dock. The *dictum* in 2 Bell's Comm. (7th ed.) 93, was not intended to be narrowed by Bell's Prin. sec. 1420, nor did the case cited support the narrow view of the latter *dictum*. On the evidence the possession necessary to confer a right of lien had been proved. If that were so, there was nothing in the agreement to exclude the common law right of lien—*Wylie & Lochead v. Mitchell*, February 17, 1870, 8 Macph. 552; *Cooper v. Barr & Shearer*, June 6, 1873, 11 Macph. 651, *rev. 2 R.* (H. of L.) 14; *ex parte Willoughby*, 16 Ch. Div. 604.

Argued for Baxter & Company—In order to confer a right of lien there must be full and exclusive possession, which could not be obtained unless the vessel was taken into a private dock or slip—Bell's Prin. sec. 1420. Further, this was not the kind of work in respect of which a right of lien existed; this was not a contract for repairs, but for completion of the vessel. Assuming that there could be a right of lien, there had not been possession. Moreover, the terms of the agreement excluded the notion of the pursuers having a lien, because it was stipulated by the agreement that Baxter & Company should have a lien over the engines for all moneys paid to the pursuers, and further, that the engines, &c., should remain the property of the pursuers until the full price had been paid

At advising—

LORD ADAM—The pursuers in this case are mechanical engineers in Glasgow. The defenders Baxter & Company are shipbuilders in Sunderland. In February 1883 they contracted with the pursuers to furnish and fit up engines and machinery on board the steamer "Greetlands" for the sum of £4325. The pursuers have furnished and fitted up the engines, but £250 only of the price has been paid, and the main object of this action is to have it found and declared that the pursuers have a lien over the steamship "Greetlands" until they are paid the sum of £4306, 0s. 9d., being the amount alleged to be due to them for engines and other furnishings supplied to, and for work done in and upon, that steamship, and that they are entitled to sell the ship, with her engines, furnishings, and pertinents, in order to make their rights of lien effectual.

The Lord Ordinary is of opinion that the ship was delivered over to the pursuers to remain in their possession until the fitting of the engines were completed—but he holds that the pursuers' right of lien was excluded or extinguished by the terms of their contract with the builders, which substituted a right of a different description, namely, a right of property. He further holds, that the ship and engines constitute an indivisible subject, of which the shipbuilders and engineers are *pro indiviso* proprietors to the extent of the respective values of the hull and engines—and he finds that the pursuers and defenders are mutually interested in the ship, and that the same ought to be sold as concluded for in the libel, and the price divided between the pursuers and defenders in proportion to the amount of the respective prices of the hull of the ship and of the engines. This view of the case does not appear to me to be sound, and as none of the parties to the case were prepared to support it, I do not think it necessary to dwell upon it.

The only question which it appears to me to be necessary to decide is, whether the ship was in point of fact in possession of the engineers when they placed the engines on board? If the fact were so, I did not understand the defenders to dispute that the pursuers had the right of lien claimed—if the fact were otherwise, I did not understand the pursuers to dispute that their action must fail.

As bearing on this question it is necessary to have regard to the terms of the contract for the engines, entered into between the engineers and shipbuilders.

It is contained in a memorandum of agreement dated 29th February 1883, entered into between the defenders Messrs Baxter & Company and the pursuers.

By the first article of the agreement Baxter & Company agreed to purchase, and the pursuers agreed to make and fit up on board Baxter & Company's screw-steamers Nos. 33 and 35, two pairs of compound engines, boilers, &c., each being as per specification mutually agreed upon. This action has reference only to the engines for No. 33. The price of these engines was £4325, and was to be payable in four instalments as therein specified.

The agreement further provided as follows—
"The engines, boilers, &c., shall be held to be the property of the second parties" (the pursuers),
"but shall be subject to the absolute lien of the

first parties" (the defenders) "for all moneys or bills paid by them to the second parties."

The relative specification therein referred to contained a clause in the following terms—"The vessel to be brought to the crane at Leith for the purpose of having the machinery put on board, and remaining at the disposal of the engineers for that purpose for the necessary period. Vessel to be removed by shipbuilders after receiving her machinery, the engineers providing men to work the machinery. Vessel to be throughout in charge of the shipbuilders."

It appears, accordingly, that it was stipulated that the ship should remain in charge of the shipbuilders while at Leith for the purpose of having the machinery put on board. I can attach no other meaning to this than that she was to remain in the possession of the shipbuilders. That this is so is confirmed by the before-recited clause of the agreement, which provides that the engines and boilers should be subject to the absolute lien of the shipbuilders therein for all moneys or bills paid by them to the engineers. This would seem necessarily to imply possession on the part of the builders in order to give rise to the right of lien; while on the other hand the provision declaring that the engines and boilers should be held to be the property of the engineers until the full price should be paid to them would have been unnecessary if the engines and boilers had been intended to remain in their own possession until the completion of the contract and the price had been paid.

I am of opinion, therefore, that the parties intended and contracted that the ship should remain in possession of the shipbuilders while the machinery was being put on board in Leith.

The question accordingly appears to me to be, whether the facts and circumstances disclosed in the evidence with regard to the actings of the parties when the ship was at Leith receiving her engines are consistent with her having remained in the possession of the shipbuilders as provided by the contract, or whether they show that notwithstanding the contract the ship was in point of fact transferred into the possession of the engineers.

The facts appear to be that the ship left Sunderland for Leith on Monday the 25th December 1883 in charge of John Morris, the shipbuilders' foreman shipwright, who had with him six or seven labouring men, and George Dover, a certificated master. She arrived in Leith next day, and was taken to a berth in the public docks, which had been secured for her by the engineers, they having no yard of their own in Leith. All the men immediately returned to Sunderland except Morris and Dover. Next day, Saturday the 27th, Morris met Thomson, the engineers' foreman, and took him on board the ship. They went over the ship together, and then Morris returned to Sunderland the same night. Thomson also left, leaving Dover alone on board the ship.

Thomson returned with his workmen on Monday morning, and proceeded to put in the engines and machinery. They came in the morning about six, and left about 5:30, the usual working hours, leaving no one on board except Dover. This continued without change until the 25th January. Thomson says—"Down to about 25th January we had nobody in charge at night, and had nothing to do with the ship except during work-

ing hours. During that period if Dover was not in charge of the ship nobody was in charge of her."

During this time Thomson had the ship shifted twice—first under the crane to get the heavy machinery swung on board, and then back again—at his own hand, and without reference to Dover. This is founded on as showing that the ship was in the possession of the engineers, but by the contract the ship was to be at their disposal for the purpose of having the machinery put on board. These proceedings in no way called for the interference of Dover, and I do not think that the fact that the engineers moved about the ship as they required for the purposes of the contract was at all inconsistent with her still remaining in the possession of the builders.

Certain expressions, such as "I leave the ship with you," said to have been addressed by Morris to Thomson, are founded on as showing that the possession of the ship was transferred to the engineers. The Lord Ordinary says—"I attach no importance to the words used, or the circumstances attending the transfer of the ship. The right of lien is a right attending the fact of possession given for the purpose of adding to the value of the subject by the application of labour and material to its repair or construction, and it would be an unsatisfactory state of the law if such a right were to depend on the expressions used by the foreman or representatives of the respective parties at the time of the transfer. Their expressions are not intended to settle anything regarding lien, and in the present case neither the builders' foreman nor the engineers' foreman had authority from their employers to make any arrangement on that subject." So far I entirely agree with the Lord Ordinary, but he goes on to add—"But they had authority respectively to give and to take delivery of the ship for the purpose specified;" and here I differ from him, because I think it is clear that Morris had no authority to put the engineers in possession of the ship, which by the contract was clearly to remain with the builders.

So matters continued until the 25th of January, when the engineers put a man on board on their own behalf. This was objected to by Dover, but he has been allowed to remain on board ever since. It is clear, however, that if the engineers had not possession of the vessel before, this could not give them possession.

The engineers' work seems to have been completed about the 13th of February, when the workmen left the ship, leaving this man on board.

Dover has remained on board of the ship all along, first as the servant and on behalf of the builders, and, after their bankruptcy early in February, then on behalf of, first, the official receiver on their estate, and then of the trustee.

Dover has been continuously on board the ship night and day since she left Sunderland. It is said he was there merely as a watchman to look after some loose ropes and other material belonging to the builders, and that his being there did not prevent the engineers having possession of the ship. But I do not think that that was the character in which he was there. I think he was the man put in charge of the ship by the builders in terms of the contract—in other words, that he was in possession of the ship on their behalf. I

think, accordingly, that the pursuers never had possession of the ship, and consequently never had any right of lien over her.

LORD SHAND—I have found this case attended with extreme difficulty, but after giving it the best consideration in my power, I have arrived at the same conclusion as Lord Adam.

We had an argument founded on the circumstance that the vessel was lying in a public harbour, and that argument was carried the length that under such circumstances the engine-builders could not acquire a right of lien over her for the work which they had done.

A passage in Mr Bell's Principles, sec. 1420, was founded on for that proposition, but I am quite unable to go along with the argument. If a ship is taken into a private yard of any builder, that circumstance would make it very clear that the ship was to be put into his possession, but even if the ship remains in a roadstead or in a public harbour the result might be the same. If the captain or the crew gave up possession of the ship to the builders or to their men for the purpose of the execution of work, I think such possession, though given in a public harbour or roadstead, would confer a corresponding right of lien. I do not therefore attach much importance to the circumstance that the vessel was in the harbour of Leith while the work was being done.

The question however is, whether possession of the vessel was taken out of the ship-builders, and the difficulty I feel in regard to that arises from this, that I find when she left Newcastle ready for the engines, the builders, who were then in possession, told the master who was put in charge of the vessel to hand her over to the engineers. Then when the vessel came to Leith, Morris did tell the engineers that he had come down to hand over the vessel, and he did so. There is also the evidence of these who took over the vessel to the same effect. That by itself certainly presents a strong element in considering who was in possession, and whether the vessel had been taken over by the engineers. But though the terms used by Morris—and they were so used with the authority of the shipbuilders, which makes the statement of importance—are so strong, yet I think there are countervailing considerations which are enough to take off the effect of that evidence. In my opinion, although the vessel was taken over, yet that, I think, was only in a limited sense. The agreement supports that view, and there is this further fact to support the argument, that there was a caretaker on board from the time the vessel left the English port down to the beginning of this dispute.

When the agreement was entered into between the parties they knew that the engines were to be put on board at Leith. By the agreement it was stipulated that the vessel was to be brought to the crane at Leith "for the purpose of having the machinery put on board, and remaining at the disposal of the engineers for that purpose for the necessary period." That stipulation could quite well be fulfilled though some-one was left in charge. The specification then goes on to provide, "vessel to be removed by shipbuilders after receiving her machinery," and it concludes with this stipulation, "vessel to be throughout in charge of the shipbuilders."

The agreement therefore comes to this, that

the parties contracted that though the vessel should come to Leith, she should be in charge of the shipbuilders, and was only to be at the disposal of the engineers for the purpose of putting in the engines. There is, further, this provision in the agreement—"The engines, boilers, &c., shall be held to be the property of the second parties until the full price is paid to the second parties in cash, but shall be subject to the absolute lien of the first parties thereon for all moneys or bills paid by them to the second parties." Now, the condition of such a lien existing in favour of the shipbuilders must be that the vessel remained in their possession while the work was being performed. The agreement thus throws light upon the arrangement which was made when the vessel came to Leith. When she came to Leith a person was left on board to represent the owners all the time. No doubt there was no further work to be done until the engines were put in, and it is said that the person who was left only looked after some ropes and loose material that were lying about the deck. But looking at the evidence it appears to me that the fact that the owners had a representative on board is sufficient to show that they did not give up possession of the vessel.

I think this view is corroborated by what the owners wrote to Dover, their representative, when this question arose—"You must *not*, however, allow any person to enter on board the ship with a view of taking possession on behalf of Ross & Duncan, the engineers, or any other person." And the engineers themselves seem to have held the same view, for they sent Ross to take possession on their behalf. It is, moreover, not unimportant to observe the terms of a letter written by Messrs Ross & Duncan to Ross on 6th May 1884—"The engines, boiler, and machinery of the 'Greetlands' (which are in course of construction) are ours and non-delivered, and we authorise you to continue as you have been doing to retain possession of them for us." There is no indication there that the engineers had got possession of the ship, or that she was under their control.

On the whole evidence I have come to the conclusion that the ship was at the disposal of the engineers, but that they had not possession of her.

I must further add, with reference to what the Lord Ordinary has said, that even if possession had been given up by the owners, and the vessel had been taken over by the engineers, I could not agree with his Lordship's opinion. I think that the circumstance that they had expended labour on the vessel in fitting in the engines would have entitled them to a right of lien over or retention of the ship in security of their claim for work done and materials supplied under the contract.

LORD MURE—I am of the same opinion.

This action is laid upon the right of lien which the pursuers allege they have, and there is a conclusion for declarator to that effect. The question whether the pursuers have that right depends upon whether the pursuers had obtained actual and exclusive possession of the ship during the time when the engines were being fitted in. If such possession was given, then the claim to a right of lien would be established; if possession was not given, then there would be no right of lien. That is a question of fact.

We have, however, had an able argument on

the more general question, whether there could be such a right of lien unless the vessel was in a private dock? On that point we were referred to various authorities, but I think it clear that there may be such a handing over even of a vessel in a public harbour, as to confer a right of lien.

Now, we have not only the evidence of the parties, but also the terms of the contract entered into, because the parties were not in this case satisfied to depend on the usual rules of law, and accordingly put their arrangements into writing. There is appended to the contract a specification in which it is expressly stated that when the vessel arrived at Leith she was to be at the disposal of the engineers for the purpose of putting the machinery on board, but that the "vessel was to be throughout in charge of the shipbuilders." Now, if there was no more evidence than that, I think this agreement provides that the engineers were not to get possession of the ship. But further I think that the oral evidence quite supports this view. Dover, who came down with the vessel, holds a master's certificate, and he explains that the accounts in connection with harbour dues were sent to him, and that he was entered in the harbour books as master. Morris also came down with the vessel, and he says that he had actual command of her; but one thing I think is clear, and that is that Morris left the vessel after she had been at Leith for a day, and that after that Dover had entire charge. There is this in Morris's evidence:—"On the occasion of my first visit to Leith, Dover came down with me on board the ship. (Q) Do you know who had given him his instructions?—(A) I believe I told the other foreman to send for Dover. The other foreman, who is my brother, had a talk with me about it. Before leaving Sunderland I told Dover that he had to come on board the ship to go down to Leith. (Q) Was that all?—(A) To look after the ship." And then in reply to a question by the Court—"I told him before he left Sunderland that he was to remain and look after the vessel when she was lying at Leith." That is Morris's account of the matter, and there is also the evidence of Thomson, Ross & Duncan's foreman, who says—"When Morris went away on the Saturday I left the ship along with him. I question if there was anybody left on board then. I think Dover left along with us. (Q) Did he go back that night?—(A) I presume he did. I cannot say who was in charge that night, but I expect it would be Dover. There was nobody there on the part of our firm. My men went to work at six o'clock in the morning. I went with them at that time, and left with them about half-past five in the evening. There was nobody in charge for us between half-past five in the evening and six o'clock in the morning. Dover was on board." That evidence is quite consistent with Dover's evidence, and also with the terms of the specification. On the question of fact, therefore, I come to the conclusion that there was no transference of possession sufficient to give a lien.

The **LORD PRESIDENT** concurred.

The Court dismissed the action in view of the possibility of the pursuers claiming re-delivery of the engines.

Counsel for Pursuers (Reclaimers)—Asher, Q. C.—Low. Agents—Webster, Will, & Ritchie, S. S. C.

Counsel for D. Baxter & Company and Trustee—Comrie Thomson—Dickson. Agents—Davidson & Syme, W. S.

Counsel for Lambton's Bank—D. F. Balfour, Q. C.—Strachan. Agents—Mack & Grant, S. S. C.

Counsel for Charlton & Johnson—Thorburn—Moody Stuart. Agents—Auld & Macdonald, W. S.

Saturday, November 14.

FIRST DIVISION.

[Sheriff of the Lothians
and Peebles.]

ROSS v. HAIRSTENS.

Bankruptcy—Cessio—Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 7—A. S. Ancient Processes of Cessio, 22d December 1882.

Where a petitioner brought a process of cessio stating that he had no estate whatever, and it appeared that the only object of the process was to get rid of an existing debt, the Court held that the application was an abuse of the process, and should be refused.

John Fraser Ross, 12 Hope Street, Edinburgh, presented a petition in the Sheriff Court at Edinburgh praying to have it found that he was entitled to the benefit of the process of *cessio bonorum*, that decree should be granted accordingly, and that a trustee should be appointed to manage and dispose of his estate for behoof of his creditors, under the Act 6 and 7 Will. IV. cap. 56, the Sheriff Courts (Scotland) Act 1876, the Debtors (Scotland) Act 1880, and the Bankruptcy and Cessio (Scotland) Act 1882.

The petitioner averred that he was insolvent, and ready to surrender his whole means for his creditors; that upon 22d September 1885 he had received a duly executed charge for payment of £23, 2s. upon an extract-decree from the Sheriff Court of the Lothians and Peebles at the instance of Mrs Mary Rhind or Elston, one of the creditors called as defenders to the present action; that the days of charge had expired without payment of this debt; and that the petitioner was notour bankrupt under the Debtors (Scotland) Act 1880.

James M'Whir Hairstens, writer, Dumfries, one of the persons called as creditors, objected to the petition being granted, on the grounds, *inter alia*, that the debt under which notour bankruptcy was alleged to have been constituted was that admittedly of a half aunt to the petitioner, was not *bona fide* contracted, and had admittedly for its object the obtaining of a discharge from his liabilities, the debtor having previously granted a trust-deed for behoof of his creditors while he was carrying on business in Aberdeen; that as the debtor had acknowledged in his state of affairs that he had no estate, decree of cessio was incompetent, and that the whole proceedings were very suspicious. To which objections the petitioner replied that the debt to Mrs Elston was *bona fide* contracted for board, lodgings, and money lent, and that it was honestly due.

It appeared that the petitioner had in October

1883 granted a trust for creditors in favour of certain trustees, one of whom was Mr Hairstens. The estate was realised by these trustees, and divided among the creditors, with the exception of Mr Hairstens, who refused to accept a dividend. Mr Hairstens was agent for creditors who held securities over the petitioner's heritable property, which was insufficient, and they therefore ranked for the deficiency, but with regard to his personal claim Mr Hairstens intimated immediately before the payment of the dividend that he refused to rank. It also appeared that in April 1885 the petitioner had presented a petition for cessio in the Sheriff Court at Aberdeen, which had been objected to by Hairstens and been refused.

Upon 29th October 1885 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor—"The Sheriff-Substitute having resumed consideration of the foregoing petition and productions, together with the note of objections and answers thereto, and having heard parties' procurators, Dismisses the petition: Finds the opposing creditor Mr Hairstens entitled to £2, 2s. sterling of modified expenses, and decerns for payment to the said Mr Hairstens or his agent.

"Note.—The Sheriff-Substitute is satisfied that the pursuer has presented this application, not for a legitimate purpose, but with the view of getting rid of Mr Hairstens' debt, which it is plain still subsists, Mr Hairstens having refused to accede to the trust-deed mentioned in the proceedings."

The pursuer appealed to the Court of Session, and argued—No doubt there was, as stated in the application, no estate to divide, but it was no objection to the application for the benefit of cessio that there was no estate to divide when there was notour bankruptcy—See Act of Sederunt ancient cessios, 22d December 1882. If in former times sequestration could be obtained although there was no estate, it followed that a cessio could now be obtained in this case. Indeed, it followed *a fortiori*, seeing that this was just sequestration applicable to small estates. The respondent could not well resist the application, as it was he who had divested the petitioner of his whole estate. His sole object was to secure a preference for his debt, and to keep it up against the debtor.

Authority—*Gardiner v. Woodside*, June 24, 1862, 24 D. 1135.

Replied for the respondent—The application should be refused; it was an abuse of the process of cessio. The respondent while acting as trustee specially reserved his private claims. The process of cessio was now one of *distribution*, and in the absence of any funds in the present case it was impossible that it could be worked out—Debtors Act 1880 (43 and 44 Vict. cap. 34); Sheriff Court Act 1876 (39 and 40 Vict. cap. 70), sec. 26, sub-sec. 3.

At advising—

LORD PRESIDENT—The grounds upon which the Sheriff-Substitute had refused this application are very distinctly stated in the note to his interlocutor, and are, that he is satisfied that the pursuer has presented this application, "not for a legitimate purpose, but with the view of getting rid of Mr Hairstens' debt, which it is plain still subsists, Mr Hairstens having refused to accede to the trust-