

Counsel for Pursuers (Reclaimers)—Asher, Q. C.—Low. Agents—Webster, Will, & Ritchie, S. S. C.

Counsel for D. Baxter & Company and Trustee—Comrie Thomson—Dickson. Agents—Davidson & Syme, W. S.

Counsel for Lambton's Bank—D. F. Balfour, Q. C.—Strachan. Agents—Mack & Grant, S. S. C.

Counsel for Charlton & Johnson—Thorburn—Moody Stuart. Agents—Auld & Macdonald, W. S.

Saturday, November 14.

FIRST DIVISION.

[Sheriff of the Lothians
and Peebles.]

ROSS v. HAIRSTENS.

Bankruptcy—Cessio—Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 7—A. S. Ancient Processes of Cessio, 22d December 1882.

Where a petitioner brought a process of cessio stating that he had no estate whatever, and it appeared that the only object of the process was to get rid of an existing debt, the Court held that the application was an abuse of the process, and should be refused.

John Fraser Ross, 12 Hope Street, Edinburgh, presented a petition in the Sheriff Court at Edinburgh praying to have it found that he was entitled to the benefit of the process of *cessio bonorum*, that decree should be granted accordingly, and that a trustee should be appointed to manage and dispose of his estate for behoof of his creditors, under the Act 6 and 7 Will. IV. cap. 56, the Sheriff Courts (Scotland) Act 1876, the Debtors (Scotland) Act 1880, and the Bankruptcy and Cessio (Scotland) Act 1882.

The petitioner averred that he was insolvent, and ready to surrender his whole means for his creditors; that upon 22d September 1885 he had received a duly executed charge for payment of £23, 2s. upon an extract-decree from the Sheriff Court of the Lothians and Peebles at the instance of Mrs Mary Rhind or Elston, one of the creditors called as defenders to the present action; that the days of charge had expired without payment of this debt; and that the petitioner was notour bankrupt under the Debtors (Scotland) Act 1880.

James M'Whir Hairstens, writer, Dumfries, one of the persons called as creditors, objected to the petition being granted, on the grounds, *inter alia*, that the debt under which notour bankruptcy was alleged to have been constituted was that admittedly of a half aunt to the petitioner, was not *bona fide* contracted, and had admittedly for its object the obtaining of a discharge from his liabilities, the debtor having previously granted a trust-deed for behoof of his creditors while he was carrying on business in Aberdeen; that as the debtor had acknowledged in his state of affairs that he had no estate, decree of cessio was incompetent, and that the whole proceedings were very suspicious. To which objections the petitioner replied that the debt to Mrs Elston was *bona fide* contracted for board, lodgings, and money lent, and that it was honestly due.

It appeared that the petitioner had in October

1883 granted a trust for creditors in favour of certain trustees, one of whom was Mr Hairstens. The estate was realised by these trustees, and divided among the creditors, with the exception of Mr Hairstens, who refused to accept a dividend. Mr Hairstens was agent for creditors who held securities over the petitioner's heritable property, which was insufficient, and they therefore ranked for the deficiency, but with regard to his personal claim Mr Hairstens intimated immediately before the payment of the dividend that he refused to rank. It also appeared that in April 1885 the petitioner had presented a petition for cessio in the Sheriff Court at Aberdeen, which had been objected to by Hairstens and been refused.

Upon 29th October 1885 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor—"The Sheriff-Substitute having resumed consideration of the foregoing petition and productions, together with the note of objections and answers thereto, and having heard parties' procurators, Dismisses the petition: Finds the opposing creditor Mr Hairstens entitled to £2, 2s. sterling of modified expenses, and decerns for payment to the said Mr Hairstens or his agent.

"Note.—The Sheriff-Substitute is satisfied that the pursuer has presented this application, not for a legitimate purpose, but with the view of getting rid of Mr Hairstens' debt, which it is plain still subsists, Mr Hairstens having refused to accede to the trust-deed mentioned in the proceedings."

The pursuer appealed to the Court of Session, and argued—No doubt there was, as stated in the application, no estate to divide, but it was no objection to the application for the benefit of cessio that there was no estate to divide when there was notour bankruptcy—See Act of Sederunt ancient cessios, 22d December 1882. If in former times sequestration could be obtained although there was no estate, it followed that a cessio could now be obtained in this case. Indeed, it followed *a fortiori*, seeing that this was just sequestration applicable to small estates. The respondent could not well resist the application, as it was he who had divested the petitioner of his whole estate. His sole object was to secure a preference for his debt, and to keep it up against the debtor.

Authority—*Gardiner v. Woodside*, June 24, 1862, 24 D. 1135.

Replied for the respondent—The application should be refused; it was an abuse of the process of cessio. The respondent while acting as trustee specially reserved his private claims. The process of cessio was now one of *distribution*, and in the absence of any funds in the present case it was impossible that it could be worked out—Debtors Act 1880 (43 and 44 Vict. cap. 34); Sheriff Court Act 1876 (39 and 40 Vict. cap. 70), sec. 26, sub-sec. 3.

At advising—

LORD PRESIDENT—The grounds upon which the Sheriff-Substitute had refused this application are very distinctly stated in the note to his interlocutor, and are, that he is satisfied that the pursuer has presented this application, "not for a legitimate purpose, but with the view of getting rid of Mr Hairstens' debt, which it is plain still subsists, Mr Hairstens having refused to accede to the trust-

deed mentioned in the proceedings. I think that that is the true view of this case; that it is an attempted abuse of the process of cessio for an illegal purpose; and I am therefore for adhering to the interlocutor appealed against.

LORD MURE concurred.

LORD SHAND—I must say that I have not much sympathy with the petitioner in the way in which he has tried to deal with this debt. It would have been much better, I think, if he had raised an action of declarator to have it found that Mr Hairstens had accepted of the offered composition and was bound to accept payment. I have however some considerable difficulty in concurring with your Lordships that this is an incompetent petition, because I cannot see anything improper or dishonourable in what the petitioner has done, and I do not think that it is a very satisfactory ground for throwing out this process that it was instituted mainly for the purpose of getting rid of Mr Hairstens' debt. In the process of cessio Mr Hairstens would have an opportunity of showing whether or not he had a claim, and I cannot see that there is anything illegitimate in that. I do not think it is indispensable in order to institute a process of cessio that the debtor has some estate. Under the old law farm servants and others of that class, who used constantly to take the benefit of the process, frequently had no estate. Therefore that circumstance alone would not stand in the way of the application. What the petitioner here desires is his discharge. In considering his application two questions would necessarily arise—*First*, whether Mr Hairstens had any claim at all? If the debtor could show that he had not, then that would end the matter. But if the debt was held to be subsisting, then, in the *second* place, its merits would fall to be determined. The question here, however, is one of competency, and upon the whole matter I must say that I have very great doubts as to the view expressed by your Lordships that this is not a competent process.

LORD ADAM—The petitioner has lodged a state of his affairs, and under the heading of assets there is the word “none.” In these circumstances there can be no distribution of his estates among his creditors. But it has been said that under the old law, before the abolition of imprisonment for debt, it was a common thing to apply for cessio, even when the applicant had no estate to distribute, in order to get rid of imprisonment. Now I am not to be taken as admitting that under the old law this process was made use of when the applicant had no assets, but what I say is, that I agree with your Lordship in thinking that in the present case there has been an abuse of the process of cessio.

The Court refused the appeal.

Counsel for Appellant—Strachan. Agents—Liddle & Lawson, S. S. C.

Counsel for Respondent—Jameson. Agents—J. & A. Hastie, S. S. C.

HIGH COURT OF JUSTICIARY.

Monday, November 16.

(Before Lord Young.)

H.M. ADVOCATE v. SLAVEN AND OTHERS.

Justiciary Cases — Indictment — Relevancy — Modus — Specification.

Panels were charged with assault with intent to ravish, and also with culpable homicide. The charge of culpable homicide was to the effect that immediately after the assault with intent to ravish, the woman who had been assaulted having risen from the ground and endeavoured to escape by running in the direction of a precipice, the panels, all and each, or one or more of them, did “follow after and pursue” her to or near the edge of the precipice, and she did, “while endeavouring to escape from” their pursuit, fall over the edge of the precipice and was killed. *Objection repelled* that this charge was irrelevant in respect that no felonious intent in following after and pursuing was libelled, and that it was not clearly specified that the falling over the precipice was the consequence of the following after.

Patrick Slaven, John Williams, and Matthew Traill were indicted in the High Court for assault with intent to ravish, as also culpable homicide. The latter offence was charged as follows—“Further, time above libelled, and immediately after the assault with intent to ravish her last above libelled, the said Margaret Lindsay Cunningham having, at the place last above libelled, risen from the ground, and endeavoured to escape from you the said Patrick Slaven, John Williams, and Matthew Traill, or one or more of you, by running in the direction of the Salisbury Craigs after mentioned, you the said Patrick Slaven, John Williams, and Matthew Traill did, then and there, all and each or one or more of you, follow after and pursue the said Margaret Lindsay Cunningham to or near to the edge or brow of the rocks or craigs commonly called or known as the Salisbury Craigs, situated in the Queen’s Park aforesaid, and the said Margaret Lindsay or Cunningham did, while endeavouring to escape from the pursuit of you the said Patrick Slaven, John Williams, and Matthew Traill, or one or more of you, fall over the edge or brow of said rocks or craigs commonly called or known as the Salisbury Craigs, on to the ground at or near the road or path in the said Queen’s Park commonly called or known as the Radical Road, running under the brow of the said Salisbury Craigs, at a part of said Radical Road 200 yards or thereby from the northern termination thereof, a depth of 140 feet or thereby, by all which, or part thereof, the said Margaret Lindsay Cunningham had her skull and pelvis fractured, and received mortal injuries, whereof she immediately or soon thereafter died, and was thus culpably bereaved of life by you the said Patrick Slaven, John Williams, and Matthew Traill, or by one or more of you.”

MACWATT for Slaven took objection to the relevancy of this charge—The special facts averred did not amount to the crime charged in the