

Counsel for Pursuers—H. Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Defender—Sir C. Pearson—Law. Agents—Menzies, Coventry, & Black, W.S.

Thursday, June 26.

FIRST DIVISION.

PATERSON, PETITIONER.

Process—Judicial Factor—20 and 21 Vict. cap. 56, sec. 4.

Held that a petition for appointment of a judicial factor on a trust-estate, where the trustees had ceased to be able to act in terms of the trust-deed, was properly presented to a Division of the Court, and not to the Junior Lord Ordinary.

Maurice Paterson, John Wordie, and Alexander Donaldson were appointed to act as trustees under an antenuptial contract of marriage, dated 10th October 1874, entered into between William Macpherson and Miss Ann Amelia Boswell. It was *inter alia* declared in the contract "that so soon as the acting trustees under these presents are reduced to two, they shall be obliged to nominate and appoint at least one other trustee to act along with them in the management of the said trust; and there are hereby conferred upon the said trustees who may be assumed from time to time the whole powers, privileges, and exemptions conferred upon the trustees hereby named."

The trustees accepted the office conferred on them, but Alexander Donaldson died on 23rd August 1889.

The present petition was presented by Maurice Paterson on June 24th 1890 to the First Division. He averred that since the death of Alexander Donaldson he and the other surviving trustee had been endeavouring in terms of the marriage-contract to obtain the consent of some person to act as trustee under the said antenuptial contract, but had been unable to find anyone willing to accept the office. He accordingly craved the Court to appoint a judicial factor on the trust-estate.

The petitioner argued—That petition was competently presented to a Division of the Court—Distribution of Business Act; *Dixon's Tutor*, July 17, 1867, 5 Macph. 1052.

The Court, holding that the petition was competently presented to a Division of the Court, ordered intimation and service, and appointed a judicial factor *ad interim*.

Counsel for Petitioner—Shaw. Agents—Cairns, M'Intosh, & Morton, W.S.

Saturday, June 28.

FIRST DIVISION.

[Sheriff of Forfarshire.

CLARK v. CLARKES.

Bankruptcy—Cessio—Sale of Heritable Estate.

Held that the trustee in a *cessio* has power to sell the heritable estate of the debtor without making application to the Sheriff under sec. 15 of the Act of Sederunt anent Process of Cessio (22nd December 1882).

Cessio of the estates of David Wilkie Clarke was granted by the Sheriff of Forfarshire and James Constable Robertson, accountant, Dundee, was appointed trustee in the *cessio* by deliverance dated 7th and extracted 23rd May 1889. On 29th May David Wilkie Clarke granted disposition *omnium bonorum* in favour of the trustee. On 27th September 1889 the trustee exposed for sale by public roup certain heritable property in Dundee belonging to the cessioned estate. The property was purchased by George Clark, and the subjects were disposed to him by disposition dated 30th November, 2nd, 6th, 7th, and 13th December, and recorded 30th December 1889.

The present action was raised by George Clark against David Wilkie Clarke and his son James Clarke for the purpose of obtaining warrant to eject them from certain premises included in the subjects disposed to him by the trustee in David Wilkie Clarke's *cessio*.

The defenders averred that the only competent mode in which the trustee on a cessioned estate could sell heritable property belonging to the estate was by making application to the Sheriff under sec. 15 of the Act of Sederunt anent Processes of Cessio (22nd December 1882), which provides that "on an application by the trustee or by any creditor, the Sheriff may at any time call a meeting of the creditors to consider and dispose of any matters specified in such application." Mr Robertson had not conformed to this procedure in selling to the pursuer. He had made no application to the Sheriff under the section quoted, nor had any creditor done so. He had not obtained the authority or consent of the Sheriff, or even of the general body of creditors. The pretended sale to the pursuer and disposition following thereon were therefore null and void.

The defenders pleaded—(1) The pursuer has no title to sue.

On 28th March the Sheriff-Substitute (CAMPBELL SMITH) found that the defences were not relevant, therefore repelled them, and granted warrant of ejection as craved.

The defenders having appealed, the Sheriff (COMRIE THOMSON) on 16th April dismissed the appeal and adhered to the interlocutor appealed against.

"Note.—It appears to me that the defender here is a mere squatter or tenant at will, and that he has set forth no title, and

that in point of fact he possesses no title to defend this action. If he or others interested have been wronged by the proceedings in the *cessio*, or by the sale of his heritable property, they have their remedy, but these questions cannot be disposed of in this action."

The defenders appealed to the Court of Session, and argued—The objection to the pursuer's title could be raised by way of exception—Sheriff Court Act 1887 (40 and 41 Vict. cap. 50), sec. 11. Unless the trustee in a *cessio* had more extensive powers of sale than either the trustee in a sequestration or the trustee under a voluntary trust-deed, the sale to the pursuer was *ultra vires* and illegal—Murdoch on Bankruptcy, (5th ed.) p. 288; *Crichton v. Bell*, June 25, 1833, 11 S. 781; Trusts Act 1867 (30 and 31 Vict. cap. 97.) sec. 3. The only competent mode in which a trustee in a *cessio* could sell heritable estate was by making application to the Sheriff under sec. 15 of the Act of Sederunt anent Processes of Cessio (22nd December 1882).

At advising—

LORD PRESIDENT—The only objection taken to the judgment of the Sheriff is that the pursuer has no title, and that is founded on the allegation that the trustee in the *cessio* has no power to sell heritable estate without applying to the Sheriff to call a meeting of creditors, and that the meeting of creditors must give instructions to the trustee to sell. That is, I think, a new proposition in law. I have always believed that the effect of a disposition *omnium bonorum* for behoof of creditors was to vest the trustee with the estate of the grantor for the express purpose of distributing it. There must be a power of sale in order that such distribution may be made. Nothing is said in the Cessio Act about a power of sale just because the very object of the procedure under the Act is to bring the estate to sale. It is, therefore, clear that the Act of Sederunt has no sort of application, and the challenge of the pursuer's title to sue is worth nothing. The pursuer being the disponee of the trustee in the *cessio* is quite entitled to remove the defenders.

LORD ADAM and LORD M'LAREN concurred.

LORD SHAND was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—W. Campbell. Agents—Boyd, Jamieson, & Kelly, W.S.

Counsel for the Defenders and Appellants R. Johnstone—G. Millar. Agents—Robert D. Ker, W.S.

Saturday, June 28.

FIRST DIVISION.

Lord Kinnear, Ordinary.

BURNS v. HARVIE AND OTHERS.

Landlord and Tenant—Mineral Tenant—Compromise of Action—Res Judicata.

In an action by a mineral tenant, holding under a lease dated in 1862, against the proprietor and mineral tenants of a neighbouring estate for payment of damages for loss of coal alleged to have been illegally worked out by the latter, the defenders pleaded *res judicata* in respect of a decree pronounced in 1888 in an action at their instance against the proprietor from whom the pursuer derived right, which decree had been pronounced in terms of a compromise arrived at between the parties.

Held that the pursuer was not bound by terms of the decree, as he had not been a party to the compromise, and plea of *res judicata* repelled.

In 1887 William Harvie, heir of entail in possession of the estate of Brownlee, and John Wilson and others, his mineral tenants, brought an action against Sir Windham Anstruther, the proprietor of the neighbouring estate of Mauldslie, and the trustees of the deceased James Thornton, sub-tenant of minerals on the estate, for payment of damages for loss of minerals alleged to have been illegally worked out by the defenders under a road which the pursuer alleged to be part of the estate of Brownlee. Decree having been pronounced in favour of the defenders in the Outer House, the pursuer reclaimed, and before the case was heard in the Inner House a compromise was arrived at, and decree was thereafter pronounced by the Second Division in terms of a joint-minute by which the boundary between the two estates was fixed so as to include the road in question in the estate of Brownlee. The dependence of this action was intimated to Michael Burns, to whom the coal and other minerals within the entailed lands and barony of Mauldslie had been let for thirty-one years by lease dated 15th August 1862. Mr Burns however did not become a party to the action or to the compromise, but assumed the position shown in the following letter addressed by him on 20th December 1887 to the agents of Sir Windham Anstruther—"I beg to remind you that any arrangement Sir Windham Anstruther may make with Mr Harvie about withdrawing from the present action can have no effect whatever upon my claims, either against him or Mr Harvie, with regard to the road coal."

The present action was raised by Mr Burns against Mr Harvie and the Messrs Wilson, his tenants, for payment of damages for loss of coal alleged to have been illegally excavated by the defenders under the road in question.

The defenders founded on the decree pronounced in the previous action and pleaded—"(1) No title to sue. (2) *Res judicata*.