paid part of their claims out of his future acquisitions.

It was conceded that no rule of law preventing creditors from using diligence existed prior to the passing of the Debtors Act of 1881.

A process of *cessio bonorum* was merely a mode of obtaining protection for the person of the debtor from imprisonment for debt. The only legitimate reason for putting the debtor in prison was to compel him to make over his estate to his creditors, and therefore if the debtor were willing to make a surrender, and if the creditors were satisfied that he had handed over his whole estate, and came forward and said so, it was thought right that the power of the creditors to imprison their debtor should cease. It was never intended that the action of the debtor in giving up his present estate should debar his creditors from using diligence for the unpaid part of their claims against future acquisitions.

If I am right in my view of the effect of the process of cessio, it is clear that the Acts of 1880 and 1881 made no change in the process, except that it gave creditors a title to petition. The effect of the decree of cessio remained unaltered, because by the 5th and 6th clauses of the Bankruptcy and Cessio Act 1881 it is provided that a debtor may within six months after the date of the decree apply to the Sheriff to be discharged of all debts contracted by him before the date of the decree. But if the effect of the decree of cessio were to put an end to the right of a prior creditor to use diligence against estate of the debtor subsequently acquired, this discharge could, to say the least, be a very useless proceeding.

It was said that the proper person to do diligence against any estate of the debtor for debts incurred before the decree was the trustee. I doubt very much if the trustee in a cessio has any right to attach estate which has come into the hands of the debtor after the decree of cessio. I think his duty is solely to ingather and distribute the estate of the debtor, which he takes under the disposition *omnium bonorum*.

LORD TRAYNER concurred.

LORD JUSTICE-CLERK—I entirely agree. I do not think that I or either of my brethren who were sitting in this Division of the Court when the case was first heard had any doubt about the decision which ought to be pronounced, but sitting as we then were, a Court of three Judges, and having in view the opinions expressed in former cases by the late Lord President and Lord Shand, we did not think it right to decide the present question without the assistance of your Lordships.

LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"The Lords having, along with three Judges of the First Division of the Court, heard counsel for the parties on the appeal, do, in terms of the opinions of the Judges present, recal the interlocutor of the Sheriff appealed against, assoilzie the defender from the conclusions of the petition, and decern: Find the defender entitled to expenses," &c.

Counsel for the Appellant — Graham Stewart—Hunter. Agent — Charles Garrow, Solicitor.

Counsel for the Respondent — Craigie. Agents—Miller & Murray, S.S.C.

Wednesday, July 4.

SECOND DIVISION.

[Sheriff of the Lothians.

HALLPENNY *v.* HOWDEN.

Property—Proof—Judicial Factor—Factor Sued in Sheriff Court—Competency.

A housekeeper alleged that her late mistress had given her certain articles of furniture, and in support of the claim she handed to the judicial factor who had been appointed by the Court of Session on the deceased's estate, certain parchment labels and a list of furniture. The claim having been denied, the parties agreed to abide by the opinion of counsel, who decided in favour of the judicial factor. The housekeeper brought an action in the Court of Session for delivery of the documents against the judicial factor, who had retained them as belonging to the estate.

Held that the pursuer had failed to prove any right of property in the documents.

Opinion (*per* Lord Young) that it was incompetent to sue in the Sheriff Court the judicial factor, who was an officer of the Court of Session, upon grounds impugning his management of the factorial estate.

The late Miss Graham Stirling died at 27 Queen Street, Edinburgh, on 22nd January 1889, aged eighty-four. Mr James Howden, C.A., Edinburgh, was appointed by the Court of Session judicial factor on her estate. After her death Miss Mary Hallpenny, residing at No. 18 Broughton Place, Edinburgh, claimed that certain articles of furniture in the deceased's house belonged to her, as they had been given to her when she was housekeeper and companion to Miss Graham Stirling.

In support of her claim she produced—(1) a written list of furniture, headed—"This is a list of personal property belonging to me, Sarah Graham or Graham Stirling in 27 Queen Street, which I now commence, 17th May 1878. For Mary Hallpenny or Hall." Then followed the list of furniture. The paper was not signed. She also produced sixteen ordinary parchment luggage labels. Each of these bore to be a gift of a parti-

cular piece of furniture, some of which were mentioned in the list and some were not. Of these labels eleven were dated in 1883, four in 1886, one was without a date, and none of them were signed. The writing on all these papers was alleged to be that of Miss Stirling.

It was agreed between the parties that a joint memorial to counsel should be arranged to decide the question of property in the furniture, and that both parties should abide by his decision. A joint memorial for the judicial factor and Miss Hallpenny was then adjusted by the parties' agents, and submitted to the Dean of Faculty J. B. Balfour, Q.C. The list of furniture and the luggage labels were also sent to him, having been obtained by the judicial factor for that purpose.

Upon 27th March 1889 Mr Balfour returned an opinion that the articles of furniture claimed were not the property of Miss Hallpenny, on the ground that, "even assuming the paper writing and the sixteen parchment writings to be all holograph of Miss Graham Stirling, they are not, either taken separately or together, operative either as testamentary instruments or as *per se*, and apart from proof of actual delivery of the articles to which they relate as constituting donations of these articles or any of them in favour of Miss Hallpenny."

In August 1893 Mary Hallpenny raised an action against Mr Howden, as judicial factor on Miss Graham Stirling's estate, to recover the list of furniture and the parchment labels which had been sent to counsel in 1889, and which the defender had retained.

The pursuer pleaded—"(1) The said writing and labels being the property of the petitioners, she is entitled to delivery thereof. (2) The defender having no right to the said documents or to retain possession thereof, the pursuer is entitled to decree in terms of the petition with expenses."

The defenders pleaded—"(1) Pursuer's statements are irrelevant. (2) The pursuer has no right, title, or interest."

The Sheriff-Substitute allowed a proof, from which it appeared that the furniture in 27 Queen Street was not Miss Stirling's property, but was only liferented by her; she occasionally bought new articles of furniture, and on these occasions she obtained the said list of furniture from the pursuer, who usually kept it, and wrote down the name of the article, and returned the list to the pursuer; the articles so bought remained in Miss Stirling's possession, and were used by her up to the time of her death.

The labels were alleged to have been bought for the purpose of tying them to the different pieces of furniture, but this was never done, and after the opinion of the Dean of Faculty the list and the labels were handed back to the judicial factor's agent, who declined to give them up to the pursuer.

Upon 14th May 1894 the Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor, after stating the facts—"Finds in fact and in law, assuming the documents mentioned in the prayer of the petition to be (as the pursuer alleges) in the handwriting of the late Miss Graham Stirling—(1) That the pursuer has failed to show that she has any right, title, or interest to obtain delivery of them; and (2) that the defender as judicial factor on Miss Graham Stirling's estate is their proper custodier: Therefore assoilzies the defender from the conclusions of the libel, and decerns," &c.

The pursuer appealed, and argued—The writings were the property of the pursuer; they were delivered to her by her mistress and found in her possession when she died; that raised a presumption in her favour as her own property.—*M'Aslan* v. *Glen*, Feb. 17, 1859, 21 D. 511; *Meiklem* v. *M'Gruthar*, March 29, 1842, 4 D. 1182.

The respondent argued — There was no proof that these writings had ever been in the possession of the pursuer as her property during the lifetime of her mistress, and their possession at the time of the death did not raise any presumption, because she naturally had custody of the list. If the labels had been bought by Miss Graham, they were intended for a particular purpose, and were never used for that purpose, so they were never delivered to the pursuer. The writings were handed over to the judicial factor as part of the deceased's estate to enable him to judge in whom was the property of the furniture, and he retained them as part of her property which fell under his charge.

At advising—

LORD JUSTICE-CLERK—It is certainly very unfortunate that there should have been so much litigation about such a trifling matter as we have before us, but we must deal with it. The claim of the pursuer is that the defender should be ordained to deliver up to her sixteen parchment luggage labels and a list of furniture which had belonged to Miss Graham Stirling and had been made up by herself.

The pursuer now claims that these writings should be given up to her as being her property, but upon a careful consideration of the proof I have come to be of opinion that she has not proved she ever had any right of property in them. This lady wrote out a list of the furniture she bought and gave it into the custody of her servant, and when she bought anything new she used to get the list from her and write down what she had got, but it never became the pursuer's property. The labels, if written by the deceased, are not in my opinion proved to have been made the property of the pursuer. I think we must decide in the same way as the Sheriff has done although not upon the same grounds.

LORD YOUNG—I am disposed to agree with your Lordship on the question of fact that the pursuer has not shown that she has any right of property in the articles which she claims should be delivered up to her, but according to my opinion it is my duty to state that I consider the pursuer's whole proceedings in this case incompetent

upon general considerations which do not seem to have been raised in the Sheriff Court.

When we appoint a judicial factor upon an estate, we take that estate into our own management, and appoint him as our officer to do all that is necessary for the ingathering and distribution of the estate among the parties having right thereto, he having regard to the rights of all parties who are interested in it. We put this estate into the hands of the defender as judicial factor, and he proceeded to do what he considered to be his duty in ingathering Miss Stirling's estate. Assuming it to be true that he got possession of these articles from the pursuer—who was a servant in the house where all the factorial estate was situated—for the purpose of deciding whether she was entitled to the furniture, he is nevertheless of opinion—and I concur with him—that he got them into his possession as judicial factor for the purpose of doing his duty as such, and in no other capacity, and that he is entitled to retain them.

There is no doubt that a judicial factor may recover writings or property from others in such circumstances, and that it would be his duty to restore them to the original owners when his purpose was served, but that would be a matter for him to determine in the first instance, and upon his own responsibility, and if there were grounds for saying that the circumstances under which he had acquired them did not warrant him in keeping them as judicial factor, that would be a question for our judgment, as he is an officer of our Court, and for the judgment of no other. We might have come to the conclusion that it was his duty as our officer not to retain them, but to hand them back to the person from whom he got them, or we might have arrived at a contrary result, but at anyrate it would be for anyone desiring the return of such writings to appeal to us as his master and superior in the matter to give him instructions how to act. Thus, an action in the Sheriff Court like this against an officer of Court to compel him to give up documents which he thinks it according to his duty as judicial factor to retain, is, in my opinion, utterly incompetent.

There is another ground upon which I think we ought to dismiss this case which I think I ought to state, and it is this, that where, as in the present case, there is manifestly and grossly no interest in the property sought to be recovered, the labels with writing on them being of no use whatever as property, although no doubt they may be of use as evidence in some other action, I do not think it is reasonable that we should be called upon to adjudicate upon the question whether they are property at all or not. The documents sought to be recovered in this action are quite safe in the possession of the judicial factor, and he thinks perhaps they might not be so safe elsewhere.

I am of opinion upon all these grounds that the pursuer in this action has taken up a most untenable position, and that the action ought to be dismissed.

LORD RUTHERFURD CLARK—The documents in question were given by the pursuer to the judicial factor in support of a claim she made for certain articles which belonged to the late Miss Graham Stirling. They were given for the determination of that question alone. After that question was settled, it was the duty of the factor to return them to the pursuer, unless he was able to show that he had a right to retain them.

I think, therefore, that this case is to be determined as if it were an action by the judicial factor against the present pursuer for recovery of the documents. I am satisfied that the judicial factor is entitled to retain them. There is no proof that they belong to the pursuer. They were in the house of the deceased at her death, and I think that they belonged to her.

LORD TRAYNER—This case is based upon the allegation that the articles sought to be recovered are the property of the pursuer, and the defence is that they are not her property, and that she has no right, title, or interest in them. I agree with Lord Rutherfurd Clark in thinking that the pursuer has failed to establish her alleged right of property, and am prepared to sustain the defence to which I have referred, and therefore to assoilzie the defender.

I desire to reserve my opinion on the question raised as to the competency of the action.

The Court refused the appeal.

Counsel for the Appellant—Strachan—Crabb Watt. Agents—W. T. Sutherland, S.S.C.

Counsel for the Respondent — Sym. Agent—Robert Broatch, L.A.

Wednesday, July 4.

FIRST DIVISION.

[Lord Low, Ordinary.

MILNE AND OTHERS *v.* COMMISSIONERS OF THE BURGH OF LOCKERBIE.

Burgh — Gas - Rates — Duty of Commissioners in Fixing the Price of Gas—Levying of Gas Contingent Guarantee Rate—Burgh Gas Supply (Scotland) Act 1876, *secs.* 38 *and* 41.

The Burgh Gas Supply (Scotland) Act 1876, by sec. 41, enacts that the gas commissioners shall from time to time fix the price to be paid for gas, which shall, as nearly as can be estimated, raise sufficient income to discharge all the costs incident to the manufacture and distribution of the gas, together with the interest on all money borrowed in respect of the works, and by section 38 it provides for the levying upon all ratepayers, whether consumers of gas or not, of a