Counsel for the appellants was not called on.

The Court refused the motion and sent the case to the roll.

Counsel for the Appellants—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents — A. R. Brown. Agents—Ronald & Ritchie, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Sheriff Court of Dumfries and Galloway at Kirkcudbright.

ROWAN & BORLAND *v.* M'LAUCHLAN.

Process — Cessio — Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *secs.* 8 *and* 9—*Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 22), *sec.* 9—*Petition for Cessio—Withdrawal of Petitioning Creditors Prior to Date of Debtor's Examination — No Other Creditors Made Parties to Petition—Failure of Debtor to Appear—Decree of Sheriff Granting Cessio under sec.* 9 *of Act of* 1881.

In a petition for cessio at the instance of certain creditors of a debtor, the petitioners withdrew their petition prior to the day fixed by the Sheriff for the debtor's public examination, and on that day their agent informed the Sheriff of the fact. An agent representing certain other creditors of the debtor was present in Court, but no step was taken to sist any of them as petitioners, or to make them in any way parties to the process. The debtor failed to appear, and the Sheriff, so far as the record of the proceedings showed, *ex proprio motu* pronounced decree of cessio, and appointed a trustee under section 9 of the Act of 1881, on the ground that the debtor's failure to appear had been wilful.

Held, in an appeal in which the debtor was the appellant and the trustee and certain unpaid creditors were the respondents, that the interlocutor of the Sheriff was incompetent and fell to be recalled in respect that at the time when it was pronounced there was no instance to support the process.

Section 9 of the Bankruptcy and Cessio (Scotland) Act 1881 (44 and 45 Vict. c. 22) provides — "If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

Messrs Rowan & Borland, drapers, Newton-Stewart, on 20th January 1905 presented a petition for cessio in the Sheriff Court of Dumfries and Galloway at Kirkcudbright against James M'Lauchlan, dairyman, craving the Court to appoint a trustee to take the management and disposal of his estate for behoof of his creditors, and to ordain him, if so required, to execute a disposition *omnium bonorum* in favour of such trustee for their behoof. Messrs Rowan & Borland were creditors of M'Lauchlan for the sum of £15, 0s. 6d. with 16s. 1d. of expenses conform to extract decree of the Sheriff of Dumfries and Galloway dated 6th January 1905. In the condescendence annexed to the petition the petitioners set forth the names of two persons as being the only other creditors of the debtor so far as known to the petitioners.

On 20th January the Sheriff-Substitute (NAPIER) made the usual first order in a petition for cessio in terms of section 9, sub-section 1, of the Debtors (Scotland) Act 1880, requiring, *inter alia*, the defender and his creditors to appear in the Sheriff Court-House, Kirkcudbright, on 3rd February for public examination.

On 3rd February the Sheriff-Substitute pronounced the following interlocutor:—"Present William Nicholson jr., solicitor for creditors. The respondent failed to appear after having been duly cited. The Sheriff-Substitute holds his failure to appear wilful: Ordains the defender to grant a disposition *omnium bonorum* to Mr J. E. Milligan, solicitor, Dalbeattie, who is hereby appointed trustee for behoof of the defender's creditors: Dispenses with caution, and appoints all funds belonging to the defender's estate to be lodged in the Union Bank at Dalbeattie: Further, appoints the defender to appear for public examination within the Court-House here on the 10th inst. at 10 o'clock forenoon."

The debtor appealed to the Court of Session, and before the case came on for hearing lodged a minute in the following terms:—"Macmillan, for the respondent and appellant James M'Lauchlan, stated to the Court that . . . on the morning of the said 3rd February 1905 the appellant's agent Mr W. M. Kelly, solicitor, Newton-Stewart, on behalf of the appellant, made payment to Mr J. R. Saunders, solicitor, Castle Douglas, the agent for Rowan & Borland, the petitioning creditors, of the full amount of their debt and expenses, and received a receipt in settlement thereof. Mr Kelly had also on the appellant's behalf settled or arranged with all the other creditors of the appellant known to him, including Richard Ker and Mitchell Davidson, the only two persons mentioned as creditors of the appellant besides the petitioners in the petition for cessio. Mr Saunders thereupon promised to withdraw the petition, and in reliance on this settlement the appellant's agent informed the appellant that he need not attend the Court, and accordingly neither he nor his agent, who thereupon left to fulfil a business engagement in another part of the country, attended at the calling of the case. Mr Saunders duly intimated to the Sheriff-Clerk that the matter had been settled, and on the case being called in Court stated to the Sheriff-Substitute that his client's claims had been satisfied and that he withdrew the petition.

Mr William Nicholson junior, solicitor, Kirkcudbright, however, then appeared, and stated that he represented a creditor to the extent of £2, 10s. 6d., and desired the petition to be proceeded with. On his motion the Sheriff-Substitute pronounced the interlocutor now appealed against, holding the appellant's failure to appear to be wilful, and ordaining him to grant a disposition *omnium bonorum* to a trustee for his creditors. The appellant is willing and able to pay the claim of Mr Nicholson's client, and his agent would have settled the same had he known thereof before the calling of the case."

At the hearing the respondents, the trustee and certain unpaid creditors of the debtor, objected to the competency of the minute, maintaining that the Court could look at nothing except the note of appeal. The Court repelled the objection, and the case was continued to allow the respondents to lodge answers. In their answers they admitted that Mr Kelly settled the claim of the petitioners; that Mr Saunders, the petitioners' agent, intimated to the Sheriff-Clerk that the petitioning creditors' claim had been settled, and stated this to the Sheriff-Substitute when the petition was called. They averred, however, that the debts due to them were known all along by the appellant and his agent to have been due and unpaid.

Argued for the appellant—The interlocutor of the Sheriff of 3rd February was appealable—Sheriff Courts (Scotland) Act 1876, sec. 26 (4); *Adam & Sons* v. *Kinnes*, February 27, 1883, 10 R. 671, at p. 674, 20 S.L.R. 436; *Meikle* v. *Wilson*, May 31, 1884, 11 R. 867, 21 S.L.R. 577. It was open to objection on two grounds—(1) At the time when the Sheriff pronounced the interlocutor the process in which he professed to pronounce it had ceased to exist. The petitioning creditors had withdrawn, and no other creditor had entered the process by any of the methods known to the law—as, for example, by lodging a minute or getting sisted as a petitioner. The petition accordingly had fallen, it being impossible for a process of any kind to continue to exist without a pursuer. Had there been a process in existence it was true that non-petitioning creditors could have appeared and stated their claims and moved for cessio without the existence of a process, but they had no *locus standi*. The Bankruptcy (Scotland) Act 1856, section 34, was referred to as illustrating the point. (2) In any event, the Sheriff had erred in holding that the appellant's failure to appear was wilful. To entitle the Sheriff to pronounce decree of cessio under section 9 it must have been proved that the debtor was "contumaciously absent"—*Reid* v. *Somerville & Co.*, June 6, 1889, 16 R. 751, 26 S.L.R. 274—whereas in the present case he had absented himself in all good faith, having been informed by his agent that the matter was settled and that he did not require to attend.

Argued for the respondents—The appeal was incompetent, the decision of the Sheriff being in a matter of this kind final. But assuming its competency the interlocutor should be upheld. Proceedings in cessio were entirely statutory, and there was nothing in any of the statutes making it necessary for a creditor to sist himself formally in order to become a party to the process. The mere fact that he was a creditor and convened as such by the Sheriff-Substitute's deliverance of 28th January entitled him to move for decree of cessio under section 9—*Smith* v. *Marquess of Lothian*, November 4, 1884, 12 R. 58. Further, the appellant's failure to appear was "wilful." He had received a distinct order from the Sheriff to be present, and that order had never been officially recalled, and if he chose to disobey it he did so at his own risk.

LORD JUSTICE-CLERK—This is a very peculiar case, and I do not think I have seen one like it before. The facts, so far as ascertained, seem to be that a petition for cessio was presented, and a meeting appointed by the Sheriff at which the bankrupt and all his creditors were required to appear. But before the date of the meeting the petitioning creditors withdrew, and ceased to be the pursuers in the petition, with the result that at the date of the meeting there was nobody who could move anything in it at all. I have looked in vain in the proceedings for anything to show that anybody appeared to take up the proceedings, even assuming (as I do) that it was competent for anyone to take them up. I find nothing in the proceedings except the statement in one place that a certain gentleman appeared for creditors. Who these creditors were, how many there were, and what their debts amounted to, there is nothing in the process to suggest. The Sheriff-Substitute proceeded to hold that the debtor's failure to appear was wilful, and pronounced decree of cessio. So far as the proceedings show, I must assume that the Sheriff did that *ex proprio motu*. It was not said that he did it on anybody's motion; it was not said that anyone was sisted in the cessio, or entered the process by minute or by any of the ordinary ways known in judicial procedure. The Sheriff pronounced the decree of cessio of his own accord, and in my view it was not competent for him to do so. It was competent on the motion of anyone who had right to be there to pronounce such a judgment if he were satisfied that it was the right judgment to pronounce; but if there were nobody there in a position legally to make such a motion I do not think the Sheriff could pronounce the decree *ex proprio motu*.

But, passing this by, the next point is whether at that time the process was in such a condition that the Sheriff could pronounce any judgment in it at all. There was at that time, so far as the proceedings showed, no instance whatever to support the process, and in any proceedings, civil or criminal, which I have ever seen, if there were no instance there could be no legal or binding judgment. This by itself is sufficient for the decision of the case.

I am therefore of opinion that the interlocutor of the Sheriff-Substitute should be

recalled, and the case remitted to him to proceed.

LORD KYLLACHY—I concur. The case being decided on the grounds stated by your Lordship we are relieved of the necessity of considering whether the failure of the appellant to appear at the meeting was wilful failure in the sense of the statute.

LORD KINCAIRNEY—I am of the same opinion. I should always be reluctant to recal the judgment of a Sheriff on a point of form, especially in a process of cessio, but I do not think it is possible to allow this interlocutor to stand. The decree pronounced was practically a decree in absence. That is quite right if there is a pursuer in the action, but it can never be right if there is no pursuer, and in this case there was neither a pursuer nor a defender, nor any creditor who had made himself a party to the action. On that ground I agree with your Lordships that the judgment should be recalled.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of Dumfries and Galloway dated 3rd February 1905, and remit to him to proceed of new, and decern."

Counsel for the Appellant—Macmillan. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—F. J. Jameson. Agents—Scott & Glover, W.S.

Thursday, March 9.

FIRST DIVISION.

DALZIEL *v.* DALZIEL'S TRUSTEES.

DALZIEL *v.* HENDERSON'S TRUSTEES.

Succession—Power of Appointment—Validity of Exercise of Powers—Exercise by General Conveyance to Testamentary Trustees—Objects of Power—"Issue"—Issue including Grandchildren—Appointment to Child in Liferent and Her Children in Fee—Exercise of Powers Partly ultra vires—Competition for Administration between Two Sets of Trustees.

A, a married woman possessed of separate estate, executed a deed of settlement conveying a portion of her estate to trustees, who were directed to pay the interest thereof to herself during her life, and after her death to hold it in trust for all or any one or more of her "issue, . . . at such ages and times . . . in such shares, if more than one, and in such manner" as she should by deed or will appoint, and, in default of such appointment, for all her children, it being further provided that "no child who, or any of whose issue," should take any part of the trust funds under any such appointment, should be entitled to any share of the unappointed trust funds without bringing the share or shares "appointed to him or to her, or to his or her issue," into hotchpot.

A had also a power of appointment over certain funds held by trustees under her father's trust-disposition "in trust for all or such one or more exclusively of the others or other of the issue of" A "born or to be born during the life of" A "or within twenty-one years after her death if more than one, in such shares and with such future and other trusts for the benefit of such issue or some or one of them, with such provision for their respective maintenance . . . and upon such conditions, with such restrictions, and in such manner, as" A . . . "shall appoint, and in default of such appointment . . . in trust for all or any of the children or child living at" the truster's "death or born afterwards of" A; " . . . provided always that no child . . . who or whose issue shall take any part of the same trust estate under any appointment . . . shall, in default of any appointment to the contrary, have or be entitled to any share of the unappointed part of the same trust premises without collating the share or shares appointed to him or her or to his or her issue." . . .

A died, survived by a son and daughter, and left a will by which she bequeathed to trustees all the residue of her estate, "of whatever nature or kind soever, and including all property over which I have any power of appointment," to hold in trust for her son and daughter, with directions restricting her daughter's right to a liferent, and giving the fee of her daughter's share to her daughter's children as her daughter might appoint, and conferring a power on her daughter to provide a liferent of a certain amount to a surviving husband.

Held (1) that the powers of appointment possessed by A under the deed of settlement as well as under her father's trust-disposition and settlement were validly exercised by the general conveyance of the residue of her whole estate to her testamentary trustees, such conveyance being a formal mode of conveying the beneficial interest; (2) that the directions in A's will restricting her daughter's right to a liferent, and giving the fee of her daughter's share to her daughter's children as her daughter might appoint were *intra vires* of A's powers of appointment under both deeds, inasmuch as in both these deeds the term "issue" included grandchildren; (3) that the direction in A's will giving her daughter a power to provide a liferent for a husband was an invalid exercise of these powers, in respect that such husband was not an object of the powers; (4) that the invalid exercise of her powers in this particular, being separable, did not affect the validity of the exercise of the powers in other respects, but merely fell to be disregarded; and (5) that the funds