

“Dismiss the appeal: Find that upon the facts stated there is no legal ground upon which the magistrate was bound to hold that the constable Petrie was not acting in the execution of his duty at the time when the assault was committed, and decern: Find the respondent entitled to expenses, which modify to seven guineas.”

Counsel for the Appellant—Salvesen—Wilton. Agent—John W. Chessier, S.S.C.

Counsel for the Respondent—Graham Stewart. Agent—John Mackay, S.S.C.

## COURT OF SESSION.

Tuesday, December 8.

### FIRST DIVISION.

#### MACKAY, PETITIONER.

##### *Bankruptcy—Cessio Bonorum—Discharge—Nobile Officium.*

Where in an application for discharge of all debts contracted prior to a decree of *cessio bonorum*, the bankrupt, owing to the death of the trustee, was unable to obtain the statutory report required by the 146th section of the Bankruptcy Act 1856, and the 5th section of the Bankruptcy and Cessio Act 1881, the Court *accepted* a report by the Accountant of Court in lieu thereof, and remitted to the Sheriff to follow the course of procedure usual in such applications.

On 24th January 1890 the Sheriff of the Lothians granted decree of *cessio* against John Mackay, and appointed Mr J. J. Stewart, C.A., trustee.

On 15th October 1896 John Mackay presented this petition, setting forth that a period of more than six years had expired since decree of *cessio* was granted; that the petitioner was desirous of being finally discharged of all debts due by him before the date of the *cessio*, in terms of the 146th section of the Bankruptcy Act 1856, and the Bankruptcy and Cessio Act 1881; that a first and final dividend of 1s. 8d. in the £ had been paid; that the failure to pay 5s. in the £ had arisen from circumstances for which the petitioner was not responsible, and that owing to the death of Mr J. J. Stewart, the trustee in the *cessio*, on 11th September 1895, the petitioner could not obtain the requisite statutory report.

The petitioner accordingly craved the Court to remit to the Accountant of Court to furnish a report in lieu of that falling to be made by the trustee, and further stated—“The petitioner is unable to obtain such a report under a petition for his discharge presented in the said Sheriff Court. According to the practice in said Sheriff Court the acceptance of such a report in lieu of a statutory report by the trustee involves an exercise of the *nobile officium* competent only to your Lordships.”

The prayer of the petition embraced three heads—(1) To remit to the Accountant for the purpose above mentioned; (2) On such report being lodged, to accept it in place of, and to declare it equivalent to, the trustee's statutory report; and (3) to remit to the Sheriff of the Lothians to appoint intimation of the petition by advertisement and circular to the creditors, and thereupon, after the usual procedure, to pronounce a deliverance discharging the petitioner of all debts and obligations contracted by him prior to the *cessio*.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), sec. 146, enacts “that a bankrupt may petition to be finally discharged on the expiration of two years from the date of the sequestration without any consents of creditors, provided that it shall not be competent for him to present such petition “until the trustee shall have prepared a report with regard to the conduct of the bankrupt, and as to how far he has complied with the provisions of this Act, and, in particular, whether the bankrupt has made a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortune or losses in business, or from culpable or undue conduct.”

The Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. c. 22), sec. 5, enacts that “A debtor, with respect to whom a 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 . . . two years . . . from the date of sequestration, shall . . . apply to debtors with respect to whom decree of *cessio bonorum* has been pronounced.

The Accountant of Court, in obedience to a remit from the Court, reported, *inter alia*, that the petitioner had made a fair discovery and surrender of his estate; that he had attended the diet of examination; that he had not been guilty of collusion, and that his bankruptcy had arisen from innocent misfortune or losses in business, and not from culpable or undue conduct.

Hereafter in the Single Bills the petitioner cited the case of *White*, March 18, 1893, 20 R. 600.

The Court granted the petition.

Counsel for the Petitioner—M'Lennan—Agents—Philip, Laing, & Co., S.S.C.

Tuesday, December 8.

SECOND DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

BORTHWICK v. BORTHWICK.

*Title to Sue—Executor—Reparation—Declarator of Marriage—Breach of Promise and Seduction—Alternative Conclusion.*

The conclusions of a summons were (1) for declarator of marriage, (2) "but if it shall be found that the pursuer is not married to the defender, then and in that case" for £3000 damages for breach of promise and seduction. The pursuer pleaded (1) that declarator of marriage ought to be pronounced; (2) "or alternatively," that decree ought to be pronounced "in terms of the alternative conclusions of the summons."

After raising the action the pursuer died, and her executor craved to be sisted as pursuer in her place in order that he might insist in the conclusion of the action for damages.

*Held* (aff. Lord Stormonth Darling, Ordinary) that the conclusions of the action were substantially alternative, and that the executor was entitled to be sisted as craved.

*Opinion* (by Lord Young) that the executor of a pursuer who had died after raising an action of declarator of marriage was entitled to be sisted as pursuer and proceed with the action.

On 15th November 1895 Mrs Minnie Green or Borthwick raised an action against Robert Forrester Borthwick. The conclusions of the summons were as follows:—"Therefore the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proven relevant to infer marriage between the pursuer and the defender, and find them married persons accordingly; and therefore decern and ordain the defender, the said Robert Forrester Borthwick, to adhere to and cohabit with the pursuer, and treat and entertain her in all respects as his lawful wife: But if it shall be found that the pursuer is not married to the defender, then and in that case the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £3000 sterling on account of the defender having refused to implement and fulfil a promise of marriage made by defender to the said pursuer, and on account of the defender having seduced the pursuer."

The pursuer pleaded in her first two pleas-in-law that marriage having been duly constituted between the pursuer and defender, declarator ought to be pronounced to that effect; and 3. "Or alternatively, the defender having promised to marry the pursuer, and having failed to carry out his promise to her, and having seduced her, decree ought to be pronounced against him

in terms of the alternative conclusions of the summons."

The defender lodged defences, in which he denied both marriage with the pursuer and breach of promise and seduction.

On 21st December 1895 the Lord Ordinary (STORMONTH DARLING) closed the record and allowed a proof.

On 31st December the pursuer died intestate, and on 30th March 1896 her brother George Green was appointed her executor-dative.

Thereafter the executor-dative lodged a minute craving the Lord Ordinary "to sist him as pursuer in room and place of the said Minnie Green or Borthwick."

On 31st October 1896 the Lord Ordinary pronounced the following interlocutor:—

"Sists George Green, executor-dative to the deceased pursuer Minnie Green or Borthwick, as pursuer in room and place of the said deceased Minnie Green or Borthwick, conform to minute of sist . . . and allows the parties a proof of the averments on record relative to the conclusion of the summons for damages for breach of promise and seduction, to proceed on a day to be afterwards fixed.

*Note.*—"The defender's counsel admits that an executor has a good title to insist in an action of damages for injury to person or character, provided it has been raised by the deceased person before his death. This rule is well settled, and is not affected by the fact that under the judgment in *Bern's Executor v. Montrose Asylum*, 20 R. 859, a different rule holds where the deceased person has died without raising the action. Accordingly, if the present action had been one simply of damages for breach of promise and seduction, there could have been no doubt of the executor's right to be sisted as a pursuer in room of the defunct. But it is said that the executor has no such right, because the leading conclusion is for declarator of marriage. I assume that this is a conclusion so purely personal to the woman that, especially when founded on promise *subsequente copula*, it could not be insisted in by anyone else. Indeed the executor here avows his intention, if he be sisted, of prosecuting the action only to the effect of recovering damages. I am quite unable to see why the presence of this conclusion in the summons should affect the executor's right to be sisted. Once he is sisted he can elect to proceed only under the conclusion for damages, just as the deceased could have done. There is nothing inconsistent in the two conclusions, because the proof of promise, in order to establish marriage is of a much more stringent kind than the proof of promise to obtain damages for breach, and the deceased herself, while maintaining the promise to the fullest extent, might well have despaired of establishing it by the writ or oath of the defender.

"Accordingly, the executor, in the course which he proposes, need not contradict or abate one word of the averments which the deceased instructed her advisers to make. He might conceivably be met (though I have