No. 46. JOHN HUNTER, Appellant.—*Mr. Murray—Mr. Sandford.*

GEORGE GARDNER, Respondent.—*Dr. Lushington—Mr. Anderson.*

Cessio Bonorum.—Objections in a process of cessio,—That the certificate of imprisonment only bore from the 14th of one month to the 14th of another, but did not state if the pursuer had remained in prison in the interval; that all the creditors had not been called; and that the pursuer had from time to time varied the amount of his debts; repelled (affirming the judgment of the Court of Session).

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2D DIVISION.

GEORGE GARDNER, comptroller general of the customs for Scotland, having from various causes become involved in his circumstances, he called, in April 1830, a meeting of his creditors, and laid before them a state of his affairs, showing that his funds amounted to 700*l.*, and his debts to 2,080*l.*, besides an annuity to his sisters of 75*l.*, on which no valuation was put. His income was about 580*l.* per annum. With a view to liquidate his debts, he offered to convey to a trustee, for behoof of his creditors, his whole effects, and also to assign whatever part of his salary should be thought reasonable. Ultimately all his creditors, except John Hunter, creditor for about 200*l.*, agreed that they should accept 300*l.* per annum out of his income, the sisters to draw a proportion effeiring to their annuities. As Hunter persisted in dissenting, Gardner who had been imprisoned, but had been liberated, had recourse to the benefit of the process of cessio bonorum.

Hunter in limine objected—1. The certificate of imprisonment only bears that the pursuer was imprisoned on the 14th of May 1830, and was in custody on the 14th of June following, when the certificate was granted; but there was no evidence that he was not at liberty during some part of the intervening period, and all the creditors have not been called. He farther pleaded the merits, that the pursuer had from time to time varied the amount of his debts in a very unsatisfactory and suspicious manner.

Answered—1. The pursuer was in gaol during the whole statutory period, and the certificate is in the usual terms. 2. This objection was formerly urged, and the pursuer called the cre-

ditors omitted, by a supplementary summons. The same objection by Hunter, an opposing creditor formerly cited, is incompetent. 3. On the merits the variation in the state of the debts is satisfactorily accounted for. The objecting creditor has in view, by his opposition, to concuss the other creditors to pay his debt, in order that they may, for their own safety, keep the respondent from going again to gaol. If he be a second time imprisoned he will lose his situation, and the creditors will be deprived of any chance of payment. Sept. 28, 1831.

The Court (8th March 1831) found the pursuer entitled to the benefit thereof; ordained him to grant a disposition of his effects, and to convey and assign, habili modo, a proportion of his salary amounting to 300*l.* sterling yearly, as proposed, to his creditors or their trustee, to be applied towards payment pro tanto of his debts, and to give his oath in terms of the Act of Sederunt, &c., and afterwards (10th March 1831) decerned in the cessio.

Hunter appealed.

Appellant.—Besides the objections raised in the Court below, the appellant is, at all events, entitled to a disclosure of the respondent's affairs much fuller than any that has been yet made, and to exhibition of every document connected with the subject.

Respondent.—The appellant has obtained every information he was entitled to. This opposition of the appellant is vexatious and oppressive, and is maintained in direct contradiction to the wishes and the interests of the other creditors.

Lord Chancellor.—My Lords, I will trouble your Lordships with a few observations on this case, feeling it to be desirable that it may be disposed of now without subjecting the parties to the expense (which probably some of them can ill afford—the one party being an insolvent, and the other a creditor of the insolvent estate) of another attendance at your Lordships' bar. There is one point upon which chiefly I have entertained some doubts in the course of this argument, and on which I do not see my way very clearly at present, in adopting the view taken in the interlocutor of the Court below. As to the first point, namely, that of the imprisonment

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being colourable, it is out of Court; and as to the question of fraud, that does not appear to me to be raised in a sufficiently competent and distinct form in the Court below to enable the parties to avail themselves of the objection. I may also state, that if there is any particular branch of the jurisdiction of the Court below which ought not to be rashly made the subject of appeal to your Lordships, it is that of awarding the cessio bonorum; this matter is intended to be for the consideration of the Court below; the Court below is to examine the pursuer—to have the advantage of hearing all that can be urged on the opposite sides of the bar—to be satisfied that the case is one of good faith and innocent misfortune, not coupled with extravagance; for though there has been no fraud, yet if the insolvency has befallen the party in consequence of a degree of extravagance which may not strictly be called criminal, but which must still, in a moral point of view, be considered so much a deviation from prudence that it cannot be called innocent—that would preclude the granting a cessio bonorum. But, my Lords, the point upon which I entertain a doubt is that on which the Court have directed that he shall assign for the benefit of his creditors a considerable proportion of the profits of an office which he held, of comptroller of the customs. It appeared to me on the first view, and it seems to me still, to be perfectly clear, that if the profits of that office were attachable, if they were within the diligence legally competent to the creditor, as the granting of the benefit of the cessio discharges the person and likewise the property after acquired from liability to debts, there could be, on no principle, any pretence for holding that the Court of Session had the power to say to any one creditor, "We think it fair that a compromise should be taken, and a "part only of the future profits of the office be given up for your "benefit and that of the rest of your fellow-sufferers under the in-"solvency; you may or you may not agree to that, but we impose "upon you the necessity of taking either this part or none at all; for "by one and the same sentence by which we discharge the insolvent, "we tell you that you may have a certain portion of the revenue of "this office in payment of the debt, but any thing beyond it you are "precluded from attaching." For I take it to be clear, that no person, after such an interlocutor was pronounced, would have a right to attach, however attachable it might have been in its own nature, to the extent of one farthing beyond the sum assigned by the order of the Court. But, my Lords, all this proceeds upon the supposition that this is attachable. I do not assume that it is attachable, and then argue that the Court of Session has no right to make a partial assignment. On the contrary, I hold that the Court of Session must have considered it attachable, because they found it

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the subject of assignment—because their modus operandi was to give, through the assignment, the benefit of a portion of it to the creditors. Then I ask, how can they take a part of it, and only a part, and exclude the creditors from their recourse against the whole of it, when they, by the very act of assigning a part of it under their sentence, assume that it is of an attachable nature, because, if it be not of an attachable nature, how should it be made the subject-matter of an assignment? Now, my Lords, in what way this is to be answered I profess not yet clearly to have discovered. There is no doubt that there are decisions which appear to have not been questioned, at all events, to have been followed in a consistent course by the Court of Session, and which assume that many things which in this country are not held to be assignable are the subject-matter of assignment in Scotland. There are several cases in which the half pay of officers, and I think the full pay of officers, and also ministers' stipends, are all made the subject of this judicial compact entered into by the Court with the creditors in this mode of extending the extraordinary remedy of the cessio bonorum, borrowed from the civil law, and extending it to the debtor, on such terms for the creditor as in the exercise of a sound discretion they deemed it fit to impose upon one party for the benefit of the other. That appears to be the ground of much of these cases; and the Court seem not to have scrutinized very nicely, whether, from the nature of the subject-matter, namely, the half pay or the full pay of an officer, or a minister's stipend, or, in the present case, the salary of an officer employed under government, and in the execution of an important public trust, an assignment can validly operate upon and affect those particular rights; but they have nevertheless assumed to deal with them, and have directed that a certain proportion of them shall be assigned as the condition of granting the benefit of the cessio bonorum. Those cases, undoubtedly, could not have occurred in this country. I may refer to the well-known case of Flarty v. Odlum, in 3 Term Reports, 681, which, from its importance, was the subject of much discussion, it being the first case in which it was held that the half pay of an officer was not the subject of assignment, and it was followed in Lidderdale v. the Duke of Montrose, in 4 Term Reports, where the doctrine laid down was made the subject of further discussion, and the Court adhered to their former view that the half pay was free from attachment; so that neither is a man bound to put it into the schedule of his assets, nor does the general assignment to the provisional assignee transfer it, nor would a bargain and sale to the assignees under a commission of bankrupt pass it out of the bankrupt; it is unassignable and incapable of being affected by any of those modes of proceeding.

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The same doctrine was laid down with respect to the profits of a living in the case of Archbuckle v. Cowtan, the judgment in which has been very much considered in Westminster Hall, and like most of the judgments of that most able and learned lawyer Lord Alvanley, has given great satisfaction to the courts and to the profession. In the report of that case your Lordships will find laid down the general principle, though not perhaps worked out in these words, that all such profits as a man receives in respect of the performance of a public duty are, from their very nature, exempt from attachment, and incapable of assignment, inasmuch as it would be inconsistent with the nature of those profits that he who had not been trusted, or he who had not been employed to do the duty, should nevertheless receive the emolument and reward. Lord Alvanley quotes Flarty v. Odlum, and Lidderdale v. Montrose; and in illustrating the principle on which a parson's emoluments are not assignable, he does not confine his observations to the particular case of half-pay officers, or the case of a parson's emoluments, but he makes the observation in all its generality, as applicable to every case of a public office and the emoluments of that office. The first case in which the doctrine had been extended to half pay was a case in 1st Henry Blackstone, 627, decided by the Court of Common Pleas, the case of Barwick v. Read, which clearly recognizes the principle. There was a case also of Stewart v. Tucker, reported in the 2d volume of Sir William Blackstone's Reports, 1137, in which it was held, as to an officer's full pay, that the use of it might be assigned in equity; though in that case also the doctrine was clearly recognized that the full pay of officers was not attachable. But the distinction was taken in Stewart v. Tucker of the half pay being granted pro servitio impenso, and the duty being executed, and being no longer in fieri; that was, however, discussed by the Court in Flarty v. Odlum, and the rule extends to half pay as well as full pay. In this case, as well the other case of Archbuckle v. Cowtan, it was perfectly clearly held by the Court, that in all such cases one man could not claim to receive by assignment or attachment emoluments which belonged to another deemed to be capable of performing the duties appended to those emoluments, but which duties could not be performed by the assignee; and there was an old case referred to in Barwick v. Read, and a curious case in Dyer, in which, so long ago as the reign of Elizabeth, the question appears to have been disposed of by a decision now undisputed, and now referred to in Westminster Hall. That was a replevin brought by a party whose goods had been distrained for a rent-charge in arrear. The party who had made the distress avowed, upon the replevin being brought, that he took the goods for rent in arrear, and set forth

his having a right to a rent-charge, which had been conferred upon him with a power of distress on the manor in question, and matters within the manor, pro bono concilio suo impendendo: to which there was a plea in bar by the plaintiff, not denying that the defendant had a rent-charge, nor denying that he had it upon those terms, but pleading in bar, that the defendant, the avowant, had been committed to the Tower for treason, and that while he was so incarcerated he the plaintiff had had occasion for his advice, and had endeavoured to have access to him for the benefit of his counsel, but that he could not, and therefore he alleged that the rent-charge ceased, and that the avowant had no right to distrain for the arrears. That was the answer to the avowry, and to that plea there was a demurrer, which raised the very question I am now dealing with, whether what had been given pro concilio impendendo was the subject of assignment?—whether its continuance did not depend upon the possibility of doing the service for which it was given? And the Court were clearly of opinion, that all such emoluments given for services done or to be done could not go to the King, and would not go to the creditor under any process—that the execution of law would not go to the assignee. My Lords, all these cases lay down this principle, which is perfectly undeniable, that neither attachment nor assignment is applicable to such a case; I am therefore not very well capable of understanding how, if this could not be assigned, it could yet be attachable. If it was attachable, then the Court had no jurisdiction to force the creditor to accept a moiety of it; if it is not attachable, then the creditor certainly has no right to complain—he could not have got any part of it without the order of the Court, and he gets something by that order. But how does it happen that the Court could assign it? It is common to the laws of both countries, on principles of public policy, to hold, that if a matter is not attachable, the Court cannot compel an assignment; yet its not being attachable is, so far as we are informed, the only ground for the decision of the Court. I am, however, ready to think there must be other grounds which I cannot discover. By authorities in the Court below it appears that they have dealt with these cases of salaries, and whole pay and half pay, and ministers' stipends, as if they were subject to the order of the Court in such cases, though not attachable, and which is the foundation of their dealing with them. Probably the only view the Courts have is, that doing the thing under authority gives something like a judicial right and claim to these emoluments, without inquiring very much as to their power to do so. But as it appears that the decisions are uniform, and that they have been unappealed from in any one

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instance, in such circumstances I am not prepared to advise your Lordships to disregard those decisions, though I have felt it my duty, in the presence of the gentlemen of the Scotch bar, to enter upon the question, feeling most desirous to obtain some further information from the Court below as to the manner in which the two things are to be reconciled in principle. I must however say, that as the principle on which these decisions were pronounced is not very discoverable, if it had not been a case in which such a course would be productive of hardship to the parties, I should have felt a strong inclination to recommend that this question be remitted; but as the effect, would be inconvenient, I shall not advise your Lordships so to do. Still I wish to have it understood, that if ever this question shall arise again, this decision can only be taken as an acknowledgment that all those decisions subsist unappealed from and unreversed, but that this admission is not to be considered of a nature to bind your Lordships to any opinion, as if we clearly understood the grounds on which those decisions had been made.

The House of Lords ordered, That the interlocutors complained of be affirmed.

Appellant's Authorities.—4 Ersk. 3, 26; 2 Bell's Com. p. 581; Smith, 9th March 1798 (M. 11,799); 2 Bell's Com. p. 581; Wight, 13–14th June 1814 ( ); 2 Dow. 377; 2 Bell, p. 594—6; England, 29th July 1777 ( ); Barr, 2d March 1822 (1 Shaw, 417); Davidson, 11th March 1818 (Fac. Col.); Scott, 25th January 1817 (1 Shaw, p. 363).

Respondent's Authorities.—2 Bell, p. 587—8.

BUTT—ARNOTT,—*Solicitors.*

No. 47.

MEGGET and ROY, W. S., Appellants.—*Mr. Wilson.*

ALEXANDER DOUGLAS, W. S., for BRYDON and OTHERS, Respondent.—*Mr. Rutherfurd.*

***Process.*—Circumstances in which held (affirming the judgment of the Court below), that it is incompetent for the Court of Session to review an interlocutor of the Jury Court by suspension.**

Sept. 28, 1831.

1ST DIVISION.

MEGGET and Roy were agents in a jury cause between Jamieson and Main, tried in Edinburgh in January 1830; but Roy, it was alleged, was not licensed, and was not an agent in