Friday, February 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

FORBES' TRUSTEE *v.* FORBES.

Bankruptcy—Cessio—Illegal Preference—Title to Sue—Right of Trustee in Cessio to Reduce Illegal Preferences.

A trustee in cessio has no title as such to reduce illegal preferences.

Under a small debt decree for £4 the effects of Miss Elizabeth Forbes, residing at Gateside, in the parish of New Monkland, were poinded. The only thing attached by the poinding was a cow. Miss Forbes's mother, Mrs Elizabeth Maclean Blair or Forbes, who resided with her daughter at Gateside, brought an interdict in the Sheriff Court of Airdrie against the sale of the said cow under the poinding, on the ground that it was her property. In this action decree was given against the pursuer, and she was found liable in expenses, amounting, as taxed, to £16, 2s., for which, on 5th June 1900, decree was given in the name of Messrs J. M. & T. A. Macfarlane, solicitors, Airdrie, as agents' disbursers. The cow had meanwhile died.

On 11th July 1900 Messrs Macfarlane charged Mrs Forbes for payment, and at the same time gave her notice that they intended to apply for cessio of her estates. On 28th July the petition for cessio was presented, and served on Mrs Forbes on the 31st. On 8th November William Hugh Jardine, accountant, Coatbridge, was appointed trustee, and on 7th February 1901 Mr Forbes executed a disposition *omnium bonorum* in the trustee's favour.

On 3rd July 1900 Mrs Forbes had assigned to her daughter the said Elizabeth Forbes the lease of certain leasehold subjects in Gateside belonging to her.

Mr Jardine, the trustee in the cessio, brought the present action against Miss Elizabeth Forbes and Mrs Forbes, concluding for reduction of the said assignation. Miss Forbes lodged defences.

In this action the pursuer, after narrating the facts above mentioned, made the following averments:—"The said Mrs Forbes became notour bankrupt in terms of the Bankruptcy Act of 1856 and Acts explaining and amending the same on the 11th day of July 1900. On the 3rd of July 1900, when she executed the said assignation in favour of the defender Elizabeth Forbes her daughter, she was, as she and the other defender then well knew, hopelessly insolvent. The said Mrs Forbes is conjunct and confident with the defender her daughter, and the said assignation was granted by Mrs Forbes without true just and necessary cause, and without a just price really paid, and same was done after the contracting of lawful debts from true creditors, and in particular of the debt due to the said Messrs J. M. & T. A. Macfarlane, decerned for against her on 21st May and 5th June 1900. The said assignation was moreover a gratuitous alienation by the bankrupt in favour of her daughter the defender Elizabeth Forbes of her sole asset, she being at the time, as she and her said daughter then well knew, hopelessly insolvent, and the same was to the prejudice of her creditors, and was fraudulent at common law. The pursuer, as trustee foresaid, represents the foresaid Messrs J. M. & T. A. Macfarlane and others, prior creditors of the said Mrs Forbes, as well as the general body of her creditors. In any view the said deed was a voluntary assignation within sixty days of the notour bankruptcy of the said bankrupt for the satisfaction or further security of her said daughter in preference to the other creditors of the bankrupt, and is accordingly reducible under the Act 1696, c. 5."

The pursuer pleaded—"(1) The assignation in question was a gratuitous alienation by the bankrupt in favour of the defender Elizabeth Forbes, and was *in fraudem* of the bankrupt's creditors, and falls to be reduced at common law. (2) The bankrupt having assigned her property to her daughter without true just and necessary cause, and without a just price really paid, the assignation is contrary to the Act 1621, cap. 18, and falls to be reduced accordingly, with expenses. (3) The deed under reduction falls to be reduced, in respect it is contrary to the Act 1696, cap. 5."

The defender pleaded, *inter alia*—"(1) No title to sue."

On 5th December 1902 the Lord Ordinary (PEARSON) pronounced an interlocutor by which he repelled the first plea-in-law for the defender, and allowed a proof.

Note.—"In this action the trustee in a process of cessio, who holds a disposition *omnium bonorum* granted by the debtor, seeks to reduce an alleged illegal preference granted by the debtor to her daughter in prejudice of prior creditors. The petition for cessio was presented by a creditor on 28th July 1900. The present pursuer was appointed trustee on 8th November, and the debtor granted the disposition *omnium bonorum* in his favour on 7th February 1901.

"The averments are relevant to infer reduction provided the trustee has a title to sue for it. His title is challenged on the ground that this is truly a competition of two voluntary deeds granted by the same person, and that the trustee has no better title to reduce preferences than if he were a trustee under a voluntary trust-deed for creditors. In the latter case the trustee has no title to reduce illegal preferences unless he holds a right derived from creditors who had themselves a good title to reduce—*Fleming's Trustees*, 1892, 19 R. 542. It is said that this view of the position of the trustee in a cessio is supported by the case of *Thomas* v. *Thomson*, 3 Macph. 1160, 5 Macph. 198, where in the final decree the Court found 'that the action was incompetently raised and insisted in, in so far as the same was raised and insisted in by the pursuer in his capacity of trustee for the creditors appointed in the process of *cessio bonorum*.' The action was accordingly dismissed in so far as raised or insisted

in by the pursuer in that character, though it was sustained at his instance as a creditor of the pursuer under cessio. But it is clear from the first report of the case that a disposition *omnium bonorum* had not been granted by the debtor, nor even demanded from him, and on that ground the argument on the question of title was stopped, so far as the pursuer was insisting in the action in his capacity of trustee.

"The right of a trustee holding such a disposition to reduce preferences seems never to have been directly affirmed, and if it could be said that the disposition *omnium bonorum* was a purely voluntary disposition, there might be ground for holding that the trustee was in no better position than a trustee under a voluntary deed for creditors. Professor Bell (2 Com. 485) describes the conveyance as being 'nothing more in competition than a voluntary deed for creditors,' but the context makes it plain that he is speaking only of a competition with diligence begun for attaching the estate, and it is clear that a process of cessio is of no effect in a competition of diligence. It is to be kept in view that the process of cessio itself was at first purely voluntary on the part of the debtor. It was nothing more than a process to relieve the debtor from the hardship of diligence against his person; the debtor alone could petition, and the result of his not granting a disposition *omnium bonorum* was that his person remained open to diligence. But the character of the process has been entirely changed by the provisions of the Debtors Act 1880 and subsequent legislation. It is now open to a creditor to petition for cessio, as was done in the present case. The debtor can be compelled to execute the general disposition, and provision is now made for the debtor obtaining discharge, which was not previously open to him. The provisions of the Act of Sederunt of 1882 show how nearly the process now approaches to a sequestration as regards the position of the debtor and the creditors. It still differs from a sequestration in important particulars. It does not carry to the trustee estate subsequently acquired. Nor does it operate to equalise diligences, or to vest the estate in the trustee as if he had done complete diligence, as is the case under the sequestration statute. The effect of the trustee succeeding in the present action of reduction may be to throw the subject of the illegal preference open to the diligence of the individual creditors. But it appears to me to be the duty of the trustee as acting for the creditors to enlarge the estate available to them by challenging illegal preferences, and his relation to the creditors in this process of distribution gives him, in my opinion, a title to sue, if he relevantly avers that he represents creditors who have themselves a title to bring a reduction."

The defender reclaimed, and argued—Prior to the Debtors' Act 1880 the trustee in a cessio had no title to reduce preferences unless he had the right to sue conferred upon him by creditors who could themselves have brought a reduction—Bell's Commentaries (M'L. ed.) ii. 485; *Thomas* v. *Thomson*, July 20, 1865, 3 M. 1160, and December 19, 1866, 5 M. 198. Although the Debtor's Act 1880 had changed the procedure of cessio in many respects, it did not enlarge the rights of the trustee. Thus it was still competent for an individual creditor to execute diligence—*Simpson* v. *Jack*, November 23, 1888, 16 R. 131, 26 S.L.R. 76; *Reid* v. *Graham*, July 3, 1894, 21 R. 935, 31 S.L.R. 779. The trustee's right was only that of a disponee in heritage and assignee in moveables as at the date of the interlocutor of the Sheriff ordaining the debtor to grant a disposition *omnium bonorum*. He had no higher right than any other disponee or assignee would have. He was thus in the same position as the trustee in a private trust for behoof of creditors, who had no title to reduce illegal preferences—*Fleming's Trustees* v. *M'Hardy*, March 2, 1892, 19 R. 542, 29 S.L.R. 483. The grounds of judgment there were applicable to the present case.

Argued for the respondent—The question as to the right of a trustee in cessio to reduce illegal preferences under the Act 1621, c. 18, or 1696, c. 5, had never been decided. The passage cited by the defender from Bell's Commentaries related to the right to cut down competing diligence, not to the present question. *Thomas* v. *Thomson, cit. supra*, was not in point, because there there was no disposition *omnium bonorum* in favour of the trustee, and the case was decided before the Debtors' Act 1880, which altered the process of cessio. The trustee in cessio, provided that, as here, there were prior creditors, had an inherent title to reduce preferences, just as a trustee in sequestration had before the Bankruptcy Act 1856 gave him a statutory title—*Edmond* v. *Grant*, June 1, 1853, 15 D. 703.

At advising—

LORD PRESIDENT—The question in this case is whether a trustee in a process of *cessio bonorum*, who also holds a disposition *omnium bonorum* granted by the debtor, has a title to reduce an alleged illegal preference given by the debtor to her daughter to the prejudice of prior creditors. The petition for cessio was presented by a creditor on 28th July 1900, the trustee was appointed on 8th November of that year, and the debtor granted the disposition *omnium bonorum* to him on 7th February 1901.

I think it may be taken as settled that a trustee under a voluntary trust-deed for behoof of creditors, granted by a debtor, has not merely by virtue of such a trust-deed a title to reduce illegal preferences, although he may do so if he holds a right acquired from creditors who had themselves a good title to reduce such preferences (*Fleming's Trustees* v. *M'Hardy*, 1892 19 R. 542). It was pointed out by Lord Kinnear in that case that the Act of 1696 gives to creditors of a particular character the right to sue for the reduction of pr efer

ences falling within the scope of the Act, and it gives the right to nobody else. From this it follows that nobody can sue under it unless he can set forth a title giving him a right to sue as a prior creditor, or as a representative of a prior creditor. In the present case it does not appear that the pursuer is either the assignee of the general body of the creditors or of particular creditors. Farther, it has never, so far as I am aware, been held that a trustee in a cessio has, as such, a title to reduce alienations by the bankrupt which may be invalid under the Bankruptcy Acts or at common law. In the case of *Thomas* v. *Thomson*, 3 Macph. 1160, 5 Macph. 198, the Court decided that the action was incompetently raised and insisted in by the trustee for the creditors appointed in a process of *cessio bonorum* who did not hold a disposition *omnium bonorum* from the bankrupt. It seems to me that the essential thing which the trustee (in the absence of statutory provision on the subject) would require to show, in order to entitle him to sue such an action, is that he represents by conveyance or assignation one or more creditors who would have been in a position to do so, and this is not shown in the present case. While, therefore, I feel the force of the considerations stated by the Lord Ordinary, I am unable to concur in the result at which he has arrived.

In expressing this opinion I am not leaving out of view the argument which was urged to the effect that as under the Debtors' Act 1880 a *cessio bonorum* may be compulsory, there is more reason for holding it to have the effect of vesting the trustee with the right in question than if it was voluntary, but on the whole I think that in the absence of statutory provision we would not be warranted in holding it to have this effect.

For these reasons, I consider that the judgment of the Lord Ordinary should be recalled, and that the action should be dismissed.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I agree with your Lordships. I must say that I think that this is an action which it is not possible to regard without disfavour. It is an action against two poor women, a mother and a daughter. The mother is ninety years of age; and the daughter, who is the compearing defender, is on the Poors Roll. The pursuer sets out with perfect frankness the history of the whole course of the proceedings out of which the action has arisen; and it seems to me that that history discloses a use of the machinery of the law against these two defenders which I consider harsh and oppressive. The proceedings began with an action in the Small Debt Court at Airdrie against the daughter for the sum of £4 with expenses. That action ended in a decree against this poor woman for £4. Thereupon for the enforcement of this decree a cow was poinded, and the question arose whether the cow so poinded really belonged to the defender in this small debt action or to her mother; and there arose a litigation about that question. Before that was determined the cow died; and one would have thought that that would have put an end to the whole proceedings, in which the only question was whether that cow had been properly taken in execution of a decree for £4. But this miserable litigation went on, and the result was that a decree was pronounced for £16, 2s. of expenses against the mother, payable to Messrs Macfarlane, solicitors, Airdrie. That was a decree for more than £16 of expenses following upon a small debt action for £4. On obtaining this decree the law-agents charged the defender Mrs Forbes for payment, and at the same time intimated to her that a petition for decree of cessio would be presented against her on 21st July 1900. The petition was presented accordingly and the old woman was ordered to execute in ordinary course a disposition *omnium bonorum* and a trustee was appointed. After that appointment had been made it appeared that this defender was in possession of a small leasehold property consisting of two small houses in one of which she and her daughter lived and carried on some small business. The other was let for £7 a-year. The defenders say that that is their whole means of livelihood, and there is no reason to doubt the truth of their statement. It appeared, however, that before the decree of cessio was obtained the elder woman had conveyed this leasehold right to her daughter; and the trustee in the cessio now brings this action for the purpose of setting aside that conveyance as a fraudulent alienation of property in defraud of creditors. In whose interest the action was brought does not appear to me to be very clear. The pursuer does not aver that there are any other creditors who will benefit except the firm of law-agents who instituted the cessio proceedings. The pursuer refers incidentally to what he calls "the general body of creditors," but who they are he does not say. If there are no other creditors, then it seems to me that the statement suggests a very serious doubt whether the process of *cessio bonorum*, which is intended for the distribution of an insolvent estate among competing creditors is being put to any proper or legitimate use when an attempt is made to employ it as a diligence for the benefit of one creditor only. The first question, and it is enough for the decision of this case, is whether a trustee in a cessio has a title to reduce prior alienations of the debtor's property. If there are any other creditors, then he is not their assignee. He represents nobody. He simply holds the estate of these poor women under a conveyance *omnium bonorum*. I think it is very doubtful whether this question could have been raised before the passing of the Debtors' Act 1880. At all events, the research of counsel has not discovered anything in the books to suggest that before that Act the trustee in a cessio was ever supposed to have a title to set aside alienations of this kind; and I do not think it wonderful that they should have failed to do so, because there is nothing in

the process of *cessio bonorum* as it was then understood to furnish the basis for such an action. It was an application to the Court by an insolvent debtor to be released from imprisonment on condition of his giving up the whole estate then belonging to him to his creditors; and that condition was carried out by his granting a voluntary disposition *omnium bonorum* in favour of a trustee. It is true that by statute (6 and 7 William IV. cap. 56) the decree in a cessio was made to operate as an assignation of the debtor's moveables in favour of a trustee; but the measure of the trustee's rights remains exactly the same as before, because as regards moveables he has no further or higher right than that of a voluntary assignee, and as regards heritable estate, a disposition is still required. Now, a conveyance of the property belonging to a debtor at its date cannot give any right or title to property which he had conveyed to a particular creditor before that date; and even if as matter of construction it bore to do so it could not give a title to recover such property on any ground on which the granter himself could not have recovered it. It seems to be clear enough in the first place that a disposition *omnium bonorum* can carry no other rights than such as are vested in the granter at the time, and in the second place, that the granter of such a deed can have no right or title to challenge a previous conveyance by himself to a creditor on the ground of his own fraud. I see no ground therefore on which the title of a trustee in a cessio, taken by itself, to challenge previous alienations of the property formerly belonging to the debtor, but which *ex hypothesi* has not been conveyed to him, can possibly be sustained. And I think that this view of the meaning and effect of the disposition *omnium bonorum* is entirely in accordance with that stated by Professor Bell when he says that the conveyance though judicially sanctioned is nothing more in competition than a voluntary disposition. The Lord Ordinary says that Professor Bell is speaking only of a competition with diligence for attaching the estate. I confess I do not understand how a conveyance should have the effect of a voluntary disposition only in competition with diligence, and yet have some higher and more powerful effect in competition with completed rights of property which would otherwise be preferable. But the material question to consider is why the disposition *omnium bonorum* cannot compete with diligence; and the obvious and sufficient answer is, that the right of the disponee in trust flows directly and exclusively from the debtor whose estate is supposed to be attached, and that the latter cannot give to anybody else a right which is not vested in himself. I am confirmed in this view of the deed by the cases, of which there are several, in which it was held that the fact of a debtor having granted deeds of alienation challengeable under the Acts 1621 and 1696 was a sufficient reason for refusing him the benefit of a cessio, because he had thereby incapacitated himself from making a full surrender of his estate to his creditors; and the obvious inference is that the cessio was not regarded as a possible process for setting aside such alienations. The question is whether the Act of 1880 makes any difference. It is quite true that that statute introduced a material change in the character of the process of cessio, and it is necessary to consider what that change is, and whether it enlarges in any way the right or title of a trustee under a disposition *omnium bonorum*. There are two points in regard to which a great change has been effected by the Act. In the first place, it enables a creditor to sue out a petition for cessio, and does not leave the process in the hands of the debtor only; and in the next place, it enables the debtor to obtain a discharge. But it appears to me to leave the rights of the trustee exactly where they were. There is no clause of vesting, and there is nothing giving the trustee a different or higher right than he had before. His position, if my reading of the statute is right, is just the same as formerly, namely, that of an assignee in moveables and a disponee of heritage. It is reasonable to go from the statute to the form of the disposition *omnium bonorum* provided by the Act of Sederunt (22nd December 1882) relative to processes of cessio. By such a disposition the debtor conveys as of its date to the trustee his whole estate and effects, heritable and moveable. It seems to me to be impossible to ascribe any meaning or effect to such a conveyance other than what I have just stated, namely, that it carries the estate then belonging to the debtor, and nothing more. The Lord Ordinary observes that the relation of the trustee to the creditors gives him a title to sue if he relevantly avers that he represents creditors who have themselves a title to bring a reduction. I do not understand how the title can depend on an averment of representation. Any title in the trustee must be as assignee. The relation between the trustee in a cessio and the creditors was fully considered in the case of *Simpson* v. *Jack*, 16 R. 131, and the late Lord President (Inglis) pointed out how widely different the position of a trustee in a cessio is from that of a trustee in a sequestration—"The latter," he says, "is a poinding and arresting creditor, and his diligence of arrestment and poinding is universal and extends to everything in the bankrupt's possession, and to the whole of what may be due to him, in the same way as if he had used poinding and arrestment." In regard to the position of a trustee in a cessio he says—"All that he has to do is to realise the estate and distribute it;" and again, "a cessio has not the effect of a universal diligence in favour of the trustee in a cessio." Now, the leasehold subject in question is not in my opinion part of the estate conveyed to the pursuer by the disposition *omnium bonorum;* he has no higher or other title than that given him by the disposition; and therefore he can have no right to set aside the defender's title to it, or to recover it from her in the present process.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Counsel for the Pursuer and Respondent —A. S. D. Thomson—Adamson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender and Reclaimer —D. Anderson. Agent—Walter Finlay, W.S.

Friday, February 20.

SECOND DIVISION.

[Sheriff Court at Dundee.

FRASER *v.* CALEDONIAN RAILWAY COMPANY.

(Reported *ante*, p. 43.)

Expenses — Jury Trial — Modification — Small Amount of Damages Awarded — Action Appealed from Sheriff Court against Dismissal on Relevancy — Witnesses not Resident Locally.

In an action brought in the Sheriff Court at Dundee against the Caledonian Railway Company the pursuer claimed £200 as damages for injuries sustained by her at Buchanan Street Station, Glasgow. The Sheriff-Substitute dismissed the case as irrelevant. On appeal the Court found the action relevant, and sent the case to trial by jury. The jury found for the pursuer, and assessed the damages at £25. On a motion for the defenders that the pursuer should only be allowed expenses on the Sheriff Court scale on account of the small amount recovered, *held* that as the case had been brought to the Court of Session in a successful appeal on relevancy, and as the witnesses of the accident were not resident at Dundee, this was not a case for modification, and that the pursuer was entitled to full expenses.

Shearer v. *Malcolm*, February 16, 1899, 1 F. 574, 36 S.L.R. 419, *distinguished.*

This case was the sequel to the case reported *ante*, p. 43, in which Mrs Margaret Isabella Fraser sued the Caledonian Railway Company for £200 as damages for injury sustained by being pushed off the platform at Buchanan Street Station, Glasgow, through the pressure of the crowd, when returning to Dundee on the Dundee Autumn Holiday, 1901.

The action having been found relevant, and the interlocutor of the Sheriff-Substitute dismissing it as irrelevant recalled, as reported *ante ut supra*, on 13th November 1902 an issue in common form was approved for the trial of the cause. On 8th December the case was tried before the Lord Justice-Clerk and a jury, and the jury returned a verdict for the pursuer and assessed the damages at £25.

On 20th December the Court, on the motion of the defenders, granted a rule on the pursuer to show cause why a new trial should not be granted.

On 6th February 1903, after hearing counsel, the Court discharged the rule, and of consent applied the verdict, reserving meantime the question of expenses.

On 20th February counsel for the defenders and respondents moved the Court to modify expenses to the amount which would have been payable on the Sheriff Court scale, and cited *Shearer* v. *Malcolm*, February 16, 1899, 1 F. 574, 36 S.L.R. 419.

Argued for the pursuer and appellant—The pursuer was entitled to full expenses, taxed in the ordinary way — *Casey* v. *Magistrates of Govan*, May 24, 1902, 39 S.L.R. 635. The present case was distinguishable from that of *Shearer*. The pursuer in the present case required to appeal to the Court of Session because the Sheriff-Substitute had decided against her on relevancy. In *Shearer* the action was brought in the Court of Session. Further, in the present case the witnesses would have had to travel from Glasgow to Dundee even if the case had been tried by proof in the Sheriff Court, so that no more expense had been incurred by trying the case in Edinburgh.

At advising—

LORD JUSTICE-CLERK—We have already decided that the pursuer is entitled to expenses, and the only question remaining for us is whether there should be any modification. Now, I think that is a matter to be dealt with in each case on its own special merits. In this particular case there is this peculiarity which does not often occur in cases coming up from the Sheriff Court. The pursuer was refused a proof in the Sheriff Court, her action being held irrelevant; and accordingly, if that was an erroneous judgment it required an appeal to set it right, and accordingly here we had a discussion on the relevancy, with the result that the Court thought that there was a relevant case for consideration. Now, the case being here, no one seems to have suggested that it should be sent back again to the Sheriff at that time. There might have been reasons for that which are not known to me, but at all events no such motion was made, and when the case was here an issue was allowed and it went to trial.

Now in such cases, if the matter is a small one, and if the result of holding the case here is to enormously increase the expenses by bringing a great crowd of witnesses from distant parts of the country to Edinburgh when the case might quite well be disposed of in the Sheriff Court, I should hold that in such circumstances there were certainly grounds for modification. But this case is peculiar in this respect, that while the accident which led to the injury took place in Glasgow, the case was raised in the Sheriff Court at Dundee against the Caledonian Railway Company, and therefore required to be disposed of in the Sheriff Court at Dundee, or in the Court of Session by jury trial. It was a case of an accident occurring at an overcrowded railway station, and it is quite obvious that many of the witnesses would have to come from Glasgow to Dundee, and