Saturday, June 13.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKENZIE *v.* EWART AND OTHERS.

Bankruptcy—Cessio—Decree of Cessio in Absence of Debtor—Citation—Failure to Appear Wilful—Bankruptcy and Cessio (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 9.

The Bankruptcy and Cessio (Scotland) Act 1881 provides by section 9 that "If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

Held (*aff.* Lord Kincairney) that citation anew of a debtor to an adjourned diet, where the adjournment had been made on the motion of his agent, was unnecessary.

Held (*rev.* Lord Kincairney—*diss.* Lord Trayner) that a decree of *cessio* pronounced in absence fell to be reduced where the Sheriff in his interlocutor had given as his ground for granting such decree that the debtor had failed to satisfy him that his absence was not wilful.

Question—Whether it is necessary for the Sheriff to state in his interlocutor pronouncing decree of *cessio* in absence that he is satisfied the debtor's absence is wilful.

Upon 18th March 1890 the Sheriff-Substitute (MACKENZIE) at Dornoch pronounced the first deliverance upon a petition for *cessio* at the instance of William Ewart, butcher, Alness, and Alexander John Dallas, solicitor, Tain, against James Mackenzie, farmer, Walkerdale, Rosehall, and appointed 15th April for the public examination of the bankrupt.

On 15th April, upon the application of the debtor's agent, the proceedings were adjourned to 6th May. The debtor received no fresh citation, and failed to appear upon that date. His agent, however, was present, and explained to the Sheriff-Substitute the cause of his absence.

Thereupon the Sheriff-Substitute pronounced the following interlocutor:—"Having heard parties' procurators in respect the debtor has failed to appear at this diet for examination as ordered by last interlocutor, and has not taken means to satisfy the Sheriff-Substitute that his absence was not wilful, Decerns the debtor James Mackenzie . . . to execute a disposition *omnium bonorum* to and in favour of Robert Munro, writer, Tain, who is hereby appointed trustee for behoof of the creditors of the said debtor." . . .

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. c. 22), provides by section 9 that "If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

In December 1890 James Mackenzie brought an action in the Court of Session against William Ewart, A. J. Dallas, and Robert Munro for reduction of the said decree of *cessio*, and for damages against the first two defenders for applying for and obtaining said decree. He made certain averments intended to show that Dallas had throughout acted towards him in a malicious, oppressive, and nimious manner; that he was solvent at the date of the decree; and that in consequence of the decree having been pronounced he had suffered greatly in health and position.

He pleaded, *inter alia*—"(1) The decree of *cessio* is illegal, unwarrantable, and invalid, and ought to be reduced, in respect . . . (*c*) that the pursuer was not notour bankrupt, or wilfully absent from the diet of 6th May in the sense of the Cessio Acts. . . . (3) The defenders having, jointly and severally or severally, by the malicious, wrongful, and oppressive proceedings complained of, injured the pursuer in his feelings, health, and estate, repute and credit, in the manner condescended on, are liable to him in damages and *solatium* as concluded for."

On 24th February 1891 the Lord Ordinary (KINCAIRNEY) found the pursuer's averments irrelevant to infer the conclusions of the summons, and assoilzied the defenders.

"*Opinion.*—. . . . The decree of *cessio* was challenged because it was pronounced in the pursuer's absence at a diet to which he was not cited. There is no provision in the Debtors Act 1880 as to granting decree of *cessio* in absence of the debtor, and the power of the Sheriff to do so seems to depend on section 9 of the Cessio Act 1881, which provides that 'If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*.'

"In *Reid* v. *Somerville & Company*, June 6, 1889, 16 R. 751, a decree of *cessio* pronounced at an adjourned diet was reduced on the ground that the debtor had not been cited to that diet. That case would have been in point, and conclusive in the pursuer's favour, but for one distinction which seems vital. In that case the diet was continued on the crave of the petitioner, the adjourned diet was not intimated to the debtor, and he was not present or represented at it. In this case the pursuer avers that the diet was adjourned on the motion of his own agent, who attended at the adjourned diet. It is not pretended that the pursuer did not know of the adjourned diet. In these circumstances I cannot hold the case of *Reid* applicable, or the want of citation to this adjourned diet fatal.

"It was objected that the decree of

cessio was disconform to the requirements of the statute. The statute authorises a decree in absence when the Sheriff is satisfied that the debtor's absence is wilful. In this case the Sheriff did not find this expressly, but found in effect that he was not satisfied that the debtor's absence was not wilful. It was represented that this clumsy use of the double negative expressed only that the Sheriff was not satisfied either way, and did not know whether the absence was wilful or not. If it were necessary to adopt that construction, the decreet would be bad. The interlocutor is very strangely and unfortunately expressed, but I construe it as meaning that he was satisfied that the pursuer's absence from the meeting, which had been fixed on the motion of his own agent, was wilful, because not satisfactorily explained, and that the Sheriff-Substitute was therefore in a position to pronounce decree. Whether his opinion that the absence was wilful was well founded or the reverse, I cannot consider. I must accept the interlocutor as correct. On the whole, although the interlocutor is open to obvious criticism, I do not think that the decree is reducible on the ground of the irregularity of the proceedings." . . . .

At advising—

LORD JUSTICE-CLERK—This case relates to a very small matter indeed, but as it is a reduction it is competent only in this Court. There are several facts and statements referred to by the Lord Ordinary, but the circumstances of consequence are these—The pursuer of this action had a petition presented against him to have him ordained by the Sheriff to execute a *cessio bonorum*, and it appears that upon the second occasion on which the matter came up before the Court, and to which the case had been adjourned upon the application of the pursuer's agent, the pursuer was not present. In these circumstances the Sheriff was entitled to pronounce decree of *cessio* at once if he was satisfied that the absence of the debtor was wilful. The question was raised at the debate whether that decree could be pronounced as the debtor had not been cited anew to appear on that second occasion. But the case was adjourned to that day in the knowledge of the debtor himself and of his agent, and his agent was present upon that second occasion and stated objections to decree being pronounced. I see no ground for holding that the Sheriff in these circumstances was bound to issue a new warrant of citation before granting the statutory order for *cessio*.

Another question was raised whether the Sheriff is required to state in his interlocutor granting decree in absence that he is satisfied that the absence of the debtor is wilful. Upon that question I give no definite opinion at all. It is not necessary in this case to consider that question at all, because the Sheriff has in fact stated in his interlocutor his reasons for pronouncing decree in absence. That interlocutor is now before us, and we must take his deliverance as we find it. The difficulty here is that he has not found in express terms that the debtor's absence was wilful, but only that he "has not taken means to satisfy the Sheriff-Substitute that his absence was not wilful." Now, can that be taken as an expression of opinion by the Sheriff-Substitute that his absence was wilful? I am inclined to hold that it cannot. To find that a man has failed to prove that he did not do something is a totally different thing from finding that he did something. I am therefore of opinion that the decree is bad.

That brings me to the next question. Has the pursuer stated a relevant case for an action of damages? I am clearly of opinion that he has not, and that although the Lord Ordinary's judgment fails on the first ground, the action should be dismissed. The result will therefore be the same.

To sum up, whether or not the Sheriff is required in his interlocutor to state that a debtor's absence is wilful before pronouncing decree in absence, I am satisfied that where he does state his grounds for pronouncing decree, and these grounds do not necessarily imply that he was satisfied that the absence was wilful, the decree will fall to be reduced.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I agree with the course proposed. I think where decree of *cessio* is pronounced against an absent debtor it would be better in all cases for the Sheriff to find that the absence was wilful. I do not say it is necessary that that should be done in order to sustain the deliverance, but that it is the proper course to follow in every such case. I think that here the Sheriff has not made any such finding but has proceeded upon a totally different ground. He has granted *cessio* for a reason which he states in very peculiar terms—[*reads*]. That is his reason for granting *cessio*, and no other. Now, I think that that is granting *cessio* for a reason which the statute does not warrant, and that accordingly the decree must be reduced.

LORD TRAYNER—The summons in this case contains two conclusions—First, for reduction of a decree of *cessio*, and second, for damages sustained in consequence of that decree having been applied for and granted. With regard to the first conclusion, I agree with the Lord Ordinary. There is in my opinion no relevant ground set forth for reducing the decree of *cessio*.

I agree with Lord Rutherfurd Clark in thinking that it might be advisable for the Sheriff when he is granting decree of *cessio* in the absence of a debtor to find in his interlocutor granting decree that the debtor's absence was wilful.

I do not think, however, that the want of such a finding by him would afford any ground for impugning the regularity of the procedure.

The statute requires that the Sheriff-Substitute shall be satisfied that the debtor's absence is wilful, but does not require in terms that he shall say so. But if the Sheriff pronounces a decree in absence of the debtor I should hold that he had satisfied himself of what was antecedently necessary before he could pronounce decree, viz., that the debtor's absence was wilful.

The difficulty here arises not from silence on the part of the Sheriff-Substitute as to the debtor's absence being wilful, but from the fact that what is said on that subject by the Sheriff-Substitute leaves it open to doubt whether he was satisfied that the absence was wilful, or was not satisfied that it was not.

I agree with the Lord Ordinary in thinking that the interlocutor is open to criticism, but I also think with him that the fair reading of the interlocutor is that the debtor's absence was held to be wilful because he had not explained his absence so as to satisfy the Sheriff-Substitute that it was other than wilful. I should on these grounds be prepared to hold that the Sheriff's proceedings were in accordance with the statutory requirements, and that the decree of *cessio* should not be set aside. But assuming I am wrong on this point I concur in thinking that the pursuer has failed to set forth any relevant ground on which he can maintain the conclusion for damages.

The Court reduced the decree of *cessio*, but assoilzied the defenders.

Counsel for the Pursuer and Reclaimer—M'Kechnie—Crabb Watt. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Defenders and Respondents—Dickson—Salvesen. Agent—Alexander Ross, S.S.C.

Saturday, June 13.

FIRST DIVISION.

[Dean of Guild, Glasgow.

LANG *v.* WALKER.

Property—Dean of Guild—Appeal—Competency—Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273), *secs.* 384 *and* 277.

Held that it was incompetent under section 277 of the Glasgow Police Act of 1866, no record having been made up, to appeal an interlocutor of the Dean of Guild of Glasgow granting warrant under the statute to the Procurator-Fiscal to execute operations on property which the proprietor, after notice given in terms of section 384, had failed to execute.

Opinions by the Lord President and Lord Kinnear that the Dean of Guild would be exceeding his jurisdiction if he refused to allow a record to be made up.

Cf. Allan v. *Whyte*, December 20, 1890, 18 R. 332.

John Lang, the Procurator-Fiscal of the Dean of Guild Court of Glasgow, presented this petition to the Dean of Guild against James K. Walker, setting forth that the respondent was proprietor, in the sense of the Glasgow Police Act 1866, of lands and heritages situated at or near Nos. 5 to 17 Palm Street, and 92 and 94 Cedar Street, Glasgow, and that there was no fence protecting the back court adjoining area in connection with said property; that the Master of Works had given him due intimation in terms of section 384 of the Act; that there was no fence for protecting the back court area, and requiring him to erect an iron fence railing, &c., within ten days, to the satisfaction of the Master of Works, and that the defender had failed to comply with the said requisition, and praying for a warrant to execute the said work; thereafter to ascertain and fix the cost, and decern against the defender therefor, all in terms of the statute, particularly sections 325 and 384.

By section 384 it is enacted that the "Master of Works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney, &c., which appears to be dangerous, to his entire satisfaction."

Sections 392-394 provide for the form and services of notices.

Section 321 enacts that "The Master of Works shall, in every notice given by him to any proprietor of a land or heritage, . . . describe the work required to be executed, either directly, or by a reference to plans, sections, or specifications, or to a specimen stated as deposited in the head-office of the Board for inspection, and shall specify the period allowed for the execution of such work."

By section 322 any proprietor aggrieved by such notice may deliver written objections, the procedure in disposing of which is described.

Section 325 provides that "If the proprietor or proprietors to whom notice has been given fail to comply as aforesaid with the requisition contained in such notice, it shall be lawful for the Procurator-Fiscal to enforce the same at any time by applying to the Dean of Guild for a warrant to execute the work therein specified, in so far as not altered or varied by the magistrate or Dean of Guild; and the Dean of Guild may grant a warrant to execute such work, and shall thereafter ascertain and fix the cost thereof, and decern against the said proprietor or proprietors to whom notice was given for the proportions of such cost due by them, and may award expenses to or against any of the parties to such application, but no such application shall operate as a relief to any proprietor or proprietors from liability for any penalties which had been incurred by him or them previous to the date hereof."

Section 277 provides that "Where a record is not made up, the decision given by the Dean of Guild shall be final, and not subject to suspension, advocation, or appeal, or to any other form of review."