

had in view, I think the good sense of the thing is that the period of distribution is hastened by the wife having repudiated the settlement and claimed her legal rights. For my part I should also be disposed to hold it to be also the law, the law generally being supposed to be in accordance with good sense. But your Lordships think that the case is ruled by prior decisions, and that we must follow these authorities.

LORD RUTHERFURD CLARK—I think the case of *Muirhead* is an absolute rule, and we must follow it.

I am not at all sure that the testator did not mean to make the period of distribution depend upon the second marriage of his widow. It is evident that if she took her annuity there could be no vesting during her lifetime as long as she remained unmarried, but the moment she married a second time the term of payment arrived. So by the very form of the deed the period of distribution depends on the second marriage of the widow.

LORD TRAYNER was absent.

The Court answered the first question in the negative and the first alternative of the second question in the negative, and the second alternative in the affirmative.

Counsel for First Parties—Crabb Watt. Agents—Mackenzie & Black, W.S.

Counsel for Second Parties—Wilson—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for Third Parties—Younger. Agents—Clark & Macdonald, S.S.C.

Saturday, June 30.

## FIRST DIVISION.

### DRUMMOND'S FACTOR, PETITIONER.

*Judicial Factor—Nobile Officium—Power of Sale by Private Bargain failing Public Roup—Petition for Confirmation of Sale by Private Bargain without Public Exposure.*

A judicial factor who had obtained power from the Court to sell certain heritable property by public roup at an upset price of £9750, and failing such sale, to sell by private bargain at a price not less than the upset price, without exposing the property to public roup, sold it for £9800 by private bargain with the approval of all the creditors. A petition for approval of the sale was refused.

*Opinions* expressed that it was within the power of the Court to grant the prayer of the petition.

The judicial factor on the trust-estate of Drummond Brothers applied to the Court for power to sell certain heritable subjects at 82 George Street, Edinburgh, belonging to the factory.

Upon 19th October 1893 the Lord Ordi-

nary authorised the judicial factor to expose them for sale by public roup, after due advertisement, at the upset price of £9750, and if not sold at or above said upset price, to re-expose the same for sale by public roup, after due advertisement, at such reduced upset price as the Accountant of Court might fix, or to sell the same by private bargain at a price not less than that at which they had been publicly exposed for sale.

The judicial factor duly advertised the property, but did not expose it for sale by public roup, and in May 1894 sold it by private bargain for a sum of £9800. All the heritable creditors, including postponed bondholders who would not receive any part of their debt, approved of the sale, and Mr Hippolyte Blanc, architect, reported that in his opinion the transaction was a judicious one. The purchaser, however, was apprehensive of the validity of the title he would get, and accordingly the judicial factor presented a petition praying the Court to approve of the sale. Along with the petition he lodged a report by the Accountant of Court, saying that in his opinion the factor's acting in selling by private bargain might be approved of.

Upon 23rd June 1894 the Lord Ordinary (Low) having heard counsel for the factor and for the purchaser, reported the case to the First Division.

*Opinion.*—The petitioner is judicial factor upon a trust-estate. In May 1893 he obtained authority from the Court to sell certain house property in George Street, Edinburgh, belonging to the trust by public roup at the upset price of £9750, and if the property was not sold at or above that price, to re-expose it for sale at such reduced upset price as the Accountant might fix, or to sell the property by private bargain at a price not less than that at which it had previously been publicly exposed.

"The petitioner, before he had exposed the property for sale by public roup, received a private offer to purchase it at the price of £9800. He accepted the offer, and has now presented the present application for approval of the sale. The Accountant of Court reports in favour of the application being granted.

"The purchaser appeared, and referred to a judgment of the First Division in petition *Clyne*, June 5, 1894, in which it was held that although trustees might obtain authority from the Court to sell, they could not first conclude a contract of sale and then ask the approval of the Court. The purchaser in this case is quite willing to implement his contract, but he contended that in view of the decision referred to, it was doubtful whether the Court had power to confirm the sale, and he naturally desires to have an unimpeachable title.

"The parties asked that the case should be reported to the Inner House, and as it raises a question of importance not only to the parties, but in regard to the administration of trust-estates in the hands of judicial factors, the Lord Ordinary has thought it right to do so.

"There is this distinction between the present case and that of *Clyne*, that there the trustees had not, before entering into the contract of sale, obtained any authority to sell, while here authority was granted to the judicial factor to sell, and the present application has only been rendered necessary because he did not proceed precisely in terms of the powers which were conferred upon him."

Argued for the petitioner—He had obtained power to sell from the Court, and that by private bargain failing sale by public roup. No doubt he had sold by private bargain without publicly exposing the property, but he had secured £50 more than the upset price, had acted in the best interests of the estate, and with the approval and consent of all interested. In *Clyne's* case, June 5, 1894, 31 S.L.R. 692, a testamentary trustee, without any power of sale in the trust-deed, had sold, and asked the Court to confirm the sale. Here there was a power of sale in the original trust-deed, and the factor had obtained a power of sale from the Court. If the course followed was not in entire conformity with that indicated by the Court, it was in substantial accordance with it, and might well be confirmed. In the case of *Gilray*, March 18, 1876, 3 R. 619, the Court had approved a sale effected by a *curator bonis* without any powers.

Argued for the purchaser—He was perfectly willing to buy the property, but he was entitled to an unimpeachable title. The factor here had practically sold without power, because he had received power under a definite limitation, which he had disregarded. The power in the original trust-deed was no good to a judicial factor; he required authority from the Court before he could sell. It was doubtful whether the Court could approve of what had been done, although they might authorise its now being done.

At advising—

LORD PRESIDENT—This application raises a point of general importance in the administration of property by a judicial factor. This judicial factor, vested in the heritable property in question, came to the Court and asked authority to sell the subjects either by public roup or private bargain. Now, the Lord Ordinary, exercising the power of the Court, considered the question whether power to sell should be given, and the further question, by what mode that power ought to be exercised in the interest of the estate.

The Lord Ordinary had before him all the facts of the case, and on these he came to the decision that public roup was the proper method and not private sale, at least until the state of the market had been tested by a public exposure. Now, we find that the factor, who had taken this power, did not exercise it, but, on the contrary, without ever exposing the subjects for public sale, sold them by private bargain for £9800, a £50 note above the upset price. I cannot say that the difference of price is very impressive, or much

distinguishes the sale from one at the upset price. The factor in so acting took upon himself a very grave responsibility. One of the merits of our law with regard to estates under judicial management is that not merely formally, but in fact, no important or extraordinary step can be taken by the factor at his own hand, the Court having first to consider the expediency of what is proposed. I regard it as a grave error and a gross departure from proper practice for any officer of the Court to take upon himself to exercise powers which the Court has refused to him.

The next question is, what are we to do now? Is it competent for us to grant the authority which the petitioner asks? I am prepared to assume, and I believe that this would be within our competency. But then we must first be satisfied that it would be for the interest of the estate that we should take this step. The Lord Ordinary has decided that it was best for the interest of the estate to test the market by a public roup. I have heard nothing to indicate that the Lord Ordinary was wrong, or that a different course would now be right. Nothing has been said to reconcile me to the idea that people wanting to buy this George Street property are too shy to go to an auction; the guarded expressions of the Accountant of Court do not suggest this, and proceed upon the same meagre information which we have now had before us.

I see no ground, therefore, in the interest of the estate for supposing that they will be injured by our adhering to the ordinary and salutary course, and I am for refusing the prayer.

LORD ADAM—I think we might approve of such a sale as the present if there were very special circumstances leading us to do so, but I agree with your Lordship that we should not grant the prayer of this petition. We were told by Mr Sym that in his original petition the judicial factor had asked for power to sell by public roup or private bargain. Well, the Lord Ordinary in considering that petition did not grant authority as craved, but gave authority to sell by public roup, and failing such a sale—but then and then only—to sell by private bargain. The reason for that is perfectly obvious. The Court think it proper that the market should be tested by public competition before a property administered by a judicial factor is sold by private bargain. There might be special circumstances, such as the remoteness of the property to be sold, in which the Court would approve of sale by private bargain without public exposure, but the ordinary case, as here, is to require public roup in the first instance. This condition of a sale by private bargain was not observed. I see no reason for departing from the course prescribed by the Lord Ordinary. The only reason for doing so submitted to us is the report of Mr Blanc. He is no doubt a very competent man, but his opinion is not conclusive. I think the judicial factor has gone quite wrong here. It is very much as

if, having been refused powers, he had taken them. If he had taken a less price than that fixed as the upset price, or even the upset price, he could not have expected us to approve of what he had done, and the mere addition of a £50 note seems to me a bagatelle. No doubt as much may not be realised by a public sale, but, on the other hand, the price may and I hope will be increased.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court refused the petition.

Counsel for the Judicial Factor—Sym. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Purchaser—Dickson—Clyde. Agent—W. E. Armstrong, S.S.C.

Tuesday, July 3.

## SECOND DIVISION.

[Sheriff of the Lothians.

REID v. GRAHAM.

(Before Seven Judges.)

*Cessio Bonorum—Benefit of Cessio—Prior Creditors—Diligence for Subsequent Acquisitions—Cessio Bonorum Act 1836 (6 and 7 Will. IV. cap. 56)—Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. cap. 22)—Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34).*

A decree of *cessio bonorum* does not debar prior creditors from using diligence against the debtor's subsequent acquisitions.

*Reid v. M'Bayne*, May 16, 1890, 17 R. 757; *Calderhead v. Freer and Dobbie*, July 9, 1890, 17 R. 1098, *considered*.

The Act regulating the process of *Cessio Bonorum*, &c., 1836 (6 and 7 Will. IV. cap. 56), provides, sec. 16—"And be it enacted that the decree pronounced by the Inner House or by the Lord Ordinary on the Bills, or by the Sheriff granting the benefit of *cessio bonorum*, shall operate as an assignation of the debtor's moveables in favour of any trustee mentioned in the decree for behoof of the creditors, provided always that it shall be optional to the creditors to require the debtor to execute a disposition *omnium bonorum*, as has been hitherto granted in processes of *cessio* before the Court of Session in favour of the trustee, the expense of which deed shall be paid out of the readiest of the funds thereby conveyed."

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), provides, sec. 9—"On such petition being presented, the following provisions shall have effect—(5) Until the debtor shall execute a disposition *omnium bonorum* for behoof of his creditors, any decree decerning him to do so shall operate as an assignation of his moveables in favour of any trustee mentioned in the decree for behoof of such creditors."

The Bankruptcy and *Cessio* (Scotland) Act 1881 (44 and 45 Vict. cap. 22), provides, sec. 5—"A debtor with respect to whom decree of *cessio bonorum* has been pronounced, shall be entitled, on the expiration of six months from the date of such decree, to apply to the Sheriff to be finally discharged of all debts contracted by him before the date of such decree, and the provisions of the 146th section of the Bankruptcy (Scotland) Act 1856 with regard to the conditions on which a bankrupt shall be entitled to obtain his discharge on the expiration of six months, twelve months, eighteen months, and two years respectively from the date of sequestration shall apply to debtors with respect to whom decree of *cessio bonorum* has been pronounced. A deliverance by the Sheriff granting, postponing, or refusing a discharge under this section shall be final, and not subject to review."

On 1st October 1888 David Graham, baker, Penicuik, obtained a decree in the Debts Recovery Court at Edinburgh for £14, 19s. 4d. against George Reid, grocer, Loanhead.

Upon 7th December 1888 decree of *cessio* was granted against Reid at the instance of one of his creditors. In the state of affairs given up by Reid his liabilities amounted to £211, and his assets to £162. A trustee was appointed, but he refused to accept office, and neither he nor the insolvent was discharged.

After the decree Reid obtained work as a labourer at a weekly wage of £1, 4s. a week. He was also employed as church-officer for the Free Church, Loanhead, for payment of £6 per annum.

In 1893 Graham used arrestments under his debts recovery decree of 1st October 1888 in the hands of Reid's employers. Reid raised an action in the Sheriff Court at Edinburgh against Graham for recal of arrestments and for damages.

The pursuer averred—" (Cond. 4) The wages and earnings of the pursuer are protected from diligence for debt incurred by him prior to the said decree of *cessio bonorum*."

The pursuer pleaded—" (2) The arrestments complained of being directed against wages and earnings of the pursuer due to him subsequent to the date of the said decree of *cessio bonorum*, and which are therefore protected from diligence for debt incurred by the pursuer prior thereto, are wrongful and illegal, and should be recalled as craved."

The defender pleaded—" (4) The decree of *cessio bonorum* never having been extracted, and the trustee named in it having declined to accept the appointment, the same had not the effect of divesting the pursuer of his estate, or withdrawing it from the diligence of his creditors. (5) The process of *cessio* not being like sequestration, a universal diligence, does not protect *acquirenda* by the debtor from the diligence of his prior creditors, and the arrestments complained of having been used for the purpose of attaching subsequent earnings of the pursuer, legally