Tuesday, November 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE SCOTTISH PROVIDENT INSTITUTION *v.* WALKER AND OTHERS.

Contract— Foreign — Assignation — Locus contractus.

A domiciled Scotsman borrowed money from a money-lender in England. In security he delivered a promissory-note and a policy of insurance on his life effected with a Scottish insurance company. At his death in June 1887 the loan was only partially repaid, and in August the lender notified to the insurance company that the policy of insurance had been assigned to him. In December the estate of the deceased was sequestrated, and a trustee appointed thereon. In a multiplepoinding the Court ranked the lender preferably to the trustee for the debt still due, in respect that the loan was negotiated in England, by the law of which, as the parties admitted, deposit of the policy operated as an equitable mortgage in favour of the lender, and notification thereof by the lender to the insurance company, before the bankruptcy of the borrower, conferred on him such a preferable right.

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 110—*Prior Debt —Security.*

The Bankruptcy (Scotland) Act 1856, sec. 110, provides—"When the sequestration of the estates of a deceased debtor is dated within seven months after his death . . . any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death . . . shall . . . be of no effect in competition with the trustee."

Held that the terms of the section did not apply to the present case, the security having been acquired, not by an act of the deceased debtor, but by an act of the creditors making effectual a security which had been already validly constituted.

This was an action of multiplepoinding and exoneration raised by the Scottish Provident Institution to determine in whom lay the right to a sum of £200 contained in a policy of insurance on the life of Andrew Allan Walker deceased.

In March 1886 Andrew Allan Walker, who was a schoolmaster at Westruther, in the county of Berwick, after sundry negotiations with Messrs Cohen & Company, a firm of money-lenders in Newcastle-on-Tyne, obtained from them an advance of £100, in return for which he gave them his promissory-note, dated at Newcastle, for the amount, and deposited with them the policy of insurance on his life already mentioned. The transaction was finally concluded at a meeting between Mr Walker and a partner of the lenders' firm in their office at Newcastle-on-Tyne.

Mr Walker died on 16th June 1887, leaving £87 of his debt to the firm still unpaid.

On 1st August 1887 Messrs Cohen & Company wrote to the manager of the Scottish Provident Institution as follows:—"We beg to give you notice that Mr Andrew Allan Walker of Westruther has assigned his policy (No. 47,293 in the Scottish Provident Association) over to us as security for an advance of £100. We understand that he has since died. Please note and oblige." And again in August 3rd they wrote in these terms:—"In reply to your favour, we beg to say that we have this policy in our possession, and have had since the date of its assignment, viz., the 10th day of April 1886."

On 5th November 1887 certain creditors of the deceased Mr Walker presented a petition to the Lord Ordinary on the Bills craving sequestration of his estate as a deceased debtor, and sequestration was awarded on 19th December 1887. George Logan Broomfield was appointed trustee in the sequestration, and as such claimed the whole of the fund *in medio.*

Messrs Cohen & Company claimed to be ranked and preferred for £87, founding upon the deposit of the policy in their hands, and pleading—"(2) *Separatim*, the claimants' rights under the contract between them and the said Andrew Allan Walker fall to be determined by the law of England, and the claimants having by said law a valid lien over said policy for payment of the debt due to them, they are entitled to be ranked and preferred in terms of their claim."

The Lord Ordinary (M'Laren) on 3rd March 1888 pronounced the following judgment:—"This multiplepoinding was instituted by the Scottish Provident Institution to determine which party is in right of the sum payable under a life policy issued by the Institution. At the time when the action was raised it appears that the company were ignorant of the fact that the assured had died insolvent, but they had been made aware of claims at the instance of two persons who founded upon assignments of the policy, and the action was brought to determine the question of preference as between these claimants. One of the parties—Broomfield—has not appeared. The other assignee Mr Cohen has appeared, and in response to an intimation made to the representatives of the assured, the trustee for his creditors has also appeared. The question now raised is between the trustee for the assured's creditors and Mr Cohen, founding on his assignment to the policy.

"It appears that some considerable time before his death, Walker, the assured, had obtained a small advance—£100—from Mr Cohen, for which he gave his promissory-note, and at the same time deposited the policy of assurance as a collateral security. The assignment of the policy supposed to be effected in this way was not intimated at the time. It is further said that there was also an informal letter of assignment which has since been lost, but the contents of which, it is thought, may be proved. The question that arises first in order is, whether a good assignment can be made of the creditor's right under the policy of assurance by deposit of the deed, or by an informal letter of the kind referred to. The next question would be (as between the trustee for creditors and the assignee), whether the criterion of preference is the date of assignment or the date of the intimation of the assignment, and I rather think that these are the only two questions necessary to be considered. I do

not conceive that it lies within my jurisdiction to determine the validity of a security created by the deposit of a document under the law of England. But it is within the scope of my jurisdiction to find out by what legal system the rights of parties are to be determined. It appears to me to be reasonably clear that the validity of the assignment must be determined by the law of the country within which the assignment was made. Here the policy is issued by a company having its domicile in Scotland, and by the company's obligation a right of credit is created capable of assignment. We have nothing to consider under the law of Scotland, so far as I can see, except to see that a valid right of credit is created by the policy in the form recognised by our law. But that right of credit follows the domicile of the creditor wherever he goes, and is capable of being assigned or dealt with by him in any manner which the law recognises. The assignment of the right of credit in the policy is a new contract, distinct as regards its nature, mode of constitution, and the law that regulates it, from the contract constituted by the policy itself. And the validity of the assignment will in general be determined by the *lex loci contractus*—that is, according to the law of the country in which the transference is made or the security given.

"In this case the policy was made over to a creditor in England, and it appears to me that the contract falls to be determined by the law of England. We should certainly not recognise an assignment to an English policy by way of deposit made in Scotland. That would not be recognised by us, because the assignment was not made in the way required by our law. And I think, conversely, where the assignment is made between parties dealing with reference to the law of England, that we ought to recognise the assignment, provided it is in accordance with the requirements of that law. Subject to any inquiry that may be demanded as to what is the law of England on the point, these considerations will dispose of the first question.

"But the question that arises in bankruptcy depends upon different considerations. The authority of a trustee or creditors' representative in bankruptcy is in general recognised by foreign countries, but any question of competing right between the trustee and a creditor claiming upon a preferable security must apparently be determined by the law of the country in which the competition arises. Such at least was the opinion of Lord Deas in *Donaldson* v. *Findlay, Bannatyne, & Company*. Now, if that criterion be applied to the present case, the facts are these—The assignment, which in the present question I assume to be valid, was not intimated at the time but was intimated after the death of Mr Walker, the assured party, and undoubtedly before his estate had been brought under the judicial administration of the sequestration. The question is whether such intimation gave the creditor an effectual security. Reference was made to the Statute of 1696, and to the 110th section of the Bankruptcy Act of 1856, which extends the provisions of that statute to estates of deceased debtors. But it appears to me that neither of these statutes has any application to a case like the present, because they deal only with securities which are considered to be objectionable on the ground of being originally granted in satisfaction or security of a prior debt. And where such is the character of the security given, it is necessary in the case of real property that the security should be completed sixty days before the granter's insolvency. So the Statute of 1696 says in express terms, and the analogue of that provision with reference to such a subject as a policy would be that it ought to be intimated sixty days before the sequestration, or sixty days before the death of a deceased debtor. But where a security is originally granted, not for a prior debt, but for an immediate advance, no statutory provision of this or any other country, I should imagine, would cut down such a transaction. There would be an end to all mercantile dealings if a security for money instantly advanced were liable to be cut down by the operation of a retrospective law. Such a rule would be in the highest degree unjust, because it would ignore the fact that while the bankrupt has given security his estate has at the same time received the benefit of the advance.

"Now, in the present case, according to Mr Cohen's claim, which I assume for the purpose of the present judgment to be correct in its statement of facts, the assignment of the policy was for an immediate advance of £100, and therefore it does not come within the scope of the statutes referred to at all. No doubt if it had not been perfected by intimation to the company before the bankruptcy it would have been objectionable on another ground—that is to say, there would have been no constitution of a real right in the assignee until after bankruptcy, and the creditor would only be entitled to claim his dividend. But we are not in that class of cases, because the intimation was made in August, and sequestration was not applied for till November.

"The result of the consideration of the various questions argued is, that provided it can be established either that the mere deposit of the policy is a good security by the law of England when followed by intimation, or provided the terms of the relative letter can be proved and shown to be a good security by the law of England, then that security being followed by timeous intimation entitles Mr Cohen to a preference over the trustee in bankruptcy.

"I think that is the only deliverance I can give at this stage of the case."

The Lord Ordinary (M'Laren) subsequently on 27th June 1888 pronounced the following interlocutor:—"Directs a case to be submitted to English counsel for his opinion on the first of the two questions stated in the Lord Ordinary's judgment delivered on 3rd March last: Appoints a draft case to be prepared and lodged in process, in order that the same may be adjusted at the sight of the Court, and *quoad ultra* continues the cause, and grants leave to reclaim."

The trustee (G. L. Broomfield) reclaimed, but when the case came up for hearing in the Inner House their Lordships postponed consideration of the reclaiming-note to allow parties to ascertain and make matter of admission the effect by the law of England of the deposit of the policy of insurance with Messrs Cohen & Company in security of their loan to the deceased.

A joint minute of admissions was thereafter

put in, to the effect "that by the law of England —where the law of England applies—the deposit by the party insured of a policy of life insurance in security of a loan of money advanced on the faith of such deposit operates as an equitable mortgage in favour of the lender, and if followed by notice to the insurance company prior to notice of the bankruptcy of the party insured to said company, confers upon the lender, while the policy remains in his hands, a preferable right to the contents of the policy to the extent of the unpaid portion of the loan in competition with the trustee in bankruptcy of the party insured."

The reclaimer argued—The whole transaction between Walker and Cohen & Company was one of loan. The debtor was a domiciled Scotsman; the transaction originated in Scotland, and the place of performance was the domicile of the debtor. Therefore the legal effect of the transaction must be decided by Scots law. The place of signing the promissory-note was merely an accidental circumstance—Story's Conflict of Laws, sec. 242. By Scots law a debt or claim could not be transferred by mere delivery, but required an assignation duly intimated — *Strachan* v. *M'Dougal*, June 19, 1835, 13 S. 954; *United Kingdom Life Assurance Company* v. *Dixon*, July 7, 1838, 16 S. 1277. The property in a Scotch policy of insurance could not be transferred by mere deposit; writing was necessary—25 and 26 Vict. c. 85; 30 and 31 Vict. c. 144. The security here was not completed till after Walker's death, and it was cut down by the provisions of the 110th section of the Bankruptcy Act 1856 (19 and 20 Vict. cap. 79).

The respondents argued—The transaction was English. It was completed there, and was to be discharged there. The law of England therefore, as the *lex loci contractus*, must decide the rights of parties—Story's Conflict of Laws, secs. 395-399. Messrs Cohen & Company's right was validly completed by intimation—*Wallace* v. *Davies*, May 27, 1853, 15 D. 688. The security granted was not for a prior debt. The deposit was in security of an immediate advance, and it only required an act of the creditor to make the policy a valid security for the debt. The 110th section of the Bankruptcy Act therefore did not apply—Bell's Comm. (7th edition), ii. 211 (5th edition), ii. 226; *Taylor* v. *Farrie*, 1855, 17 D. 639; *Miller's Trustees* v. *Shield*, March 19, 1862, 24 D. 821; *Renton* v. *Dickison*, June 15, 1880, 7 R. 951.

At advising—

Lord President—We have no judgment of the Lord Ordinary in the interlocutor under review, but we have the Lord Ordinary's view expressed in a note dated 3rd March last, and the opinions there expressed appear to me to be very sound. When the case was previously before us we found that the Lord Ordinary had directed a case to be submitted to English counsel to ascertain the law of England to be applied if it should be found to be the law by which this case was to be determined. Since that time, however, on the suggestion of the Court, the parties have ascertained the English law bearing on the questions in the case, and have made it matter of admission, and so we are now in a position to dispose of the merits of the case.

The claimants Cohen & Company are moneylenders in Newcastle-on-Tyne, and they advanced to Mr Walker, now deceased, a sum of £100 on the faith of his promissory-note. In return they received not only the promissory-note of the deceased, but a policy of insurance on his life, effected with the company who are the real raisers of the action, for a sum of £200. The transaction took place in England, and the constitution of the creditor's right must be determined by the law of the country where the transaction took place—that is, by the law of England. Now, by English law, as is clear from the admissions of the parties, "the deposit by the party insured of a policy of life assurance in security of a loan of money advanced on the faith of such deposit, operates as an equitable mortgage in favour of the lender, and if followed by notice to the insurance company prior to notice of the bankrupty of the party insured to said company, confers upon the lender, while the policy remains in his hands, a preferable right to the contents of the policy to the extent of the unpaid portion of the loan in competition with the trustee in bankruptcy of the party insured."

Now, applying the law so stated to the circumstances of this case, it is to be observed that the holders of the policy—Cohen & Company—made intimation to the insurance company on 1st August 1887, after the death of Mr Walker. The notice is in these terms—"We beg to give you notice that Mr Andrew Allan Walker of Westruther has assigned his policy (No. 47,293 in the Scottish Provident Association) over to us as security for an advance of £100. We understand that he has since died." Again on 3rd August another letter was sent by them saying—"We beg to say that we have this policy in our possession, and have had since the date of its assignment, viz., the 10th day of April 1886." Now, the sequestration of Walker's estate as a deceased debtor was awarded on the 19th of December following. The question therefore comes to be, applying the law of England as ascertained by the minute of admissions, whether that intimation of the right of the depositee is not sufficient to operate in his favour so as to confer upon him a preferable right to the contents of the policy in competition with the trustee in Walker's sequestration. It must be held to have so operated. The intimation puts the holder of the policy in the same position as he would have held if a Scotch deed of assignation had been intimated by him on the same date. The intimation completes the title of the holder of the policy, and puts the receiver of the intimation in the position of holding for the assignee.

It is further maintained, however, that the 110th section of the Bankruptcy Act applies, and that this must be taken to be a security for a prior debt. But the security for a prior debt in the contemplation of the 110th section is a security acquired by act or deed of the deceased debtor, but the act in this case was one by a creditor making effectual an already validly constituted security. I am therefore of opinion that the claimants Cohen & Company are entitled to prevail.

Lord Mure—I am of the same opinion. We have now a clear admission of the English law bearing on the case which was not before us at the last hearing. There is also evidence of the

depositation of the policy, and of the notice given to the insurance company, no doubt after the death of Mr Walker but before his bankruptcy.

With regard to the provision in the Bankruptcy Act, sec. 110, I agree with your Lordship that the completion of the security in this case does not fall within the meaning of that section.

LORD TRAYNER concurred.

LORD SHAND and LORD ADAM were absent.

The Court ranked and preferred Messrs Cohen & Company in terms of their claim.

Counsel for the Claimant (Reclaimer)—Readman. Agents—Romanes & Simson, W.S.

Counsel for the Claimants (Respondents)—Salvesen. Agents — Boyd, Jameson & Kelly, W.S.

Friday, November 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

SIMPSON *v.* JACK.

Bankruptcy—Poinding—Warrant to Sell—Cessio—*Personal Diligence Act* 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 26.

A debtor who had been rendered notour bankrupt by the expiry of a charge under a decree, and whose goods had been poinded under the decree, presented a petition for the benefit of *cessio*. *Held* that the existence of the petition for *cessio* formed no bar to the poinding creditor obtaining warrant to sell.

Bankruptcy—Cessio—*Minister—Attachment of Stipend.*

A minister whose stipend was £100 per annum became notour bankrupt and applied for *cessio*. His debts amounted to £1100. *Held* (following *Scott* v. *Macdonald*, 1 Sh. App. 363) that he was entitled to the benefit of *cessio* on his assigning to his creditors £20 out of his stipend annually.

Sheriff—Judgment—Appeal—Extract—Sheriff Courts Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 32.

The Sheriff Courts Act 1876 provides (section 32) "that no extract of any such interlocutor . . . shall be issued before the expiration of fourteen days from the date thereof unless the Sheriff-Substitute or Sheriff who pronounced the same shall allow the extract to be sooner issued."

An interlocutor pronounced in a Sheriff Court process allowed "extract of this decree to go out upon caution being found." *Held* that the effect of these words in the interlocutor was not to restrict the time for appealing, but to direct that there was to be no extract until caution was found.

On 31st May 1888 Miss Maggie Simpson, Dundee, obtained in the Sheriff Court of Forfar a decree in absence against the Rev. James C. Jack, minister of the parish of Kingoldrum, for payment of a sum of £1000 as *solatium* and damages in respect of the defender's breach of his promise of marriage to the pursuer. The decree contained in common form a warrant to charge the defender for payment within seven days under pain of poinding.

Simpson having charged the defender, proceeded to poind on 23rd June, which poinding was on the 27th June reported to the Sheriff for a warrant of sale of the poinded effects.

On 6th July the first order was pronounced by the Sheriff in a petition by Mr Jack for the benefit of *cessio*. In this petition for *cessio* Mr Jack stated that in consequence of the expired charge on Simpson's decree he was notour bankrupt, and that he was willing to surrender his whole estate to his creditors.

On 9th July 1888 Mr Jack lodged in the poinding a caveat, praying to be heard before warrant to sell should be granted, and the Sheriff-Substitute heard parties thereon, and on Simpson's motion for warrant to sell.

On 16th July the Sheriff-Substitute (ROBERTSON) pronounced in the poinding an interlocutor, by which he refused *in hoc statu* warrant to sell.

"*Note.*—This poinding of the Rev. Mr Jack's effects was reported on the 27th June. A warrant to sell would have been granted thereafter as a matter of course, but since that date Mr Jack has been declared to be notour bankrupt, and has applied for *cessio*. This makes his estate litigious, and equalises all diligences within sixty days prior to the bankruptcy, and within four months thereafter. The trustee in the *cessio* will use diligence for behoof of all the creditors, so that the poinding creditor will gain nothing by selling the effects now. The trustee will sell to greater advantage, and with less expense to all concerned. I decided the same point a few years ago, and Lord Trayner, who was then Sheriff-Principal, affirmed the judgment."

On 24th July Mr Jack was examined in the process of *cessio*. No creditor appeared but Simpson, who was represented by her agent. From the deposition and state of affairs it appeared that Mr Jack was assistant and successor in the parish of Kingoldrum, and that on the death or retirement of the incumbent he would receive the whole emoluments; that the living was a small one, being worth, including an allowance from the Smaller Livings Fund of the church, £172, 12s. 5d., of which Mr Jack was receiving £91, with the manse and glebe, the latter of which was worth about £10 per annum. His emoluments thus amounted to about £100 a-year in all. He had several other creditors besides Miss Simpson. He was unmarried. His assets (including the household furniture in the manse poinded at Miss Simpson's instance, and valued at £41, 19s. 6d.) amounted to £73, 16s. 6d., while his liabilities, including the £1009, 12s. due to her, were £1114, 12s.

On 31st July the Sheriff-Substitute pronounced in the *cessio* the following interlocutor:—"Finds him entitled to the benefit of