

intimated that they were not prepared as matters stood to grant the order craved.

Counsel for the Petitioner—H. Johnston.
Agents—Crombie, Bell, & Bannerman, W.S.

Wednesday, July 9.

FIRST DIVISION.

[Sheriff of the Lothians
and Peebles.]

CALDERHEAD v. FREER AND DOBBIE.

Cessio—Earnings—Assignment to Creditors.

An agent of a building firm applied for *cessio*, his debts being £276, 10s. 6d. and his free assets £3, 10s. From his deposition it appeared that he was in receipt of a salary of £3, 15s. per week, out of which he had to pay his travelling and personal expenses, and that he also received a small addition to his income by payments on commission.

Held that he was entitled to the benefit of *cessio* on assigning £20 a-year to his creditors.

This was a petition for *cessio*, presented in the Sheriff Court at Edinburgh by Robert Calderhead against John Dobbie, Janet Freer, and others, his creditors. He averred that he was notour bankrupt in the sense of the Debtors (Scotland) Act 1880, sec. 6.

From the state of affairs lodged by the pursuer it appeared that his liabilities were £267, 10s. 6d., and that his assets consisted of his house furniture, valued at £12, 10s., and subject to a preferable claim for rent amounting to £9.

The pursuer deponed as follows—He was agent for a building firm, Benson & Company, quarrymasters, Cornecockle, Dumfriesshire, from whom he received £3, 15s. per week. Up to the previous February his salary had been £3, 10s. per week. He also made a little money on commission. The salary given him was to cover his travelling and personal expenses. These had amounted to £110 the previous year, leaving him a net income of £89. He had a wife and six children.

On 12th May the Sheriff-Substitute (HAMILTON) pronounced this interlocutor;—“Having considered the oath and deposition of the pursuer and having heard party's procurators, Finds the pursuer entitled to the benefit of *cessio*, but only on condition that he assigns to his creditors out of his earnings the sum of £20 a-year: Decerns and ordains the pursuer to execute a disposition *omnium bonorum*, and also an assignation in the above terms, to and in favour of Mr James Craig, C.A., Edinburgh, who is thereby appointed trustee for behoof of the creditors of the said pursuer, in terms of the statutes and Acts of Sederunt.

The pursuer appealed, and argued—The Sheriff had no power under the Debtors

(Scotland) Act 1880 (43 and 44 Vict. cap. 34) to make it a condition of granting *cessio* that the debtor should assign a portion of his income to his creditors. That Act did not contemplate that any condition should be adjected to the granting of *cessio*. Under the former law fees earned by personal labour could not be attached for debt—*Barron v. Mitchell*, July 8, 1881, 8 R. 933, opinion of Lord Fraser 934, and cases there cited. The pursuer's earnings were precarious and did not stand in the same position at all as the permanent incomes of officers or schoolmasters and the like.

Argued for the defenders—Before 1880 a debtor could be compelled to assign a portion of his earnings to his creditors as a condition of having *cessio* granted—*Brechin v. Taylor*, March 9, 1842, 4 D. 909; *Mitchell v. Macfarlane*, July 13, 1875, 2 R. 930; *Robertson v. Wright, &c.* November 29, 1873, 1 R. 237. The recent Acts had made no change in the law—*Simpson v. Jack*, November 23, 1888, 16 R. 131.

At advising—

LORD PRESIDENT—The question in this case is whether, in the first place, it was competent for the Sheriff-Substitute to annex to the granting of decree of *cessio* any condition, or at least such a condition as we have here, and in the second place, whether the amount of income which he has required the debtor to assign is reasonable in the circumstances.

Now, I do not think the question of the competency of annexing such a condition has been at all affected by the change of law operated by the recent statutes of 1880 and 1881. The process of *cessio* remains as it was before these Acts, a benefit to the bankrupt. The bankrupt in his petition craves the benefit of *cessio*, and the Sheriff finds him entitled to the benefit of the process. No doubt the benefit is not now so great as it was because of the abolition of imprisonment for debt, but the exemption from imprisonment was only one of the benefits afforded to the debtor by the granting of *cessio*. It also protected his estate against being affected by other diligence. The debtor conveys to the trustee his whole existing estate, and is protected against any part of that estate being made the subject of diligence. He is also, I take it, protected against diligence directed against his earnings, and therefore it is quite necessary that the Sheriff should have the power to make the condition that part of these earnings should be assigned for the benefit of the creditors, if they exceed what is necessary for the debtor's subsistence. The present is, I think, an ordinary case, and there is nothing, as I have said, in the recent statutes to alter the former rule.

The question how long such a condition will remain in operation, is, I think, easily solved. As soon as the petitioner for *cessio* comes to ask his discharge, which he can do in six months, he will find himself met with the condition that if he cannot pay 5s. in the £ he will not receive it unless he can show that his failure arises from circumstances which make it in the eye of the law

excusable. Supposing he can neither pay 5s. in the £ nor prove his failure justifiable, his only alternative is to make up the necessary amount some way or other, and if the assignation of part of his earnings contribute to this result, the debtor will thus, at the time he gets his discharge, obtain full benefit corresponding to the loss of income he has in the meantime sustained. On the other hand, if the assignation of income has not that effect, it must just continue in force till it has, when the debtor will be discharged. The moment discharge is granted the assignation will come to an end, because it is granted for the benefit of the creditors, and when the debtor is discharged he has no longer any creditors, and his debts cease to exist. He is entirely relieved of them, just as much as if he had never contracted them. Therefore the working out of the assignation ultimately affords no difficulty at all.

The remaining question is as to the amount which the Sheriff has ordered to be assigned, and I see no ground for saying it is an unreasonable amount. On the contrary, it is, I think, quite a fair proportion to be assigned.

On these grounds I am of opinion that we should adhere to the Sheriff's interlocutor.

LORD SHAND—Unquestionably prior to the recent somewhat curious Cessio Acts it was the practice to grant *cessio* under conditions, one of which was that the debtor should make over for a time a certain portion of his income to his creditors. This rule not only extended to the cases of persons having a fixed income, but also to persons possessing salaries and incomes of that class, and I see no reason to doubt that where a man's income consisted partly of commissions and partly of salary, this condition might lawfully be appended to the granting of *cessio* in his favour. I think also that no change has been operated by the recent statutes, and that it is settled by the case of *Simpson v. Jack*, that such a condition may still be appended to the granting of *cessio*.

That being so, what are the circumstances of the present case? The petition for *cessio* is presented by the debtor who is seeking to have an order of Court which will restrain his creditors from doing diligence against his property. In former times the chief purpose of the applications for *cessio* was to save the debtor from imprisonment, but as I said in a recent case, the Act of 1880 which abolished imprisonment for debt enacted that it should be competent for anyone who was notour bankrupt to apply for *cessio*, and the meaning of the enactment must be, that while a debtor who obtains decree of *cessio* must grant a disposition *omnium bonorum*, his earnings, if he is making any, are saved from the diligence of his creditors. I see no reason accordingly, why the Sheriff should not have power to append such a condition to the granting of *cessio*.

On the question whether the amount to be assigned is reasonable I concur with your Lordship.

LORD M'LAREN concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Appellant—Crole. Agent—Edward Nish, Solicitor.

Counsel for the Respondent Freer—A. S. D. Thomson—Agents—W. R. Patrick & Wallace James, S.S.C.

Counsel for the Respondent Dobbie—A. S. D. Thomson. Agents—Miller & Murray, S.S.C.

Wednesday, July 9.

FIRST DIVISION.

BLAIR (LIQUIDATOR OF THE GREENOCK PROPERTY INVESTMENT COMPANY) v. BROADFOOT'S TRUSTEES AND LYLE.

Friendly Society—Building Society—Winding-up—Liability of Members inter se—Maturing of Shares—Notices of Withdrawal.

By the rules of a building society it was provided (1) that when the profits, with the instalments paid, amounted to £25 per share, members should be paid out, provided that when members were paid out during the currency of the financial year they should only be entitled in lieu of profits to interest from the date of the immediately preceding balance on the sum standing at their credit at such rate as the directors might from time to time fix, and such interest might in the option of the directors be dealt with as profits in the maturing of shares; (2) that members who had not received an advance of money from the society might after a year from their entry withdraw by giving one month's previous notice, when the whole instalments should be repaid with the proportion of the profits effecting thereto as at the last annual balance.

The society stopped business and suspended payment on December 24th 1883, a petition for winding-up was presented to the Court on 14th January, and a winding-up order pronounced on 6th February 1884. After payment of the outside creditors of the society a surplus remained in the liquidator's hands for division among the members.

Held that a member whose shares, with the addition of interest at the rate fixed by the directors for the year, had matured before 24th December 1883, and a member who had given notice of withdrawal more than a month prior to the same date, neither of whom had received payment before the stoppage, were entitled to a preference over the other contributors for