

averted that the Commission have received and entertained claims for a revision of the rental which if sustained will by the Act draw back to June 1887, prior to the making up of the valuation roll. Now, as to the irrelevancy of these allegations I have the misfortune not to be so clear as your Lordships. I am for one thing not in a position to give an opinion on the extent of the powers of the Crofter Commission. That matter was not fully argued, nor is it competently before us. Then I take the case on the footing that *de facto* the rental has been altered, or rendered subject to alteration by a supervening event since the valuation roll was made up in September. I should have thought that that raised a serious question on the Valuation Act. That Act, I think, is concerned with valuation only, not with the validity or effect of assessment, but with the amount of the rental on which they are to be calculated, and the manner of imposing them if they are effectual. Now, I think that if a subject is destroyed by some fire or flood, or suffers alteration in value from an unforeseen cause, the question of the effect of that upon the finality of the assessment is not necessarily decided by the valuation roll. I take section 31 of the Valuation Act as affording an illustration of the kind of question which arises—"In all cases where any land or heritage shall be separately let at a rent not amounting to £4 per annum, and the names of the occupiers thereof shall not have been inserted in the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such land and heritages separately let as aforesaid, but every such proprietor charged with and paying such assessment shall have relief against the tenants and occupiers of such lands and heritages for reimbursement thereof, if and in so far as such assessments may by law be properly chargeable upon such tenants or occupiers." Now, the Crofters Act entitles the crofter to apply to the Crofters Commission both to stay action and diligence and to revise the rental, and the effect of the applications of the defender's crofting tenants have made may draw back to June 1887. It does appear to me that that may affect the landlord's claim against the tenant for relief from the rates paid by him for the tenant under this section. In fact the effect of the Crofters Act has been to make the valuation roll not conclusive of the rental against the tenant, and therefore the right of the landlord to relief is interfered with. I think that raises a serious question, but your Lordships differ from me as to this, and I will only say that I do not see my way to concur.

LORD JUSTICE-CLERK—I only wish to add that if any case had arisen here of the total destruction of the subject, that would have raised a totally different question from the one which we have to decide here, and one on which I wish to reserve my opinion, but in this case the subject has not been touched at all.

The Court pronounced this interlocutor—

"Find in fact that the rates sued for were duly assessed according to the valuation roll in force at the time: Find in law that the pursuer is entitled to insist for payment

thereof accordingly: Therefore dismiss the appeal and affirm the judgment of the Sheriff-Substitute appealed against; of new decern in terms of the prayer of the petition: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Appellant—D. F. Mackintosh, Q.C.—M'Kechnie—Orr. Agents—Stuart & Stuart, W.S.

Counsel for Respondent—A. J. Young—J. P. Grant. Agents—J. Murray Lawson, S.S.C.

Saturday, December 15.

FIRST DIVISION.

[Sheriff-Substitute of Elgin.]

ROBERTSON & SONS v. FALCONER.

Bankruptcy—Cessio—Trust-Deed—Discretion of Sheriff—Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 9, sub-sec. 3.

When a petition for *cessio* is presented at the instance of a creditor, the above subsection gives the Sheriff a discretion to grant or refuse decree "as the justice of the case requires."

A tradesman executed a trust-deed for behoof of his creditors, and about a year thereafter became unable to fulfil his obligations to certain fresh creditors who desired him to grant a second trust-deed, but to a different trustee. He declined, and one of them gave notice that he would present a petition for *cessio*. The day after receiving this notice the debtor signed a trust-deed in favour of the former trustee, who at once proceeded to realise and distribute his estate. In the petition for *cessio* at the instance of the creditor, *held* that the petitioner was entitled to obtain decree in respect of the circumstances under which the trust-deed had been granted.

On 21st September 1888 Duncan Robertson & Sons, hat manufacturers, Glasgow, in virtue of a decree obtained in the Sheriff Court of Elgin on 25th July 1888, charged Alexander Falconer, tailor in Elgin, to pay to them the sum of £25, 6s. 7d. of principal and expenses contained in that decree. The days of charge having expired without payment, Robertson & Sons presented a petition in the Sheriff Court of Elgin for decree of *cessio* against Falconer, and served notice thereof upon him on 25th September 1888. The defender deponed that he had got into difficulties about four years before; these had been tided over for a time, but more than a year before he had found it necessary to grant a trust-deed for behoof of his creditors in favour of Mr Craig, C.A., Edinburgh, who was acting for him at the time. His creditors had acceded to the deed, and he had arranged to pay them 15s. or 16s. per £, and had signed bills payable at three, six, and nine months for payment of that composition. He had paid the first instalment, and part of the second, but none of the third. The pursuers were not creditors under that trust-deed,

In June or July 1888 payment had been demanded of certain debts due to the pursuers and two other creditors, and these creditors had subsequently sued him therefor. The agent for the creditors subsequently asked him to grant a trust-deed in favour of William Stephen, accountant in Elgin, but he had declined to do so. On 26th September, however, he granted a trust-deed in favour of Mr Craig, the trustee under the previous trust-deed, and Mr Craig had disposed of his stock-in-trade, fittings, and book debts.

In the state of affairs produced by the defender, and deponed to as correct, the value of the assets belonging to him was set down at £108, 19s. 4d., and the amount of the liabilities at £294, 14s. 9d., of which £14 was a preferable claim. The claim of the pursuers and of two other creditors whom he represented amounted in all to £64.

By the Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 3, sub-sec. 3, it is provided that on a petition for *cessio* being presented at the instance of a creditor, "the Sheriff shall, on such examination being taken, allow a proof to the parties if it shall appear necessary, and hear parties *in voce*, and either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *in hoc statu*, or make such other order as the justice of the case requires."

The Sheriff-Substitute (RAMPINI) on 2nd November 1888 pronounced the following interlocutor:—"Finds that the defender executed a trust-deed on 26th September last in favour of Mr James Craig, C.A., Edinburgh, for behoof of his creditors: Finds that his estate is in process of being realised, and is in fact almost realised under said deed: Therefore refuses the prayer of the petition, dismisses the same: Finds the petitioners liable in expenses, &c.

"*Note*.—The Sheriff-Substitute has no difficulty in refusing the prayer of this petition. The estate is all but wound up under the trust-deed of 26th September 1888, and not a word has been said against the manner in which the trustee under that deed has done or is doing his duty. Looking to the fact that *cessio* is a mere distributive process, and that distribution has already taken place, or nearly so, by another process equally as effectual, and apparently more agreeable to the debtor and the majority of his creditors, the present application is a mere abuse of the process of this Court, and accordingly the Sheriff-Substitute has felt bound to exercise the discretion allowed him by the statutes."

The pursuers appealed to the First Division of the Court of Session.

Argued for the appellants—No doubt the Sheriff had a discretion to grant or refuse *cessio*, but in this case he should have granted it. The defender had abused the privilege of granting a trust-deed by first refusing to grant one in favour of a person in whom the creditors had confidence, and then granting one behind their backs to a person in whom they had no confidence. It was a device on his part to prevent decree of *cessio* being granted. Questions were to be raised as to Mr Craig's administration under the previous trust-deed, and it would not be proper for him to be in a position where he might have to decide questions in which he was interested as a

party. The creditors were entitled to have the advantages which decree of *cessio* would give them, and these were considerable, as the trustee in a *cessio* might be ordered by the Sheriff to find caution, and his accounts were subject to supervision by an officer of the Court—Act of Sederunt anent Process of *Cessio*, December 22, 1882, secs. 3 and 18. In the case of a trust-deed there might be difficulty in supervising the conduct of a trustee—Bell's Com. (7th ed.) ii. 392-397, (5th ed.) 495-502.

Argued for the respondent—In the circumstances of this case the Sheriff-Substitute had rightly exercised the discretion given him by the Debtors Act 1880, in refusing decree of *cessio*. The pursuers had no objection to a trust-deed if they had obtained the trustee they wished. The creditors represented by the pursuers only represented a small part of the claims against the defender. The allegations against Mr Craig's management should have been made before the Sheriff, who had the discretion in the matter. Even sequestration, it had been said, need not be granted if there were equitable considerations of weight to the contrary—Opinion *per* Lord President MacNeill in *Campbell v. Dunlop*, June 11, 1862, 24 D. 1103. Here the estate had been almost all realised, and only a very small sum was left for distribution, which would be swallowed up by expenses if decree of *cessio* were granted—*Ross v. Hanstead*, November 16, 1885, 13 R. 207.

At advising—

LORD PRESIDENT—In this case if it were not for the discretion given to the Sheriff under the 3rd sub-section of the 9th section of the Debtors Act 1880 I should be of the opinion that there was nothing to prevent a creditor, who had not acceded to the granting of a trust-deed, going on with the diligence of *cessio*. I say "diligence," for it appears to me that a *cessio* at the instance of a creditor is really of the nature of diligence. But no doubt we must take into account the latitude given to the Sheriff as to whether *cessio* shall be granted or not.

The Sheriff-Substitute is of opinion that it is expedient in the interests of all concerned that the trust-deed should be made use of in winding-up this estate, and that decree of *cessio* should not be given. I do not agree with that opinion. I think that in this case the trust-deed was granted in such circumstances that a creditor was entitled to say that it was done improperly on the part of the bankrupt, and that it should not receive effect.

The creditors who are represented by the applicant say they asked the bankrupt to grant a trust-deed in favour of a different party, but that he refused to do so, and that the negotiations came to an end. It appears to me that these creditors had no alternative but to apply for *cessio* or for sequestration, and as the debts due to them were not of sufficient amount to warrant an application for sequestration, they gave notice to the debtor that they would present an application for *cessio*. The next day the bankrupt executed a trust-deed to a person in his confidence, to whom he knew the creditors would object. Now, the Sheriff-Substitute says that this gentleman is to have the management of the estate of the bankrupt, and I do not think that that is

justly or fairly within the discretion given to the Sheriff by the enactment.

The advantage which the creditors have in bringing the matter into Court is, that the trustee in a *cessio* is bound to account for his actings to an officer of the Court. But in the present case, if the trustee is to go on to distribute the estate, and then to obtain his discharge, there is no security whatever for the creditors. The person in whose favour the bankrupt has now granted a trust-deed was also trustee under a former deed, and there is no evidence that his administration was unobjectionable. If objections are made, he is in the position of being the only party to call himself to account. I am therefore for recalling the interlocutor of the Sheriff.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

The Court sustained the appeal, recalled the interlocutor appealed from, and remitted to the Sheriff to grant decree decerning the respondent Alexander Falconer, as debtor, to execute a disposition *omnium bonorum* for behoof of his creditors, and to proceed further in terms of the Statute 43 and 44 Vict. c. 34.

Counsel for the Appellants—C. S. Dickson. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Respondent—Strachan. Agent—Peter Douglas, S.S.C.

Tuesday, December 18.

SECOND DIVISION.

MORRISON v. TAWSE.

Married Women's Property (Scotland) Act 1877 (40 and 41 Vict. c. 29), sec. 3—Wife's Earnings not Kept Separate.

A married woman's earnings had not been kept separate from those of her husband, but had been lodged in a bank account in their joint names, "to be repaid to either and the survivor." *Held (diss. Lord Young)* that she was entitled, even after her husband's death, to prove that her earnings had equalled his in amount, and to credit herself with half of the sums so invested before accounting, as sole trustee and executrix for her husband's trust-estate.

James Tawse, bleacher, Downfield, Dundee, died on 6th September 1886, survived by his wife and a daughter by a previous marriage. He left a trust-disposition and settlement dated 15th September 1885, by which he appointed his wife his sole trustee and executrix. After providing for payment of his debts and deathbed and funeral expenses, he provided that his widow should during her lifetime not only be entitled to the free liferent use and enjoyment of the whole trust-estate, but should also be entitled from time to time, as she should think necessary, to use and appropriate such parts of the capital of the estate as she might require for her own personal use and maintenance, and that upon her

death the residue of his estate should be divided into three equal shares, of which his daughter was to get one.

The said daughter Mrs Rachel Tawse or Morrison claimed *legitim*, and accordingly brought an action of count, reckoning, and payment against the executrix Mrs Tawse in the Sheriff Court at Dundee to have the amount of her *legitim* determined.

The Married Women's Property (Scotland) Act 1877 (40 and 41 Vict. c. 29), sec. 3, provides that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof."

At the time of her marriage in 1868 Mrs Tawse was a washerwoman, and after her marriage she continued to take in washing.

In 1869 James Tawse received payment of a legacy of £40. In the same year, on the death of his son, he received £200 from an insurance company. From his marriage in 1868 until his death in 1886 he made on an average £1 a-week as a bleacher. Upon 1st March 1870 the sum of £240 was lodged in the National Bank of Scotland, Dundee, upon a deposit-receipt in favour of the said James Tawse and his wife, "payable to either or survivor." After that date various sums were lodged in the same bank upon deposit-receipt in similar terms until 11th April 1881, when the amount, being £400, was uplifted and lent to the Dundee Provident Property Investment Company upon a deposit-receipt in favour of the said James Tawse and his wife, and bearing that that sum was to be repaid "to either or survivor." This Investment Company went into liquidation on 12th March 1884, at which date £14, 16s. 10d. of interest was due upon said sum of £400. In January 1885 £51, 17s. 1d., or a dividend of 2s. 6d. per £1, was paid, leaving a balance of £362, 19s. 9d, which was still unpaid.

Upon 22nd November 1881 the said James Tawse and the defender opened an account with the Dundee Savings Bank in their joint names, "to be paid to either of them and the survivor," and on 24th September 1884 they opened another account with said Savings Bank in the same terms. The balances at the credit thereof at the date of the death of the said James Tawse were respectively £144, 18s. 5d., and £108, 3s. 2d., which with interest amounted together at the date of the action to £261, 16s. 6d.

The defender alleged that at the date of the marriage she had £104; that during her marriage she made from 2s. to 28s. a-week by washing; and that she was entitled to £28, 2s. 6d. as alimony, at the rate of 12s. 6d. a-week for forty-five weeks, from the death of her husband until