

judge of the right of relief competent to the personal debtor put an end to his obligation. Now, there are different ways in which the subject of the security may be diminished; *e.g.*, by discharging the burden over a part of it, or by severing it into *pro indiviso* shares and releasing one of them, or by splitting the *plenum dominium* into a superiority and a subordinate right. A reasonable creditor might consent to discharge the *dominium utile* from the burden, and a reasonable personal obligant might also consent if applied to, because the enhanced value of the land feued would render less likely the enforcing of his obligation. But in this case the debtor's consent was not asked, and he is now called on to pay a debt which is secured over subjects in which he has no interest. He is therefore quite entitled to put forward the defence that the creditor is not in a position to assign to him the security-subjects entire and undiminished. It makes no difference in principle that no part of the *corpus* of the security estate has been severed, because the creditor has consented to the release of certain subaltern rights which constitute a part of the security. I need hardly point out how material such a release may be in the case of feus for building purposes. In the present case, if the feus had not been released, the houses would of course be subject to the heritable security, and in all probability it would not have been necessary to enforce the defender's personal obligation.

LORD ADAM—I am of the same opinion. The case is one in which a heritable security was granted over the *dominium utile* of certain lands. When the debt is discharged the creditor is bound to reconvey the subject of the security to the debtor, but he only proposes to reconvey the *dominium directum* of the lands. That is not the same but a different subject. I do not think that any question whether the debtor would be prejudiced thereby arises for our consideration. I agree with your Lordships.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—H. Johnston—Macphail. Agents—Mill, Bonar, & Hunter, W.S.

Counsel for the Defenders (Webster's Surviving Trustees)—Graham Murray, Q.C.—Clyde. Agents—Welsh & Forbes, S.S.C.

Counsel for the Defender, Robert Adam, Executor of a Deceased Trustee—Wallace. Agents—Bruce & Kerr, W.S.

Tuesday, January 29.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GORDON'S TRUSTEES v. M'GREGOR AND OTHERS.

Bankruptcy—Cessio—Assignment—Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 9.

Section 9 of the Debtors (Scotland) Act provides that any creditor of a debtor who is notour bankrupt may apply for decree of *cessio* against him, and that, until the debtor shall execute a disposition *omnium bonorum*, any decree decerning him to do so shall operate as an assignment of his moveables in favour of the trustee mentioned in the decree of *cessio*.

Held that a decree of *cessio* granted at the instance of a creditor, although not extracted or followed by a disposition *omnium bonorum* by the debtor, is effectual as an assignment of the debtor's moveable estate in favour of the trustee in the *cessio* without intimation.

Mrs Gordon Galbraith or Gray died on April 13th 1892, leaving a testament dated April 7th 1891, by which she bequeathed all her estate to her husband Alexander M'Gregor Gray, whom she nominated as her sole executor, and confirmation duly followed.

At her death she was entitled to a sum of £365, 2s. under the settlement of her father the late Peter Gordon, Glasgow.

A process of *cessio* was raised against Gray, and *cessio* was awarded upon 13th May 1893, and the debtor decerned to execute a disposition *omnium bonorum* in favour of Alexander Cumming Rutherford, as his trustee. No disposition *omnium bonorum* was granted, and no further proceedings took place under the *cessio*. The decree was not extracted until 8th January 1894.

In December 1893 Gray married Miss Agnes Jardine Buchanan. In contemplation of this marriage the intending spouses executed an antenuptial marriage-contract dated November 15th 1893. By this contract Gray disposed to his intended spouse, whom failing the child or children of the marriage "all right and interest belonging to him in the estate of the said deceased Peter Gordon under and in virtue of his trust-disposition and settlement," &c. On the other part Miss Buchanan accepted the above-mentioned provisions and the others conceived in her favour in full satisfaction of all terce of land, legal share of moveables, and every other thing that she *jure relicta* or otherwise could claim from the said Alexander M'Gregor Gray, or his heirs, executors, or representatives, if she should survive him. The contract was intimated to two of the trustees on 29th December 1893, and to the remaining trustee on January 9th 1894.

In January 1894 a process of sequestration

was raised in the Sheriff-Court at Glasgow, and after the usual procedure Robert Tosh, accountant, Glasgow, was appointed trustee in the sequestration, and was confirmed on February 15th 1894.

Alexander Cumming Rutherford, the trustee in the *cessio* process, by assignation dated May 14th 1894, assigned to Tosh his whole right and interest in the bankrupt estate.

Gray and his wife on the one hand, and Tosh as trustee in the sequestration on the other, claimed the amount due to Mrs Galbraith or Gray under Peter Gordon's settlement from Peter Gordon's trustees, who brought an action of multiplepinding in the Sheriff-Court at Glasgow to have these competing claims determined.

Both parties claimed the fund.

Tosh pleaded—“(1) The common debtor having been divested of his estates by the decree of *cessio* granted in favour of the said A. C. Rutherford, and the same having been transferred to the said A. C. Rutherford, the claimant, in virtue of his assignation, is entitled to be preferred to the fund. (2) The antenuptial marriage-contract having been entered into by the common debtor when in a state of insolvency and when an undischarged bankrupt, it ought to be set aside and the claimant preferred to the fund *in medio*, and to be found entitled to expenses against the opposing claimants. (3) The antenuptial marriage contract conveyance having been granted by the common debtor in fraud of his creditors, it ought to be set aside and the claimant preferred. (4) The claimant as trustee on the sequestrated estates of the common debtor, is entitled to be preferred to the fund.”

Gray pleaded—“The fund *in medio* being a portion of the residue of the estate of the deceased Peter Gordon, and the claimants being entitled thereto under and by virtue of the foresaid trust-disposition and settlement, the testament of the said deceased Margaret Gordon Galbraith or Gray, and the foresaid antenuptial contract of marriage, they are entitled to be ranked and preferred in terms of their claim.”

“The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34) provides by section nine “that any creditor of a debtor who is notour bankrupt, may present a petition to the sheriff of the county praying that the debtor may be ordained to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed to take the management of the estate for behoof of his creditors, and that such process shall be deemed a process of *cessio*.” Section 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.”

Upon August 4, 1894, the Sheriff-Substitute (Murray) pronounced this interlocutor

—“Ranks and prefers the real raiser on the fund *in medio* to the extent of £13, 0s. 5d. the amount of his taxed expenses, and these expenses having been paid before consignation for the reasons assigned in the note annexed hereto, Ranks and prefers the claimant Tosh to the balance of the fund *in medio*.”

Upon appeal the Sheriff (BERRY) adhered.

“Note.—. . . In disposing of the question between the parties, the material facts and dates are as follows. On 13th May 1893, in a petition for *cessio* at the instance of a creditor, the bankrupt was decerned to execute a disposition *omnium bonorum* in favour of A. C. Rutherford as trustee for his creditors. No such disposition has been executed by the bankrupt. The decree of *cessio* was extracted on 8th January 1894. Subsequently the bankrupt was sequestrated, and an assignation in favour of the trustee in the sequestration, the present claimant, was executed by the trustee in the *cessio*. Previous to his marriage with his present wife, the bankrupt and his intended wife entered into a marriage contract, which bore, *inter alia*, to convey to her all his interest in the estate of Peter Gordon. The contract is dated 15th November 1893, and, as appears from a docket thereto, it was intimated to two of Peter Gordon's testamentary trustees on 29th December 1893, and to the third then surviving on 9th January 1894. The question whether the decree of *cessio* on 13th May 1893, in right of which the trustee in the sequestration stands, confers, in respect of its priority in date, a preference over the right taken under the intimated marriage-contract is important. The Debtors Act, 1880, by sec. 9 (5), provides that “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.” It is said that that enactment is not so sweeping in its terms as the corresponding provisions of the Bankruptcy Act, 1856, and that the assignation under the Debtors Act cannot be treated as equivalent to an intimated assignation. It is also argued that the date when the decree of *cessio* was extracted, and not the date of the decree itself, is the governing date in questions like the present. On neither of the points thus raised on behalf of the claimants, the bankrupt and his wife, are they, in my opinion, entitled to succeed. I agree with the Sheriff-Substitute that, as a judicial assignation, the decree of *cessio* did not require intimation in order to be operative; and further, that it was effectual in competition although unextracted. Had I thought that effect could be given to it only when extracted, a nice question might have arisen, whether, as intimation was made to a majority of Peter Gordon's trustees on 29th December 1893, although not made to the remaining trustee until 9th January 1894, the intimation was not sufficiently completed and so effectual at the former date, *i.e.*, before 8th January

1894, the date of the extract. Taking the view of the law which I have stated, it is unnecessary for me to consider that question."

The claimants, Alexander M'Gregor Gray and Agnes Jardine Buchanan or Gray, appealed to the Court of Session.

At advising—

LORD YOUNG—I have no more to say than that I concur in the judgment of the Sheriff, and very much on the grounds stated by him.

LORD RUTHERFURD CLARK—I am not without doubt of the necessity of intimation of the assignation effected by the Act, but I say no more as I know your Lordships are satisfied.

LORD TRAYNER—I agree with the judgments pronounced by the Sheriff and the Sheriff-Substitute. The procedure under an application for *cessio* is now different in some respects from what it was under the Act of 1834 (6 and 7 Will. IV. cap. 56), although that statute is still read as one of the *Cessio* Acts.

Formerly the process of *cessio* could only be raised by the debtor, and its primary object was to protect the debtor from personal diligence. If the petitioner was found entitled to the benefit of *cessio*, a distribution of his estate might be made among his creditors, but the application was one for the benefit of the debtor more immediately than for the benefit of creditors. If the debtor failed (without sufficient reason assigned) to appear at any diet of Court at which he was ordered to attend, the petition was dismissed. The creditors could not carry on the petition if the debtor did not do so. But now *cessio* has been much assimilated to sequestration. Any creditor may petition for decree of *cessio* against his debtor, and such decree may be pronounced against the debtor, including a decree ordaining him to grant a disposition *omnium bonorum* whether or not the debtor appear for examination, or at any other diet of compareance. I am disposed therefore to think that the decree ordering the debtor to grant such a disposition (which by statute operates as an assignation of the debtor's moveables until the disposition is granted) was intended to operate as a divestiture of the debtor, and to vest his trustee with the debtor's moveable estate, very much to the same effect as an act and warrant in favour of a trustee in bankruptcy. The provisions of the Bankruptcy Act of 1856 are more distinct on this point than the provisions of the *Cessio* Acts. But unless this effect is attributed to the decree ordaining the debtor (in a *cessio*) to grant a disposition *omnium bonorum*, the *Cessio* Acts have practically failed in their attempt to give the creditors any effectual remedy against their debtor or his estate.

I am of opinion also, in accordance with the views expressed by Lord Neaves in the case cited to us—*Bald v. Gibb and Bruce*, February 11, 1859, 21 D. 473—that the assignation effected by the statute to which I have referred, does not require any

further intimation to make it effectual than is given by its having been pronounced in open court, and published in the way provided for its publication.

The LORD JUSTICE-CLERK concurred.

The Court refused the appeal.

Counsel for the Appellants—Dundas—Deas. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Jameson—Salvesen—Agents—Patrick & James, S.S.C.

Friday, February 1.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

MACKINTOSH AND ANOTHER v. MAY.

Lease—Right of Sporting—Right to Sub-let—Foreign—Conflict of Laws—Lease of Scots Shooting Executed in English Form.

Where a Scots proprietor let the right of shooting and fishing over his estate to an Englishman, held (*aff. judgment of Lord Stormonth Darling*) (1) that the lease, although executed in England and in the English form, fell to be construed according to Scots law, and that it was inadmissible to refer to facts extrinsic of the contract with the object of showing that the parties intended it to be construed according to English law; and (2) that no right to sub-let was conferred upon the tenant, in respect that such a right was not expressly given, and could not be implied.

In 1890 Eneas Mackintosh of Balmespick, in the county of Inverness, let to Frank Boyd May, of Kingsbury House, Middlesex, the exclusive right of sporting and shooting over the estate of Clune in that county, together with the lodge and furniture therein, and the right of fishing in the rivers appertaining to the estate, for five years, at a rent of £498, payable by equal yearly instalments on 30th June and 31st December in each year. The contract between the parties was contained in a deed drawn by an English solicitor, and was in these terms—"This indenture, made the 5th day of December 1890, between . . . witnesseth that in consideration of the rent and lessee's covenants hereinafter reserved and contained, the landlord doth hereby demise unto the tenant all that exclusive right of hunting," &c. It was also agreed that the tenant should have power to determine the lease at the end of the third year on giving six months' previous notice in writing to the landlord. The deed was executed according to the English form, in London.

No power was given by this deed to the tenant to sub-let the subjects, but prior to the date of the indenture, upon September