

deposition 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 (Reclaimant)—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—Pounding—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 pointed 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 pointing 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 pointing.

Simpson having charged the defender, proceeded to point on 23rd June, which pointing was on the 27th June reported to the Sheriff for a warrant of sale of the pointed 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 pointing 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 pointing an interlocutor, by which he refused *in hoc statu* warrant to sell.

"*Note.*—This pointing 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 pointing 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 pointed 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

the process of *cessio bonorum*, and he having taken the statutory deposition, grants the benefit of the process of *cessio bonorum*, and decerns, assigns, and adjudges the pursuer's moveable property to and in favour of James Forrest junior, solicitor, Kirriemuir, as trustee for behoof of the pursuer's whole creditors, without prejudice to the pursuer granting a disposition *omnium bonorum* if required: Finds the pursuer entitled to expenses as prayed for, of which allows an account to be given in, and remits the same when lodged to the Auditor of Court to tax and report: Further appoints the trustee, before acting, to find caution to the extent of £100 sterling, in terms of the statute and relative Act of Sederunt, and directs the moneys coming into the trustee's hands to be lodged in the National Bank at Kirriemuir, &c.

"*Note*.—I was asked to make it a condition of *cessio* being granted that the reverend petitioner should hand over a certain proportion of his stipend to his creditors. I can see no authority for this in the *Cessio* Acts. Mr Goudy, in his book on Bankruptcy, p. 451, seems to think that there is no way of recovering such estate for the benefit of creditors in *cessio* under the Debtors Act. And I certainly was not referred to any case where this had been done.

"Under the older bankruptcy law there is a case where a clergyman's stipend was conveyed to his creditors after leaving him £95, 6s. 1d. as *beneficium competentia*—*A B v. Sloan*, 3 S. 195—and possibly, if I were to convert this *cessio* into a sequestration under the 11th section of 44 and 45 Vict. c. 22, the trustee might attach part of the reverend petitioner's salary. This step would entail considerable expense to the creditors, and might not avail them after all, for in the case *Barron v. Mitchell*, 8 R. 933, it is evident, from a perusal of the Lord Ordinary's interlocutor, that they would be met with a difficulty, and looking to the small sum, if any, that would be left after leaving the petitioner a competent livelihood, I am unwilling to take this step. For if the Court in 1824 thought a clergyman could not live decently under £95, 6s. 1d. a-year, probably now that the expense of living has increased, a larger sum would be allowed. If so, there would be little or nothing over for the creditors. The petitioner is only an assistant and successor in the parish, and his whole present means are required to keep him decently in his clerical position.

"Should he apply for his discharge hereafter it will be open for his creditors to object."

Miss Simpson took an appeal from both these interlocutors to the Sheriff (COMBIE THOMSON), who in both cases dismissed the appeal.

In disposing of the appeal from the Sheriff-Substitute's interlocutor of 16th July, refusing a warrant to sell the pointed effects, the Sheriff appended to his interlocutor the following note:—"I express no opinion as to the effect of a decree of *cessio* in equalising diligences. The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act. The only interest opposed to the course which has been followed is that of the pointer, who has a completed diligence. But her rights, including her claim for expenses, are

sufficiently secured by the provisions of the statutes."

In dealing with the appeal from the Sheriff-Substitute's interlocutor of 31st July, which granted Mr Jack the benefit of *cessio*, the Sheriff added this note to his interlocutor:—"I am of opinion that it is not competent at this stage of process of *cessio* to entertain the proposal that as a condition of granting the benefit of that process the petitioner should hand over a certain proportion of his stipend to his creditors. I do not say whether his refusal to do so may be a good ground for refusing or delaying his discharge; that matter will come up in due time, unless what seems eminently desirable happens, namely, a settlement of the case."

Miss Simpson appealed both these interlocutors of the Sheriff to the Court of Session.

Argued for the appellant—*In the pointing*—The Sheriff-Substitute was in error in refusing a warrant to sell the pointed effects, and so all that followed upon his interlocutor of 16th July was irregular. No "lawful cause," as required by section 26 of the Personal Diligence Act, had been shown why this sale should not have been proceeded with. A *cessio* was not a "lawful cause" for refusing a warrant of sale. For "lawful cause"—Mackay's Practice, vol. ii. p. 211. Even if the Sheriff had under the Personal Diligence Act a discretion, yet it must not be arbitrarily exercised—*Clark v. Hinde, Milne, & Company*, December 18, 1884, 12 R. 347; Bell's Comm. (5th ed.) p. 596. The appellant's interest was in the present case paramount, and she ought to be allowed to carry out her diligence. The debtor became notour bankrupt on the 20th of June 1888, because at that date there was insolvency concurring with a duly executed charge for payment along with an execution of pointing of the debtor's moveables. Both at the date of the debtor's insolvency and at the present time the appellant was the only person interested in the diligence, as no other creditor had done diligence—Bankruptcy and *Cessio* Act 1881 (44 and 45 Vict. c. 22), sec. 11. *In the process of cessio*—For the law as to *cessio*, which has not undergone any change, see 2 Bell's Comm. p. 595; as to the arrestability of clergymen's stipends—Connal on Teinds, ii. p. 99. In the case of *Scott v. M'Donald*, 1 Sh. App. 362, a clergyman had to assign half of his salary as a condition of obtaining the benefit of *cessio*—*Dove Wilson's Sheriff Court Practice*, p. 673, and *Learmonth v. Paterson*, January 21, 1858, 20 D. 418. In the case of *Davidson*, March 1818, F.C., an officer had to give up one-half of his pension as the condition of his obtaining *cessio*—see also *Shand's Practice*, p. 820. In the present case the respondent was abusing the process of *cessio*. He allowed decree in absence to pass, and then claimed a *cessio* in order to get the damages assessed. The Court should refuse *cessio*, or grant it conditionally on the respondent assigning a portion of his stipend to his creditors. The appeal to the Sheriff was competent, as the clause of extract in the interlocutor of 31st July was not intended to preclude appeal.

Argued for the respondent—*In the pointing*—The appeal of the interlocutor of 16th July refusing a warrant of sale was incompetent,

in respect that there was no final judgment. Section 26 of the Personal Diligence Act merely put a ministerial duty on the Sheriff; here there was merely a ministerial duty of sale. Notour bankruptcy did not terminate a pouncing, it merely let all the creditors share in the benefit of the existing diligence, and the purpose of a *cessio* was to give the bankrupt immunity from diligence. No doubt there was a material difference between a trustee in a *cessio* and a trustee in a sequestration, for the latter was in a position to equalise all diligences. *In the cessio*—The interlocutor of 31st July 1888 was not appealable, because an appeal was not taken before the decree was extracted—Sheriff Courts Act 1876 (39 and 40 Vict. c. 70), sec. 26, sub-sec. 4, secs. 32 and 33, and the case of *Tennents v. Romanes*, June 22, 1881, 8 R. 824. The extract allowed by the Sheriff was reasonable, and an opportunity of appeal was allowed to the appellant, but was not taken advantage of. The object of the Sheriff Court Act of 1868 was to shorten the time for appeal.

At advising—

LORD PRESIDENT—This diligence of pouncing proceeded upon an extract decree for the sum of £1000. The charge following thereon was dated 13th June, and it expired on the 20th of the same month, and Mr Jack, the defender, accordingly became notour bankrupt. His creditor then proceeded to execute a pouncing, and a certificate of execution was returned to the Sheriff in common form, and was reported by the sheriff-officer on 27th June. Thereafter the Sheriff-Substitute appointed parties' procurators to be heard on a motion for a warrant to sell, which was the next step which would follow as a matter of course, unless any reason was adduced for suspending that warrant. After hearing the creditor and the debtor, the Sheriff-Substitute *in hoc statu* refused a warrant to sell, and the reason he assigned for doing so is put in his note thus—[His Lordship here read the Sheriff-Substitute's note quoted above, p. 76]. Now, I think that that judgment proceeded upon a mistake as to the effect of a decree of *cessio*. It is very true that a debtor who applies for *cessio* must have been previously made notour bankrupt, and that this has the effect, which the Sheriff-Substitute very properly states, of equalising diligence done within sixty days prior to the bankruptcy, and within four months thereafter. But I do not understand what the Sheriff-Substitute means when he says, "the trustee in the *cessio* will use diligence for behoof of all the creditors." All that the trustee in a *cessio* has to do is to realise the estate and to distribute it. His position is not the same as that of a trustee in a sequestration, and there is nothing in the appointment of a trustee in a *cessio* which to my mind can in any way prevent a pouncing creditor from going on with his diligence. I am therefore of opinion that the Sheriff-Substitute had no ground whatever for refusing this warrant to sell. It is seen now, by the expiry of the four months, that no other creditor is going to claim to share with the pouncing creditor in the produce of the sale, and in that case the effect of course must be that the pouncing creditor will obtain payment of her debt so far as the proceeds of the sale will go in extinction

of her debt. I think therefore that the interlocutor refusing *in hoc statu* a warrant of sale is not justified by anything which has occurred, and I am just as little disposed to agree in the view of the Sheriff, who says—"The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act." I do not think he is, and if any good cause could have been shown for stopping the issue of this warrant of sale, of course it was in the discretion and in the power either of the Sheriff-Substitute or of the Sheriff so to act. But there is no reason of this kind suggested; there is nothing, in short, to debar this pouncing creditor from going on in the exercise of her undoubted right, and from bringing the pointed goods to a sale.

As to the process of *cessio*, the first question which we have to determine is, whether any appeal was competent from the Sheriff-Substitute's interlocutor of 31st July 1888? The respondent says that the appeal to the Sheriff was incompetent, because the Sheriff-Substitute's decree had been extracted prior to the taking of the appeal to the Sheriff.

The question therefore comes to be, was this extract justified by the terms of the interlocutor, and particularly by the part of it which deals with extracting? The Sheriff-Substitute appended these words to the end of his interlocutor—"And allows extract of this decree to go out upon caution being found." Now, the respondent construes these words as meaning that the moment caution is found extract may be obtained; whereas, if the cause had been allowed to take its ordinary course there could have been no extract for fourteen days, and in support of this contention sec. 32 of the Sheriff Court Act of 1876 was cited, which provides that extract shall not issue for fourteen days unless the Sheriff-Substitute shall allow the extract to be issued sooner. Now, it appears to me that what this section means is, that the Sheriff may, upon special cause shown, shorten the time for taking an appeal by allowing extract within the fourteen days, but that he must specify the time in his interlocutor. To maintain that the present interlocutor means, "if you find caution to-day you may extract to-day, therefore that appeal shall not be competent to-morrow," is a somewhat startling suggestion, and to adopt such a reading of this interlocutor would undoubtedly result in injustice. But I do not think that this was the Sheriff-Substitute's intention, nor do I think that the words of this interlocutor, fairly construed, bear the meaning that extract is to go out within any less time than an extract usually does; but only that the Sheriff intended to affirm emphatically that there was to be no extract until caution was found. I do not construe these words as meaning that extract is to be allowed to go out the moment caution is found. In the present case extract was taken on the 1st August, the day after the interlocutor bears to be signed, and it appears to me that that extract was in the circumstances altogether unjustifiable.

That being so, there is nothing now left in this *cessio* except to determine how much, if any, of the pursuer's stipend as assistant and successor in the parish of Kingoldrum ought to be assigned to his creditors as the con-

dition of his obtaining *cessio*.

Now, the emoluments of this gentleman are very small. I do not think that they can be taken as being more than £100, and certainly that sum does not leave him much room for assigning anything to his creditors consistently with his living at all in the manner becoming a parish minister.

Looking to what has been done in previous cases, I do not think that he can assign more than £20 out of the £100, leaving £80 at the disposal of the minister. I think therefore that we should remit to the Sheriff in order that he may give effect to this, and find the petitioner entitled to the benefit of *cessio* on his assigning to his creditors £20 of his salary. Nor do I see any reason for saying that this is a proceeding in any way incompetent in a process of *cessio*. There is direct and clear authority in the judgment of the House of Lords in the case of *Scott v. M'Donald*, 1 Sh. App., and there are other authorities of an analogous kind, all of which go to show that though a person's means are derived from the emoluments of an office, or from an annuity, he is not thereby exempt from the claims of his creditors, but that some reasonable proportion of his means must be assigned to them as the condition of his obtaining the benefit of *cessio*.

That was what the Court did in the case of *Scott*, and we shall in the present case adopt the course which was there followed. The Sheriff-Substitute seems to think that the recent *Cessio* Acts have to a certain extent altered the law in this matter, but I can only say that I have not heard anything cited from these Acts which can in any way bear out the suggestion.

LORD MURE concurred.

LORD SHAND—I agree with what your Lordship proposes in both cases.

Upon the 16th of July, when this pouncing was sisted by the interlocutor of the Sheriff-Substitute of that date, the appellant had presented a report of the pouncing which had followed upon a decree of the Court containing a warrant to pounce. The appellant craved a warrant of sale, but this the Sheriff-Substitute refused, assigning as a reason that the respondent had applied for the benefit of a *cessio*. In the case of such applications the debtor is generally notour bankrupt, but if he is not the process of *cessio* makes him so. But in such cases the pouncing creditor is entitled to go on with his diligence unless something illegal is being done in the course of it. The rights of the other creditors are fully preserved, as even in the event of a sale of the pointed effects they are entitled to step in and claim a share in the proceeds.

But the mere circumstance that the debtor had applied for *cessio* did not entitle the Sheriff to interrupt the diligence of the pouncing creditor, for there was nothing here of the nature of a competition of diligence, but merely a conveyance by the debtor of his property to a trustee for behoof of his creditors. Nor was any good reason assigned by the Sheriff-Substitute for stopping the creditor in the carrying out of her diligence. Nor could the debtor assign any lawful cause why this should be done. Nor do I agree with the reasons assigned by the Sheriff

for affirming the Sheriff-Substitute's interlocutor of 16th July. He may have a discretion, but no good reason was suggested why that discretion should be exercised on the present occasion.

As regards the *cessio*, we are asked to construe the clause at the end of the interlocutor of 31st July, which allows extract of the decree to go out upon caution being found. Now, I agree with what your Lordship has said, that an interlocutor allowing extract of the decree before the usual period must be rigidly construed, and I also agree with the interpretation which your Lordship has put upon this clause, and think that what the Sheriff-Substitute really meant by these words was that caution was to be found before this decree was extracted. I also agree with your Lordship as to the competency of dealing with a salary or stipend in a process of *cessio*, and I think that the respondent here should be ordained to assign £20 per annum of his stipend to his creditors as the condition of his obtaining the benefit of *cessio*. I do not think that a gentleman in a position of this kind should be left in possession of an income utterly unfit to maintain the office he holds, and I therefore think that at present, and looking to the amount of his emoluments, a larger sum should not be demanded from him. When, however, the respondent comes to ask his discharge another and a different question may arise, because he has prospects, and it might fairly be urged then that a larger sum should be provided in view of his income being certainly increased in the event of his surviving the present incumbent.

LORD ADAM was absent from illness.

The Court sustained the appeals, and remitted to the Sheriff-Substitute to grant warrant of sale in the pouncing, and to grant *cessio* on condition of the respondent assigning to his trustee £20 per annum of his stipend.

Counsel for the Appellant—Galbraith Miller.  
Agent—R. D. Ker, W.S.

Counsel for the Respondent—Sir Charles Pearson—Law. Agents—Reid & Guild, W.S.

Saturday, November 24.

## FIRST DIVISION.

[Lord Fraser, Ordinary.

TROTTER v. HAPPER.

*Reparation—Breach of Promise of Marriage—Proof before Lord Ordinary—Jury Trial—Judicature Act 1825 (6 Geo. IV. c. 120), sec. 28—Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 49—Evidence (Scotland) Act 1866 (29 and 30 Vict. c. 112), sec. 4.*

The Judicature Act 1825, sec. 28, provided *inter alia*, that all actions for damages on account of breach of promise of marriage or on account of seduction should be held as causes appropriated to jury trial. The Court of Session Act 1850, sec. 49, limited the class of cases appropriated to jury trial to actions for libel, or for nuisance, or pro-