1894, the date of the extract. Taking the view of the law which I have stated, it is unnecessary for me to consider that question."

The claimants, Alexander M'Gregor Gray and Agnes Jardine Buchanan or Gray, appealed to the Court of Session.

At advising—

LORD YOUNG—I have no more to say than that I concur in the judgment of the Sheriff, and very much on the grounds stated by him.

LORD RUTHERFURD CLARK—I am not without doubt of the necessity of intimation of the assignation effected by the Act, but I say no more as I know your Lordships are satisfied.

LORD TRAYNER—I agree with the judgments pronounced by the Sheriff and the Sheriff-Substitute. The procedure under an application for *cessio* is now different in some respects from what it was under the Act of 1834 (6 and 7 Will. IV. cap. 56), although that statute is still read as one of the Cessio Acts.

Formerly the process of *cessio* could only be raised by the debtor, and its primary object was to protect the debtor from personal diligence. If the petitioner was found entitled to the benefit of *cessio*, a distribution of his estate might be made among his creditors, but the application was one for the benefit of the debtor more immediately than for the benefit of creditors. If the debtor failed (without sufficient reason assigned) to appear at any diet of Court at which he was ordered to attend, the petition was dismissed. The creditors could not carry on the petition if the debtor did not do so. But now *cessio* has been much assimilated to sequestration. Any creditor may petition for decree of *cessio* against his debtor, and such decree may be pronounced against the debtor, including a decree ordaining him to grant a disposition *omnium bonorum* whether or not the debtor appear for examination, or at any other diet of compearance. I am disposed therefore to think that the decree ordering the debtor to grant such a disposition (which by statute operates as an assignation of the debtor's moveables until the disposition is granted) was intended to operate as a divestiture of the debtor, and to vest his trustee with the debtor's moveable estate, very much to the same effect as an act and warrant in favour of a trustee in bankruptcy. The provisions of the Bankruptcy Act of 1856 are more distinct on this point than the provisions of the Cessio Acts. But unless this effect is attributed to the decree ordaining the debtor (in a *cessio*) to grant a disposition *omnium bonorum*, the Cessio Acts have practically failed in their attempt to give the creditors any effectual remedy against their debtor or his estate.

I am of opinion also, in accordance with the views expressed by Lord Neaves in the case cited to us—*Bald* v. *Gibb and Bruce*, February 11, 1859, 21 D. 473—that the assignation effected by the statute to which I have referred, does not require any further intimation to make it effectual than is given by its having been pronounced in open court, and published in the way provided for its publication.

The LORD JUSTICE-CLERK concurred.

The Court refused the appeal.

Counsel for the Appellants — Dundas—Deas. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Jameson—Salvesen—Agents—Patrick & James, S.S.C.

Friday, February 1.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MACKINTOSH AND ANOTHER *v.* MAY.

Lease—Right of Sporting—Right to Sub-Let—Foreign—Conflict of Laws—Lease of Scots Shooting Executed in English Form.

Where a Scots proprietor let the right of shooting and fishing over his estate to an Englishman, *held* (*aff.* judgment of Lord Stormonth Darling) (1) that the lease, although executed in England and in the English form, fell to be construed according to Scots law, and that it was inadmissible to refer to facts extrinsic of the contract with the object of showing that the parties intended it to be construed according to English law; and (2) that no right to sub-let was conferred upon the tenant, in respect that such a right was not expressly given, and could not be implied.

In 1890 Eneas Mackintosh of Balnespick, in the county of Inverness, let to Frank Boyd May, of Kingsbury House, Middlesex, the exclusive right of sporting and shooting over the estate of Clune in that county, together with the lodge and furniture therein, and the right of fishing in the rivers appertaining to the estate, for five years, at a rent of £498, payable by equal yearly instalments on 30th June and 31st December in each year. The contract between the parties was contained in a deed drawn by an English solicitor, and was in these terms—"This indenture, made the 5th day of December 1890, between . . . witnesseth that in consideration of the rent and lessee's covenants hereinafter reserved and contained, the landlord doth hereby demise unto the tenant all that exclusive right of hunting," &c. It was also agreed that the tenant should have power to determine the lease at the end of the third year on giving six months' previous notice in writing to the landlord. The deed was executed according to the English form, in London.

No power was given by this deed to the tenant to sub-let the subjects, but prior to the date of the indenture, upon September

10th 1890, Mr Mackintosh, in a letter to Mr May, wrote—"Of course you would have powers to sub-let to any desirable tenant should any unforeseen event cause you to wish it."

Mr Mackintosh died upon December 3rd 1893 leaving a will and codicils, by which he appointed his widow Mrs Mackintosh, and the Rev. William Lachlan Mackintosh, Canon Residentiary, St Andrews Cathedral, Inverness, as the liferentrix and fiar respectively of the estate of Clune.

In March 1894 May informed Mrs Mackintosh that as he was unable to go to Clune that season he intended to sub-let the shootings, &c. Mrs Mackintosh intimated that she was willing to take the lease off his hands, but that she objected to his sub-letting.

In these circumstances the liferentrix and fiar brought a note of suspension and interdict against May to have him interdicted "from subletting or assigning, without consent of the complainers, the right of hunting," &c., over the estate of Clune, "or the lodge and furniture and effects situated thereon, or the right of fishing" let to him.

The complainers averred—"The said lease contains no power to the tenant to sub-let or assign. With reference to the answer, it is not known and not admitted that by the law of England power to sub-let is implied in the phraseology used in the lease referred to."

The respondent averred—"It was the intention of both parties to the said indenture that the meaning and effect of the contract thereby concluded, and the import of the stipulations therein contained, should be interpreted according to the law of England. Said meaning, effect, and import cannot be comprehended otherwise than by reference to the law of England. By the law of England a power on the part of the tenant to sublet is implied in the phraseology used in the said indenture. This circumstance was in view of both parties when the said lease was entered into, and it was the intention of both parties that the respondent should have power to sub-let."

The complainers pleaded—"(1) The lease under which the respondent holds the right of shooting and the furnished shooting-lodge of Clune, containing no power to sub-let or assign, the complainers are, in the circumstances stated, entitled to have him interdicted from doing so, in terms of the prayer of the note. (2) The averments of the respondent are irrelevant in respect (*a*) the lease in question cannot be modified or construed by reference to the previous communings of the parties; (*b*) the lease being one of heritable estate situated in Scotland, must be interpreted according to the law of Scotland."

The respondent pleaded—"(3) The respondent having by the indenture in question power to sub-let, the reasons of suspension and interdict should be repelled with expenses."

Upon 30th November 1894 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor—"Having considered the closed record and productions, suspends, interdicts, prohibits, and discharges in terms of the note of suspension and interdict; declares the interdict formerly granted perpetual, and decerns, &c.

"*Opinion.*—I feel reluctantly compelled to decide this case in favour of the complainers. I say reluctantly, because I am amazed that they should have raised the present question, particularly as it is not denied that the late Mr Mackintosh wrote the letter of 10th September 1890. In any case, I should have thought that the reasonable course for a landlord to follow, when his shooting tenant found it impossible to occupy personally in the last year of a five years' lease, would have been to offer to consider the name of any sub-tenant he might propose, and agree to it if unobjectionable. But the liferentrix has not chosen to follow that course, and therefore parties are remitted to their strict legal rights, the respondent maintaining that he has the right to sub-let to anyone, and the complainers maintaining that he has no right to sub-let at all.

"The respondent is an Englishman, and the lease, which is in English form, was executed by him and the late Mr Mackintosh in London on 5th December 1890. It contains no express power to assign or sub-let, but the respondent maintains and offers to prove that both parties intended the meaning and effect of the contract to be interpreted according to English law, and that by English law a right to sub-let is implied in such a lease. His counsel founded strongly on the recent case of *Hamlyn* v. *Talisker Distillery*, 1894, App. Cas. 202, in which it was held that, when two persons living under different systems of law enter into a personal contract, the question which of these systems is to be applied to its construction depends upon their mutual intention, either as expressed in the contract or derivable by fair implication from its terms. That was a case where the main part of a mercantile contract executed in London was to be performed in Scotland, but there was a subsidiary agreement to refer disputes to the arbitration of members of the London Corn Exchange. It was this subsidiary agreement which gave rise to the question, and the House of Lords held that by its terms the parties had manifested their intention to have the contract interpreted by the law of England. But that case affords no countenance to the idea that you can travel beyond the contract itself in order to discover the intention of parties. Now, this lease contains nothing to show or even to suggest that the parties intended it to be construed according to English law, except the bare fact that it is couched in English law language, and therefore I think it would be altogether inadmissible in law to attempt to discover their intention from the negotiations which led up to the lease, although I have already expressed my opinion that in *pro conscientiâ* the promise then held out by the late Mr Mackintosh ought to have been respected by his representatives. I admit that if the instrument contained terms of art which required to be translated into language intelligible to a Scots

lawyer (as in *Studd* v. *Cook*, L.R., 8 App. Cas. 577), it would be necessary to resort to English lawyers for their interpretation. But this lease though in English form contains no such terms of art, and the real contention of the respondent is that in every lease (at all events for a term of years) English law implies a power to sub-let. Something was said about the word 'demise,' but there is no mystery in that. It is a good English word signifying the transfer of a right, and it cannot seriously be maintained that the right to sub-let depends upon its use.

"It seems to me, therefore, that there is no room for inquiry. A lease of shootings in Scotland as now understood means a right to occupy Scottish land for a limited purpose. The nature and extent of such a right, so far as expressed in a foreign contract between the lessor and lessee, will receive effect in Scotland, if not contrary to public policy as here administered. But where the contract is silent on any point, and it is necessary to resort to the implication of law, I do not know of any law to which resort can be had except the *lex rei sitae*. It was argued by the respondent that in a lease of shootings there is an implied power to sub-let even by the law of Scotland. There is no direct authority on the point except a *dictum* of Lord Kinloch in *Fife* v. *Wilson*, 3 Macph. 323. But I rather think that the scantiness of authority has arisen from the impossibility of drawing any valid distinction between such a lease and an ordinary lease of a rural tenement. Lord Kinloch observed in that case that a 'lease of shootings implies *delectus personæ* in a sense perhaps more emphatic than almost any other kind of lease.' Professor Rankine expresses the same opinion at pp. 161 and 434 of his book on Leases, and I concur."

The defender reclaimed, and argued—There was no authority in the law of Scotland for saying that a power to sub-let was not given in the lease of a sporting subject as in a lease of an urban tenement, although it was admitted that the power to sub-let could not be implied in an agricultural lease. No reason was given for the difference. There was a *dictum* by Lord Kinloch against the implied power, but the case had not gone to the Inner House—*Earl of Fife* v. *Wilson*, December 24, 1804, 3 Macph. 323. 2. In considering a contract entered into between parties residing in different places where different systems of law prevail, it was a question in each case by what law the parties intended that their rights under the contract should be determined—*Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21. The defender was willing to prove that the intention of the parties was that the indenture should be read as an English deed. Even assuming that proof of the parties' intention was not allowed, it was plain from the fact that the deed was executed in London in English form, especially from the use in it of technical English words, such as "demise," that the deed was to be read as an English deed—*Studd* v. *Studd, &c.*, December 10, 1880, 8 R. 249. Under an English sporting lease a right to sub-let was implied.

The respondent argued—The lease conferred the right of sporting over heritable subjects in Scotland, and in its nature resembled more the lease of an agricultural subject than the lease of an urban tenement. The rules applicable were therefore those which applied in the case of agricultural leases, and the right to sub-let could not be implied. The lease was an ordinary sporting lease although drawn in England. The term of occupancy was five years, which was the customary term of such a lease—*Farquharson*, November 3, 1870, 9 Macph. 66, Lord President, p. 70. The tenant was also bound to keep an effective gamekeeper on the premises, and exercise his rights over the estate in a fair and sportsmanlike manner. These conditions corresponded to the qualifications which were stated to be in view in an agricultural lease—Bell's Com. i. 72. The right of shooting over the lands was not a mere personal franchise, but was a right of occupation of lands as much as under an agricultural lease although for a different object, and the rights and limitations must be judged of as in such a lease—*Stewart* v. *Bulloch*, January 14, 1881, 8 R. 381; *Pollock, Gilmour, & Company* v. *Harvey*, June 5, 1828, 6 S. 913. It was said that this contract was made in London, and therefore fell to be judged of by English law, but the circumstance that it was made out of Scotland was of no importance; what was to be considered was, whether this was really a Scots contract or not, and all the stipulations showed that it was intended to be a lease according to Scots law of a Scots subject — *Valery* v. *Scott*, July 4, 1876, 3 R. 965. It was not possible to go into prior communings between the parties; the contract itself must be construed as the final decision of the parties to it, and here the intention of the parties could not be ascertained otherwise, because Mr Mackintosh was dead, and it would be of no avail for an English solicitor to say that when he drew the lease he intended it to be construed by English law—*Buttery & Company* v. *Inglis*, November 3, 1877, 5 R. 58; *Lloyd* v. *Guibert and Others*, November 27, 1865, L.R., 1 Q.B. 115.

At advising—

LORD JUSTICE-CLERK—We have nothing before us to indicate what was the intention of the parties except the document itself. It is not legitimate to look for an explanation of the meaning of that document to the previous communings of the parties.

The purport of the document is that the two parties agreed to a lease of certain landed property in Scotland, and the lessor, the landlord, agreed to give the other party the right of shooting and sporting over certain lands which belonged to him. From circumstances with which we are not acquainted, it was convenient to the parties to get the lease drawn up in London, and it was drawn up by an English solicitor, but it is just a lease of certain subjects in Scot-

land, comprising a furnished house, and the right of shooting over certain lands.

No doubt the word "demise" is used, but counsel for the defender admitted that that word is simply equivalent to "let," and it is plain that the document was a lease in the ordinary meaning of the word, because the terms "lease" and "tenant" are used throughout the deed.

Assuming that it is only a lease, it may be quite true that an English solicitor in drawing up a lease would not insert a clause to the effect that the tenant might grant a sub-lease of the subjects, because by the law of England the power to grant a sub-lease was implied, but then we have no indication of the intentions of the parties except the deed itself, and I think that must be interpreted according to our law, and if that is so, then the result is quite clear.

Upon the whole matter, I think the Lord Ordinary has come to a right conclusion, and as the deed contains no stipulation that the tenant is to have the right to grant a sub-lease, no such right can be implied.

LORD YOUNG—I think this is a Scottish lease, although it is made by a contract drawn in England. Now, in a lease of an agricultural subject, the parties may contract for whatever they please, but, if the lease does not say that the tenant is to have the power to grant a sub-lease, by our law that power is not implied; it must be contracted for. On the other hand, in the lease of an urban subject—an unfurnished house—the law is otherwise; the parties may contract for whatever they choose, but if there is nothing said in the lease about it the power to sub-let is implied.

Now, with respect to a sporting lease, there is no direct authority, but there is an *obiter dictum* by a very distinguished Judge to the effect that a sporting lease is in this matter even stronger than the analogy of an agricultural lease, and that it is not at all analogous to the lease of an urban tenement. I agree with that *dictum*. I am prepared to hold that where a sporting lease has been prepared in Scotland it will, in the absence of any stipulation on the subject, be implied that there was no power to sub-let.

The only question remaining, therefore, is, whether the rights of parties under a lease of Scots subjects, which may be a lease for profit, or for shooting, or fishing, where the profit only comes when the land has been occupied, but which has been prepared in England, are to be decided according to the rules of the English or the Scots law? I am of opinion that such a lease is a lease of Scots subjects, and that the law of Scotland as to what is implied or not implied in a lease is applicable.

I therefore apply to this lease the Scots law regarding such leases, and as I find no expression in it as to the parties' intention in regard to sub-tenants, I am of opinion that there is no implication that the tenant could sub-let the subjects, but that it is implied he could not sub-let them.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD TRAYNER—I am of opinion that this is a Scots contract, and must be construed according to Scots law, and that not only is the right to sub-let the subjects not implied, but it is not implied unless it is expressly given.

The Court adhered.

Counsel for the Pursuer—W. C. Smith—M'Clure. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender—Jameson—M'Lennan. Agent—Richard Lees, Solicitor.

Friday, February 1.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BEDOUIN STEAM NAVIGATION COMPANY, LIMITED *v.* SMITH & COMPANY.

Ship—Cargo—Action for Freight—Defence of Short Delivery—Bill of Lading—Proof—Presumption.

In an action to recover the balance of freight of a parcel of jute carried from Calcutta to Dundee, brought by the shipowners against the consignee, the defender averred that the amount of jute delivered to him was twelve bales short of the amount shown by the bill of lading signed by the shipmaster to have been shipped at Calcutta, and pleaded compensation.

Held (*rev.* judgment of Lord Kyllachy) that, although the bill of lading afforded *prima facie* evidence as against the shipowners of the quantity shipped, in the circumstances, and having regard particularly (1) to the fact that the vessel on her arrival at Dundee was so fully loaded that another bale could not have been put into the hold, and (2) to the positive testimony of the ship's officers that every bale was delivered which was put on board at Calcutta, the shipowners had discharged the *onus* laid upon them, and proved delivery of the whole cargo shipped.

This action was brought by the Bedouin Steam Navigation Company, Limited, the registered owners of the steamship "Emir," against Henry Smith & Company, jute spinners and manufacturers, Dundee, to recover £35, 7s. 2d. as the balance of freight alleged to be due to them for the conveyance of 500 bales of jute from Calcutta to Dundee.

In defence Henry Smith & Company stated that the full cargo of 500 bales mentioned in the bill of lading had not been delivered, but that they had obtained delivery of twelve bales less than that number.

They pleaded—"(2) The pursuers having