possible answer on the merits. In the absence of the other *pro indiviso* proprietors they must be held, if not concurring in what the pursuer is doing, at least as not objecting to it; and as neither they nor the tenants offer any opposition to what the pursuer is asking, the other *pro indiviso* proprietor, who is also the debtor in the bond, cannot be heard to state the objection which she here takes to the pursuer's title.

Lord Shand—The principal defender in this case is proprietor *pro indiviso* of two-fifths of the estate of Bruntshiels, which is let in grass parks to tenants whose rents form the subject of the present litigation. Her right being one *pro indiviso* is a right over the whole estate, but it only extends to so much of the rents as corresponds to her two-fifths share of the property. She has conveyed away her rights in the property to the pursuer. She granted a bond and disposition in security for money lent to her by the pursuer, conveying to him, as the condition of the loan, her two-fifths share of the estate, and assigning the rents effeiring to that share.

Now, if the objection which she has stated here had been taken by the tenants on the estate I do not see reason to doubt that it would have been well founded. They contracted for payment of their rents as a whole, and they would, I think, be able to maintain successfully that they were not bound to apportion the rents and pay them among the different *pro indiviso* proprietors and their assignees according to their several rights. In like manner, the other *pro indiviso* proprietors might succeed in maintaining that one of their number was not entitled to have the rents split up—directly drawing his or her share from the tenants—but that the rents should be paid over in one *cumulo* sum to the person having the authority of all the proprietors to grant a discharge. The Lord Ordinary has so held, and I see no reason to doubt that he is right.

A good deal has been said in the course of the argument as to the views expressed by the Judges in the cases of *Cargills* v. *Muir*, 15 S. 408, and *Lawson* v. *Leith and Newcastle Steam Packet Company*, 13 D. 175, with reference to what are called joint rights as contrasted with the rights of tenants-in-common, as they are called in the law of England.

I do not think that it is necessary to give any opinion on the matters discussed. I rather take it to be clear that neither a joint owner nor a tenant in common could in his own name sue for the whole rent nor for his own share of the rent. An instance in our law of joint proprietorship, in the sense of the joint ownership in the law of England is that of trustees holding a conveyance in ordinary terms for trust purposes. In joint ownership the property is vested in A and B and the survivor. On the death of one of them his right goes necessarily to the survivor. A tenancy-in-common, on the other hand (as it is called in England), seems to arise where each of the *pro indiviso* proprietors has a certain share or right in the property, which he may himself dispose of as he thinks fit by a deed granted by himself. It appears to me that the right here held by the creditor in the bond and also by each of the *pro indiviso* proprietors is a right of this latter kind, because each of the proprietors may dispose of his own share of the estate, and upon his death there is no vesting of his share in the surviving *pro indiviso* proprietors. The law seems to be the same in England as in this country, that in actions on the contract of lease—as distinguished from actions to protect the property from injury or to vindicate claims of damage because of its wrongful destruction—one *pro indiviso* proprietor has not a title to sue—Woodfall on Landlord and Tenant, p. 12; *Descharme* v. *Horsgood*, 10 Bing. 526. I assume the Lord Ordinary is right in his general view of the case, but I think the fact that the defender Mrs Black, in the position in which she stands, has no case on the merits. She conveyed away to the pursuer all her rights. The specialties of this case are that neither the tenants nor the other *pro indiviso* proprietors object to the action, and I think Mrs Black has averred no right or legitimate interest to do so. Had she raised an action for the rents, or rather her share of them, she would have been successful unless the tenants stated a defence, which they have not done here, and her creditor is not to be put in a worse position than she herself was in.

On the whole matter, I am of opinion that Mrs Black has no legitimate interest or right to maintain her defence, which is simply an attempt to prevent effect being given to her own assignation without any legal ground for so doing, and that we ought to recal the Lord Ordinary's interlocutor and grant decree to the pursuer in terms of the conclusions of the summons.

Lord Adam—I concur; but I reserve my opinion as to the main question here till the point is raised in a question with a tenant or a joint proprietor.

The Court recalled the Lord Ordinary's interlocutor, repelled the defences, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer — Gloag — Martin. Agents—Henderson & Clark, W.S.

Counsel for the Compearing Defenders (Mr and Mrs Black)—Sir C. Pearson—Shaw. Agent—John Rhind, S.S.C.

Friday, January 18.

FIRST DIVISION.

[Sheriff of Forfarshire.

HENDERSON *v.* ROBB AND OTHERS.

Bankruptcy—Cessio—*Creditor*—*Title to Sue.*

When decree of *cessio* has been granted, a creditor can only sue an alleged debtor of the estate by obtaining the use of the trustee's name (which he can compel by finding security for expenses), or an assignation to the claim.

On the 25th of March 1886 decree of *cessio* was granted in the Sheriff Court at Forfar against Joseph Robb, farmer, Glenquiech, and William Carnegie was appointed trustee on his estate. William Henderson, crofter, lodged in the process of *cessio* an affidavit and claim for £100.

William Henderson thereafter raised an action against David Robb and David Howe, farmers,

and Archibald Smith, solicitor, Kirriemuir, whom he averred to be debtors to the bankrupt estate, for payment of the sum of £100 either to himself or to William Carnegie, trustee on the estate of Joseph Robb.

The pursuer's averments were to the following effect—He lent Joseph Robb two sums of £50 in 1883, for which he held an acknowledgment by Joseph Robb written across a bill stamp. At the date of the decree of *cessio* Robb was tenant of the home farm of Glenquiech for the period of seven crops from 22nd November 1879 under a lease entered into between John A. S. Maclagan, the proprietor, and himself. On the 1st of April 1886 the defenders and William M'Kenzie, farmer, who had since become bankrupt, at their own hand, and without consulting the trustee in the *cessio*, sold and disposed of the whole plenishing on the farm of Glenquiech, the value of which amounted, according to the bankrupt's state of affairs, to £187. The proceeds of the sale were received by the defender Smith. The defenders never accounted to the trustee or to any of the creditors of Joseph Robb for their intromissions in connection with the said sale. They had since settled with all the other creditors of Joseph Robb except the pursuer, who had repeatedly applied for payment without success. The pursuer applied to the trustee to take steps against the defenders, but he had refused to do so. The defenders, in justification of their proceedings, founded on a pretended trust-disposition and assignation dated April 1884, bearing to be executed by Joseph Robb, John A. S. Maclagan, and the defenders Robb and Howe and William M'Kenzie, whereby Joseph Robb pretended to assign, convey, and make over to and in favour of the defenders Robb and Howe, and the said William M'Kenzie, his interest in the lease from and after Candlemas 1884, and also the crop, stocking, and other effects belonging to him at the said farm, *inter alia*, for the management and cultivation of the farm, the sale and realisation of the produce, payment of an acceptance of Joseph's Robb's to the said William M'Kenzie and the defenders Robb and Howe for £170, dated 29th June 1883, and payable three months after date, which had not been met, and was then in the hands of the defender Smith as onerous indorsee and holder thereof, and for payment of the residue to Joseph Robb. The said pretended trust-disposition and assignation was never published or intimated to the creditors of Joseph Robb. The defenders Robb and Howe and William M'Kenzie did not control or manage the farm, and never entered into possession thereof, or the crop, stocking, and effects thereon. On the contrary, Joseph Robb remained on the farm, and continued in the full and undisturbed possession and management thereof.

The pursuer pleaded—"(1) The defenders having without title, warrant, or authority intromitted with and sold the crop and stocking which belonged to the said Joseph Robb, and had become vested in the said William Carnegie as trustee for Robb's creditors, are liable to such creditors for the amount of their claims. (6) In the circumstances condescended on, and the pursuer being the only creditor of the said Joseph Robb whose claim existed at the date of the decree of *cessio*, and is still undischarged, he is entitled to a direct decree against the defenders."

The defenders pleaded—"(1) The pursuer has no title to sue. (2) The pursuer's averments are irrelevant and insufficient to support an action against the defenders."

The Sheriff-Substitute (ROBERTSON) on 14th June 1888 pronounced this interlocutor—"Finds that the pursuer has not stated a relevant case on which decree could be granted: Therefore to this extent sustains the preliminary pleas, and dismisses the action, &c.

"*Note.*—This action is raised to recover payment from the defenders, conjunctly and severally, of a debt due by Joseph Robb to the pursuer. There is no sort of contract or guarantee between the pursuer and the defenders. The action is raised on the narrative that the defenders have intromitted with the estate of Joseph Robb, he being a bankrupt, and have thus incurred liability.

"The first difficulty I have is, that as a trustee has been appointed on Robb's estate, he is the person entitled to the money sued for assuming it to be due, for behoof of Robb's creditors. It is true I am asked alternatively to give the money to him, but this is surely a peculiar request, seeing that the trustee is no party to the action, and has declined to move in the matter. If a trustee on a cessioned estate declines to take up and enforce a doubtful claim, probably any creditor may do so if he likes at his own risk, and I therefore am not prepared to say that the action is incompetent, or that the pursuer has no title to sue.

"But after reading the record and seeing the productions, I do not think a relevant case is made out or that a proof can be allowed.

"It turns out that what the defenders have done has only been done by virtue of certain deeds granted by Robb long before his bankruptcy, by which he assigned and made over his whole estate to the defenders, and until these deeds are reduced their positon is impregnable.

"The pursuer's case comes to this, that other creditors have got before him, and have done first what the pursuer might have done himself had he taken time by the forelock. His debt was incurred in 1883, and between that date and 1886, when a petition for *cessio* against Robb was presented, the pursuer took no steps apparently to secure himself or to recover payment of his debt.

"After seeing the deeds in virtue of which the defenders have acted, the pursuer has had to rewrite his whole case at the adjustment of the record, a proceeding which probably I ought not to have permitted, and to which the defenders strongly objected. But even after reading his new case I cannot go further in the action until the trust-deed and assignation produced by the defenders are reduced."

The pursuer appealed, and argued—On the question of relevancy—The Sheriff was wrong in thinking it necessary that the assignation should be reduced before the pursuer's claim could be considered—40 and 41 Vict. cap. 50, sec. 11; *Nivison* v. *Howat*, November 22, 1883, 11 R. 182. Further, reduction of the deeds was not necessary for the success of the pursuer in the action, as the assignation could confer no right without being followed by possession. On the

question of title—The trustee had refused to move in the matter, and the pursuer was the only unpaid creditor. He was therefore the only person interested, and was entitled to bring his action directly against the defenders without obtaining the use of the trustee's name, or an assignation to the claim. The objection to his suing directly was merely technical—*Teuton* v. *Seaton*, May 27, 1885, 12 R. 971. There was an alternative conclusion for payment to the trustee, and it could not be doubted that he had a right to sue for payment of the value of the property carried off by the defenders. No doubt in *Rae* v. *Meek*, July 19, 1888, 15 R. 1033, it had been laid down by Lord Shand that a beneficiary could not directly sue a debtor to the trust-estate, but that rule need not apply to a case of bankruptcy. The pursuer's interest being undoubted, it was almost a necessary consequence that he had a title, for where there was an interest there was almost always a title. This was not a case of a third party being simply indebted to the bankrupt; the ground of action was intromission. In the case of heirs of entail, if one raised a question and had it determined, the decision would bind the others. And the same result followed when one member of the public came forward to vindicate a public right. So this question, if decided, would be *res judicata* as regarded the rest of the creditors. On the question of caution—If the pursuer had used the trustee's name, of course he would have had to give security that he would keep him *indemnis*. But the position of the pursuer here was quite different from the position of the pursuer in the case of *Teuton*. There was here no averment that he was *vergens ad inopiam*, or unable to bear the expenses of the litigation. If the pursuer had obtained an assignation to the claim there must have been some averment of *inopia* on his part to support the demand for caution.

The respondents argued—On the question of relevancy—There was no averment that Joseph Robb paid the rent of the farm after the assignation had been granted. That was an important omission from the pursuer's averment of possession. As to the defender Smith the assignation was not in his favour, and throughout he had merely been acting as an agent for others. On the question of title—The pursuer was suing an alleged debtor of his debtor, which he clearly had no title to do. His proper course was either to have obtained the use of the trustee's name or an assignation to the claim. A debtor of a bankrupt was entitled to demand that he should settle any question that might arise with the trustee. In *Teuton's* case the pursuer was merely obliged to find caution—*Sprot* v. *Paul*, July 5, 1828, 6 S. 1083; *Spence* v. *Gibson*, December 13, 1832, 11 S. 212. A decision in this case would not bind other creditors, and so the defenders might be harrassed with litigation. Neither the trustee nor the other creditors having sanctioned the prosecution of this claim, it was incompetent for a single creditor to prosecute it—*Gray* v. *Fraser*, February 6, 1850, 12 D. 684. The trustee had not admitted the pursuer's claim, and it might turn out he was not a creditor at all.

At advising—

Lord President—The pursuer in this case is an alleged creditor of Joseph Robb, tenant of the farm of Glenquiech, for the sum of £100 advanced to Robb in the year 1883. If Robb had remained solvent the action would have been laid against him, but unfortunately he became insolvent, and a process of *cessio* was instituted against him in March 1886, and on the 25th of that month decree of *cessio* was pronounced, and William Carnegie was appointed trustee on his estate.

This action is directed neither against the pursuer's original debtor in the sum of £100 nor against the trustee in the *cessio*, but against parties who are said to have intromitted with the crop and stocking of the farm, and to be liable to account therefor. Now, of course the only party to bring them to account for the debt is the trustee in the *cessio*. The original debtor Joseph Robb is divested, and the decree of *cessio* has had the effect of vesting the estate in Carnegie—not indeed to the full effect which takes place under the sequestration statutes, but still it gives to the trustee an active title to recover the debts due to the insolvent estate. The pursuer, however, says that the trustee will not move, and that therefore he is entitled to take proceedings against the defenders himself, especially as he alleges that he is the only unpaid creditor of Joseph Robb.

I am of opinion that the pursuer has no title to sue. He is doing what has over and over again been found incompetent—that is, trying to sue his debtor's debtor. If the original debtor had been solvent the defenders would have been debtors to him, and now that he is insolvent they are debtors to the trustee, and the pursuer can have no direct action against anyone but the trustee in the *cessio*. The remedy of the pursuer is to claim against the estate, which I suppose he has done, and then, if the trustee declines to sue the alleged debtor, to ask him to put him in a position to do so by granting him the use of his name, or by granting him an assignation to the claim. That of course the trustee will not be bound to do except upon the footing of being kept free from the costs of the litigation, and upon that footing the trustee, if unwilling, may be compelled to grant the use of his name.

Nothing of that kind, however, has been done here. The pursuer sues in his own name, and he has not taken any assignation to the claim. He is therefore simply suing his debtor's debtor.

Lord Mure—I am of the same opinion, and from the nature of the case I regret that I am obliged to come to that conclusion. The pursuer's debt is not disputed on record, and he has an interest to endeavour to recover that debt, but unfortunately in respect of the *cessio* he has no title to sue. The trustee is the party to recover whatever is due to the bankrupt estate, and your Lordship has alluded to the circumstances in which Henderson might prosecute his claim. His course was to call on the trustee to take proceedings, and if he refuse, to ask him for the use of his name, or for an assignation to the claim, on condition of being kept free of the costs of the litigation. That course not having been taken, I am of opinion he has no title to sue.

Lord Shand—I do not think it was suggested in the argument that we have any decision bearing directly on the question here raised, which, as a question of title to sue, is, I think, an import-

ant one. I agree with your Lordship in thinking that there are clear general principles which exclude the pursuer's action on the ground of no title. As Lord Mure has pointed out, one would desire if possible to sustain the pursuer's title, because, in the first place, I do not think the argument against the relevancy of the action has any foundation. The action would be relevant if it had been brought by the trustee. And, in the second place, considerable expense has been incurred in reaching this point of the litigation. It is further said that the pursuer is the only unpaid creditor, and if so, he had the material interest to have the question tried if it be assumed that his averments are true. But though the case in this view looks like one of hardship, I am afraid that if the Court were to yield to that consideration this might hereafter be cited as one of those hard cases which make bad law. We should be sanctioning a principle which might lead to confusion in the administration of insolvent and bankrupt estates, and to the pursuit of claims by creditors who had no real title seeking to have their actions maintained on specialties. It is, I think, clearly safer and better to lay down a rule or to adhere to a rule which rests on general principles.

Now, the material fact of the case is that Robb's estate was transferred under a decree of *cessio* to Carnegie, the trustee in the *cessio*, and that he is consequently now the person in right of the administration of the estate.

If Robb has any debts due to him, Carnegie is vested with the right and duty of recovering these debts. The other creditors of Robb have no right to do so, because Carnegie is vested with the sole title to the estate. The petitioner has raised his summons with alternative conclusions that the money shall be paid to himself, or otherwise to Robb's trustee. But even as regards the second alternative the trustee is the only person with a title to maintain the demand. It would be very embarrassing if separate creditors were entitled to raise the question. An alleged debtor of a bankrupt would be liable to an action at the instance of any creditor of his creditor, which cannot be allowed. The alleged debtor, moreover, is not the proper person to discuss the question whether the pursuer is really a creditor of the bankrupt. That is a question with the trustee. Further, a debtor is entitled to say that he must have the trustee to deal with as being a person with means, and that he shall not have to litigate with a third party.

There is a well-settled rule as to how parties should proceed in such circumstances, which is very well illustrated in the two cases of *Sprot* v. *Paul*, 6 S. 1083, and *Spence* v. *Gibson*, 11 S. 212. In both cases the Court held that the trustee was bound to give his name, if required to do so, on security being found for his expenses, or to give an assignation to the claim, which of course, where the claim is not purchased, may be made subject to the condition that any sums found due should ultimately come into the trust-estate.

That being so, I think there is nothing more to be said, and I agree that this creditor cannot be allowed to move on his own account.

The case is analogous to that of a beneficiary on a trust-estate—the trustees are the parties to sue for debts due to the trust-estate. The beneficiary has no direct title. If the trustee refuses to sue, his title in certain circumstances may be acquired by the beneficiary either by the use of his name or an assignation to his right and title to maintain the action. The beneficiary is not entitled to sue directly for payment of a debt due not to himself but to the trust-estate. This view is borne out by the opinion of your Lordship the Lord President in the case of *Heaton*, 10 R. 1110, and I have only repeated what I said on this latter point in the case of *Rae* v. *Meek*, 15 R. 1050–1051. I accordingly agree in thinking that we must dismiss the action.

Lord Adam—I concur in thinking that it is very clear on principle and is perfectly settled that a creditor cannot directly sue his debtor's debtor. Lord Shand has mentioned some of the reasons why that is the law. It is equally clear that if such a person wishes to recover sums of money due to his debtor he must proceed by arrestment and forthcoming. Much less can a direct action be allowed where the pursuer only alleges himself to be a creditor, and his claim has never been sustained or adjudicated upon as in this case. It is simply a case of an alleged creditor of A suing B, an alleged debtor of A. I must say I think that such an action is contrary to all principle. If that is so, how does the fact of the debtor's estate being under *cessio* give that creditor a right to sue a debtor which he had not before? I think it would require something very clear to bring about that result; whether it is in a sequestration or in a *cessio* the bankrupt estate is vested in the trustee, and he is the only person who has a title to sue a debtor to the estate.

If the trustee refuses to take action, there are quite well-known means by which the creditor should proceed. He can demand the use of the trustee's name, and if the trustee refuses to give it, he can be compelled to do so on condition of being kept *indemnis* as regards the expenses by the creditor who desires to sue the action. How far that entered into the consideration of the course pursued by the defender here I do not know. The creditor's other course is to get an assignation.

Now, where you have two such well recognised courses, which the pursuer might have known, although I regret the expense which has been incurred, I entirely concur that to sustain the pursuer's title to sue would be *pessimi exempli*.

The Court recalled the interlocutor appealed from, sustained the first plea-in-law stated for the defenders, and assoilzied them from the conclusions of the action.

Counsel for Pursuer—Sir C. Pearson—Law. Agents—Fodd, Simpson & Marwick, W.S.

Counsel for Defenders—Sol.-Gen. Darling, Q.C. —Salvesen. Agents—Irons, Roberts, & Co., S.S.C.