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

attachable, the same ought not to be recalled. (6) The arrestments complained of being legal and competent, the defender is not liable in damages for having used them."

Upon 24th November 1893 the Sheriff-Substitute (RUTHERFURD) pronounced this judgment:—"Finds that the pursuer's earnings and emoluments subsequent to the date of the decree of *cessio bonorum*, referred to on record, are not by the said decree protected from the diligence of creditors whose debts were incurred prior thereto; therefore repels the pursuer's second plea-in-law, and, to the effect mentioned, sustains the defender's fifth plea-in-law," and he allowed proof before answer of the pursuer's averments of oppressive and malicious use of arrestment.

Upon appeal the Sheriff (BLAIR) upon 20th December 1893 found the facts above stated in regard to the application for *cessio*, and proceeded:—"Finds that said decree has not been extracted, and that no further procedure has taken place in said petition: Finds that said unextracted decree is no bar to the arrestments used by the defender; assoilzies the defender from the conclusions of the libel. . . .

"*Note.*—This action concludes for the recal of arrestments used by the defender to attach certain sums due to the pursuer, and for damages in respect of the illegal use of these arrestments. The pursuer avers that he formerly carried on business as a grocer at Loanhead, and having got into pecuniary difficulties, the defender, one of his creditors, obtained decree against him for the sum of £14, 19s. 4d. on 1st October 1888; on 5th November 1888, a Mr Rae, another creditor, obtained decree against him for the sum of £20, 1s. 4d., and thereafter raised a process of cessio, on which, on 7th December 1888, decree was pronounced in the terms quoted in the preceding interlocutor. The petition for cessio concludes with the statement, 'So far as known to the pursuer, the defender's whole creditors are 1, the pursuer.' The present defender was no party to the proceedings. The decree of 7th December 1888 has not been extracted, consequently Mr Munro, who was appointed trustee, was never in a position to act, or to take any steps to realise the estate for the benefit of the bankrupt's creditors. In the course of the present year the defender has used arrestments, under the decree of 1st October 1888, to attach certain sums of wages and earnings due to the pursuer. The pursuer maintains, on the authority of the cases of *Calderhead* v. *Freer and Dobbie*, 17 R. 1098, 1890, and *Stewart* v. *Robertson*, June 30, 1891, decided by Lord Low (not reported), that it was incompetent for the defender to use arrestments for the purpose of attaching the pursuer's earnings after the date of the cessio, for the debt incurred to him prior to that date, and if the case had been in the same position as these two cases it would have been the duty of the Sheriff to have disposed of this case in accordance with these decisions. But it appears to the Sheriff that there is an important destinction. In the cases of *Calderhead* and *Stewart* the decrees had been extracted, the trustees had accepted and acted, and steps had been taken to realise the debtors' estates, and to distribute it among the creditors. In the case of *Rae* v. *Reid*, as already stated, the decree has not been extracted, and since 1888 nothing has been done in the process. So far as the Sheriff has been able to ascertain, there are two cases in which the effect of an unextracted decree in a *cessio bonorum* has been considered by the Court—first, the case of *Wilson* v. *Magistrates of Edinburgh*, July 8, 1788, M. 11,757, in which the Magistrates were found liable in sums due by a debtor, who had been liberated after decree had been pronounced, finding him entitled to the benefit of cessio, but before the decree had been extracted; and second, the case of *Bald* v. *Gibb and Bruce*, February 11, 1859, 21 D. 473, in which it was held that the personal protection contained in a decree of cessio did not come into operation before extract, and therefore that a poinding executed between the date of the decree and the date of extract had not the effect of rendering the debtor notour bankrupt. But if the unextracted decree did not protect the person of the debtor, still less, in the opinion of the Sheriff, can it be held to protect his estate, or prevent the use of diligence by a creditor to operate payment of his debt. When it was apparent that the proceedings in the cessio were to lead to no result, the debtor could have had the order to grant a disposition recalled under section 17 of the Act of Sederunt of 22nd December 1882.

The pursuer appealed.

After a hearing before the Judges of the Second Division, the case was remitted to be tried by four Judges of the Second, and three Judges of the First Division.

The appellant argued—The arrestments ought to be recalled. It was admitted that under the old law of cessio prior creditors could use diligence against *acquirenda* of their debtor, but the change in the law which had been made by the Act of 1881 had given a cessio the same effect as a sequestration, so that only the trustee could use diligence against estate which the debtor acquired after the date of the decree of cessio—*Calderhead* v. *Freer and Dobbie*, July 9, 1890, 17 R. 1098; *Reid* v. *M'Bayne*, May 16, 1890, 17 R. 757; *Stewart* v. *Robertson*, June 6, 1891, unreported. The amount earned by the pursuer after decree of cessio could not be said to be *acquirenda*—*Barren* v. *Mitchell*, July 8, 1881, 8 R. 933. In another case cessio had been refused becase the debtor averred that he had no estate, but if the creditors could have attached *acquirenda* there would have been no need to refuse cessio, as it would not have put the applicant in a better position than if it had not been granted—*Ross* v. *Hairstens*, November 16, 1885, 13 R. 207.

The respondent argued—Prior creditors could use diligence against *acquirenda* of the debtor, in spite of the decree of cessio —*Simpson* v. *Jack*, November 23, 1888, 16

R. 131; Bell's Comm. ii. 485. If the contrary were held, decree of cessio would operate as a discharge of all his prior debts. A statutory authority to pursue was given to the trustee in a sequestration by the Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), sec. 103. That power was not given under the Cessio Acts. The statements in the Judges' opinions in *Calderhead* (cited *supra*) were *obiter*.

At advising—

LORD YOUNG—The question which has been argued before us is necessarily a general one, and it is this — Whether a decree in a petition for cessio in the terms quoted by the Sheriff in his interlocutor of 20th December 1893 protects the estate of the applicant for cessio—the estate which he has acquired subsequent to the decree—from the diligence of creditors to whom he had incurred debts previous to the application for cessio.

The estate before us in this case is a very simple one; it amounts only to the weekly earnings of the petitioner and applicant, some 24s. weekly, and a small wage he has as church-officer in a dissenting church, but the general question which was argued before us is altogether irrespective of the nature or extent of the estate, and is as I have stated.

Both Sheriffs have decided that it is not so protected, but a doubt as to the correctness of this decision has arisen by reason of certain *obiter dicta* by the late Lord President and Lord Shand in two cases—*Calderhead* v. *Freer and Dobbie*, July 9, 1890, 17 R. 1098; *Reid* v. *M'Bayne*, May 16, 1890, 17 R. 757. But giving all respect and weight to these *dicta*, I have come without any doubt or difficulty to be of opinion with the Sheriffs that the decree granting cessio affords no such protection as the pursuer in this action has urged. It has never been held that diligence used against a debtor's estate prior to his application for cessio became bad when he did make that application, and I know of no authority or principle for holding that it does so.

Under our old law, and the old law still exists, with, as I think, an unimportant change, the process of cessio existed solely for the personal protection of the debtor, and proceeded upon this intelligible view, that where an honest man was prepared to hand over all his estate, and did actually hand over his whole estate, to his creditors, his person ought to be protected against incarceration, and if he was in prison that he ought to be liberated.

But the decree of cessio gave him no discharge against his creditors. It did not discharge his debts, and his creditors were in just the same position as if no decree of cessio had been applied for or granted. They had all the rights they ever had against all his estate, whether it had existed before his application or had been acquired afterwards.

Now, by a change in the law introduced by a recent statute standing upon a very intelligible and convenient consideration, a debtor who has given up his whole estate for the benefit of his creditors may apply to the Sheriff for his discharge, and very large discretion is given to the Sheriff in considering whether he shall grant it or refuse it or delay it or allow it in modified terms. If it appears that the debtor has given up his whole estate, and that it has been realised and distributed among his creditors, by granting him his discharge in the cessio process in small cases the debtor obtains a discharge equivalent to but without the expense of a discharge in a proper sequestration. That is the only change that has been made in the law of cessio, and it does not seem to me to be pertinent to the question that has been argued before us.

If the pursuer in this action before us is in a position to present an application to the Sheriff, and to say that according to the true meaning of the change which has been wrought by the Statute of 1881 in the process of cessio he is entitled to get his discharge, he may do so, and if he is able to persuade the Sheriff to give him his discharge, then these persons who were his creditors before he applied for cessio will not be able to do diligence against any estate he may afterwards acquire. He is not in a position to make that application, and he argues that it is not necessary for him to make it, because he says that the change in the action of cessio introduced by the Act of 1881 was for a different purpose than merely granting a discharge. He says that the law as it has existed since the Act of 1881 protects property which he may acquire after the date of the decree granting cessio from the diligence of his creditors, no matter of what nature that property may be. To say that by this change in the law creditors before the granting of cessio are debarred using diligence against estate acquired after that time is not in my view the true meaning of the Act.

My view, therefore, in accordance with what I have said, is that we must negative the proposition, the affirmative of which the pursuer asks us to pronounce. I know of no authority nor principle upon which the affirmative of the proposition could stand.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD M'LAREN—The question argued to us really comes to this, whether a decree of *cessio bonorum* when pronounced by the Sheriff operates as a perpetual restraint upon diligence at the instance of prior creditors, because if creditors are to be restrained in this way during the subsistence of the process of cessio, and until the debtor is discharged, it is evident that the right to use diligence for debts preceding the *cessio bonorum* can never be revived. The proposition in fact comes to this, that the pronouncing of the decree of cessio, and the surrender by the debtor of his whole means and estate, *eo ipso* discharges the debts which the debtor had incurred up to that time, and puts it out of the power of the creditors to recover the un-

paid part of their claims out of his future acquisitions.

It was conceded that no rule of law preventing creditors from using diligence existed prior to the passing of the Debtors Act of 1881.

A process of *cessio bonorum* was merely a mode of obtaining protection for the person of the debtor from imprisonment for debt. The only legitimate reason for putting the debtor in prison was to compel him to make over his estate to his creditors, and therefore if the debtor were willing to make a surrender, and if the creditors were satisfied that he had handed over his whole estate, and came forward and said so, it was thought right that the power of the creditors to imprison their debtor should cease. It was never intended that the action of the debtor in giving up his present estate should debar his creditors from using diligence for the unpaid part of their claims against future acquisitions.

If I am right in my view of the effect of the process of cessio, it is clear that the Acts of 1880 and 1881 made no change in the process, except that it gave creditors a title to petition. The effect of the decree of cessio remained unaltered, because by the 5th and 6th clauses of the Bankruptcy and Cessio Act 1881 it is provided that a debtor may within six months after the date of the decree apply to the Sheriff to be discharged of all debts contracted by him before the date of the decree. But if the effect of the decree of cessio were to put an end to the right of a prior creditor to use diligence against estate of the debtor subsequently acquired, this discharge could, to say the least, be a very useless proceeding.

It was said that the proper person to do diligence against any estate of the debtor for debts incurred before the decree was the trustee. I doubt very much if the trustee in a cessio has any right to attach estate which has come into the hands of the debtor after the decree of cessio. I think his duty is solely to ingather and distribute the estate of the debtor, which he takes under the disposition *omnium bonorum*.

LORD TRAYNER concurred.

LORD JUSTICE-CLERK—I entirely agree. I do not think that I or either of my brethren who were sitting in this Division of the Court when the case was first heard had any doubt about the decision which ought to be pronounced, but sitting as we then were, a Court of three Judges, and having in view the opinions expressed in former cases by the late Lord President and Lord Shand, we did not think it right to decide the present question without the assistance of your Lordships.

LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

"The Lords having, along with three Judges of the First Division of the Court, heard counsel for the parties on the appeal, do, in terms of the opinions of the Judges present, recal the interlocutor of the Sheriff appealed against, assoilzie the defender from the conclusions of the petition, and decern: Find the defender entitled to expenses," &c.

Counsel for the Appellant — Graham Stewart—Hunter. Agent — Charles Garrow, Solicitor.

Counsel for the Respondent — Craigie. Agents—Miller & Murray, S.S.C.

Wednesday, July 4.

SECOND DIVISION.

[Sheriff of the Lothians.

HALLPENNY *v.* HOWDEN.

Property—Proof—Judicial Factor—Factor Sued in Sheriff Court—Competency.

A housekeeper alleged that her late mistress had given her certain articles of furniture, and in support of the claim she handed to the judicial factor who had been appointed by the Court of Session on the deceased's estate, certain parchment labels and a list of furniture. The claim having been denied, the parties agreed to abide by the opinion of counsel, who decided in favour of the judicial factor. The housekeeper brought an action in the Court of Session for delivery of the documents against the judicial factor, who had retained them as belonging to the estate.

Held that the pursuer had failed to prove any right of property in the documents.

Opinion (*per* Lord Young) that it was incompetent to sue in the Sheriff Court the judicial factor, who was an officer of the Court of Session, upon grounds impugning his management of the factorial estate.

The late Miss Graham Stirling died at 27 Queen Street, Edinburgh, on 22nd January 1889, aged eighty-four. Mr James Howden, C.A., Edinburgh, was appointed by the Court of Session judicial factor on her estate. After her death Miss Mary Hallpenny, residing at No. 18 Broughton Place, Edinburgh, claimed that certain articles of furniture in the deceased's house belonged to her, as they had been given to her when she was housekeeper and companion to Miss Graham Stirling.

In support of her claim she produced—(1) a written list of furniture, headed—"This is a list of personal property belonging to me, Sarah Graham or Graham Stirling in 27 Queen Street, which I now commence, 17th May 1878. For Mary Hallpenny or Hall." Then followed the list of furniture. The paper was not signed. She also produced sixteen ordinary parchment luggage labels. Each of these bore to be a gift of a parti-