

PRESIDENT. If Lord Moray had presented in 1670, I should have thought his titles sufficient, with constant possession, to have established his right to the patronage of Kinlos.

JUSTICE-CLERK. I think that Lord Moray's title would have been sufficient, had his possession been uniform.

GARDENSTON. Lord Moray had a good prescriptive title: by the annexation, his title extended to the whole parish, *pro indiviso* indeed, but still there was a subject for prescription, just as in the case of a commonty.

ALVA. When there was originally an alternative right, we are not to presume that the presentation 1670 was by the Earl of Moray, which we might have done, had there been no other person who could claim.

On the 29th July 1777, "The Lords preferred Miss Brodie for this *vice*."

*Act.* Ilay Campbell. *Alt.* D. Rae.

*Reporter*, President for Lord Kennet.

1777. July 29. LIEUTENANT JAMES ENGLAND *against* NICOL SHAW and OTHERS.

*CESSIO BONORUM.*

Found that an officer applying for the benefit of the *cessio*, must assign his half-pay to his creditors.

THE question in this case was, Whether Lieutenant England, the pursuer of a *cessio bonorum*, should make over his half-pay to his creditors? Besides other authorities, the pursuer referred to the cases of *Grierson against Campbell*, 5th March 1768; *Fairies*, 1774; *Ferguson*, 1776. The defenders referred to Voet, *lib.* 42, *tit.* 3; Statutes of William the Lion, cap. 17; Stair, 4. 52. 30; Bank, 4. 40. 1; Ersk. 4. 5. 26.

The following opinions were delivered:—

MONBODDO. I am not apt to give much weight to a single decision; but *here* there are three consecutive decisions. Independent of them, I should think that the half-pay of a lieutenant in the army cannot be assigned. I think that the party himself has a right to plead this, because he has an interest: half-pay is not only a remuneration, it is also of the nature of a retaining fee. The half-pay list is a fund for veteran officers. An officer must live like a gentleman, and L.38 *per annum*, which is the extent of his half-pay, is surely a small sum for that purpose. An aliment is here given from year to year: it is like servant's wages, and a *beneficium competentiæ* ought to be allowed.

HAILES. There is no doubt that there are three consecutive decisions, finding that an officer seeking the benefit of a *cessio bonorum* is not obliged to assign his half-pay: but, although there are three decisions, the only one where

the question was debated on the Bench, was that of *Lieutenant Grierson*. It must be confessed, that the cause *there* was not argued so fully as it has been *here*: the case of half-pay was likened to servant's wages, and it was not attended to that servants, if these wages were high, might be bound to assign what was over and above subsistence; besides, a notion had crept in, that half-pay was not assignable at all. But now we have learned, from the English case quoted, that a half-pay officer may grant a perpetual power of attorney for levying his half-pay, which, in effect, is an assignation. Hence also it follows, that a half-pay officer may spend the whole, or any part of this provision, so that he is not obliged to bestow it annually on his proper maintenance. It seems a contradiction, that a man may spend his half-pay, and yet be allowed the benefit of a *cessio* without assigning it to his creditors. How can he withhold a fund to-day which he is at liberty to spend to-morrow?

COVINGTON. The principle, as to half pay, ought to reach to full pay. The same plea may be urged for the highest as well as the lowest officer of the army; and the same plea may be urged for every person who has an office with certain emoluments. The plea here is, that the sum is little enough, without any deductions, for the livelihood of this gentleman: the *beneficium competentiæ* is out of the question, for *that* is consented to by the creditors. A debtor taking the benefit of the *cessio* must do all in his power to satisfy his creditors: if the pursuer could make out that the half-pay is not assignable, he would say something, but that is not the case.

BRAXFIELD. If the half-pay is not assignable, the pursuer's argument is good; but it is certainly assignable: subjects properly alimentary are not assignable. But the question is, *Who* must make that objection? Not the debtor himself, but the person bestowing the aliment. Suppose any man should lend out a sum, declaring it to be alimentary for himself, still it would be attachable by posterior creditors. In the case of *Dick of Grange*, the plea was entered in the name of the wife and children, and it was founded in law, for the fund was created by the beneficence of the Crown for their behoof. In the case of *Crawford*, the plea was made in the name of the proprietor: this pursuer is not entitled to the *beneficium competentiæ*, for *that* relates to *acquirenda*. The profits here are *in futuro*, but the title to them already exists in the pursuer's person.

ALVA. This is not an assignable subject in our sense of the word, for the public may recal it if assigned.

JUSTICE-CLERK. I have always studied to keep up to the principles which ought to be considered in the process of *cessio*, but I think that they apply not to this case: the half-pay is merely alimentary, and it is scrimp. The State regrets that it cannot afford more to veteran officers: this is an aliment granted from year to year by the public; why should it be put upon a different footing from an aliment granted by a private party? It is said that the party granting the aliment might object, but not the party alimented. I should be sorry if the judgment proceeded on that circumstance that the Crown does not interpose: the Court is called in duty to attend to the interest of the public.

ELLIOCK. The question here is in a *cessio bonorum*; the law says that the pursuer must assign whatever is in his power. He can assign this fund. Why

should he not? As to the interest of the public, if the public is dissatisfied, it may strike Lieutenant England off the half-pay list: had he been on full pay, and contracted debts which he could not discharge, he would have been obliged to sell out in order to satisfy his creditors. It is strange if the public should mean to secure to him his half-pay when, in similar circumstances, it would have deprived him of his full pay.

GARDENSTON. Aliment must be proportioned to a man's condition. If he has been extravagant, he must satisfy himself with a humble aliment: he who seeks the benefit of a *cessio bonorum* must make a surrender of all that he has. Although one should sink a sum for an aliment, still he would be bound to make a surrender of it. If the half-pay officers are to be considered as having an alimentary provision, the same rule must go to all officers: the public will not be well served by officers who live beyond their incomes and disappoint the payment of creditors. Indeed, it would be fatal to half-pay officers themselves, if the half-pay was to be inviolable, for they would never obtain any credit. As to the decisions, I think nothing of them, for they are all recent: this is only the *second* time that the case has been deliberately considered.

WESTHALL. The great difficulty arises from the course of decisions.

PRESIDENT. If half-pay may be voluntarily assigned, or made over by a power of attorney, Why must not the pursuer assign in this case? By the law of Scotland, in the case of a *cessio*, creditors have an absolute right to attach the effects of the debtor, leaving always to him his personal liberty. A *cessio bonorum* is not altogether a demand of right. The interest of creditors must be preserved. The pursuer asks his personal liberty: Good; but then you must give up your effects: if you will not, you ought not to have the benefit sought. If you do not make a surrender of every thing, you are, in effect, a fraudulent bankrupt. The smaller that the debt is, the argument of the pursuer is so much the worse. The decisions on this point are not a proper *series rerum similiter judicatarum*. About the time of their being pronounced, too much favour was shown, in some cases, to persons claiming the benefit of a *cessio*.

On the 29th July 1777, "The Lords found that Lieutenant England, on obtaining the benefit of *cessio*, must make over his half-pay to his creditors."

*Act.* G. Ferguson. *Alt.* A. Ferguson. Hearing.

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