SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

WIGHT—*Appellant.*
RITCHIE (W. S.)—*Respondent.*

June 13, 15, 1814.

CESSIO BONORUM.

IN a process for a *cessio bonorum*, mere irregularity in the mode of keeping books is not of itself a ground for refusing the remedy. But a full disclosure must be made, and no fraud must appear; and therefore, where a person applied for a *cessio*, though a period of between five and six years had elapsed since his first incarceration, and though he had been, by his own statement, referring to certificates produced, in actual confinement for 11 months—(a few weeks, as stated by the opposing creditor)—the remedy was refused by the House of Lords, (affirming a judgment of the Court of Session,) on the grounds stated by *Lord Redesdale*, that a sufficient disclosure had not been made to enable the creditors, upon investigation, to say whether there was fraud or not; that certain books, and papers from which entries had been made, had been withheld; and that there had been a concealment at the time of an arrangement with the creditors, and a misapplication of funds after that arrangement.

The *Lord Chancellor* doubted whether it would not be better if there had been no appeal in cases of *cessio;* and *Lord Redesdale* expressed an opinion that it would have been better if in such cases the decisions below had been final.

The *onus* of proving fraud, in cases of *cessio*, rests on the person resisting the remedy (*per Lord Redesdale.*)

THIS was an appeal from a judgment of the Court of Session, refusing the benefit of the *cessio bonorum*, stated to be the second appeal of the kind that had ever come before the House of Lords.

June 13, 15, 1814.

CESSIO BONORUM.

It appeared that *Wight*, the Appellant, had been a starch-manufacturer at Ormiston, a farmer, and a dealer in corn and spirits. In 1807 he found it necessary to call a meeting of his creditors, and on the 17th and 22d April of that year meetings took place. Wight exhibited a state of his funds and debts, and proposed a composition of eight shillings in the pound, which was accepted by the creditors, with some exceptions. Ritchie, the Respondent, along with a relation of Wight, became surety for the payment of this composition,—the Appellant becoming bound to make over to the sureties the funds out of which the payments were to be made. In the mean time he himself was suffered to continue in the management and collection of these funds; but when the first instalment of the composition became due, no part of the funds were forthcoming, and the Respondent was compelled by the creditors to pay the whole. The Respondent had also become surety for the Appellant for a debt due to Price and Moss, of London, and was under the necessity of paying it, taking an assignation of their diligence, upon which he proceeded against Wight, and put him in prison. Some time after, with the concurrence of the other surety, he applied for and obtained a sequestration, and the son of that surety, an accountant, was appointed a trustee, who certified that the books and papers of the Appellant had been delivered to him, and that as far as he had investigated them they appeared to have been regularly kept.

Wight a starch-manufacturer, &c.

Makes an arrangement with his creditors. Respondent surety for payment of the composition.

Wight allowed to collect the funds in his own name —and alleged misapplication.

July, 1808, Wight imprisoned at Ritchie's instance.

Sequestration of Wight's property, and certificate of trustee, that the books appeared regular.

Nov. 1808, Wight applies for a *cessio*.

The Appellant then raised a process of *cessio bonorum*, stating in the summons, "that his inability

June 13, 15, 1814.

CESSIO BONORUM.

"to pay his debts was not occasioned by any fraud "in him, but was owing to losses and misfortunes "in business." The creditors to whom the Respondent was bound had no interest in opposing it; but objections were made by the excise collector at Edinburgh, in respect of arrears of starch duties. The Appellant however settled with the excise, and on 24th December, 1808, the Court (Second Division) found him entitled to the benefit of the *cessio*, and decerned in terms of the libel.

Appellant decreed entitled to the *cessio* Dec. 24, 1808, the day on which the Court rose for the Christmas recess.

On the 2d or 3d of February, 1809, Ritchie presented a reclaiming petition, which was objected to as incompetent, on the ground that the interlocutor had become final; but on the 7th February, 1809, the Court ordered the petition to be answered.

2d or 3d Feb. 1809, reclaiming petition—objected to as incompetent, but ordered to be answered.

The grounds on which the Respondent objected were, that the books exhibited by the Appellant contained false entries, and forced and fictitious balances; and cash-books were withheld by him which were necessary to explain his transactions, and to supply numberless omissions in the books exhibited. He was guilty of committing gross frauds upon the revenue. When he stopped payments in April, 1807, he prevailed upon the Respondent to become surety for the payment of his composition, by the false assurance that his debts amounted only to a certain sum, while he concealed from the Respondent's knowledge, that other debts, to a considerable amount, were due by him. He fraudulently betrayed the confidence reposed in him, of collecting those funds which were intended to be applied in payment of the composition-bills, by embezzling

Grounds of objection.

June 13, 15, 1814.

CESSIO BONORUM.

them to his own use, and leaving the Respondent to retire those bills out of his own funds.

After reference to Mr. Dundas, an accountant, who made three reports unfavourable to the Appellant, and subsequently to Mr. John Stewart, an accountant, who made two reports favourable to the Appellant, the Court having advised the whole proceedings, by the narrowest majority "altered the "interlocutor reclaimed against, and found that the "Pursuer (Appellant) was not entitled to the benefit "of the process of *cessio bonorum, in hoc statu,* "and decerned accordingly." From this judgment Wight appealed.

Nov. 13, 1813, *cessio* refused.

It was contended for the Appellant,—1st, That the interlocutor of 24th Dec. 1808, was final, the six *sederunt* days having expired before the reclaiming petition was presented; and that all the subsequent proceedings ought to be reversed. 2d, That the alleged fraud against the excise was proved to be unfounded; and, though it had been proved, it would not be such a fraud as would preclude the relief; for in Maclean's case, 1803, the only one of this kind ever before appealed from, the House of Lords gave the benefit of the *cessio,* though books were fabricated, because it was not a fraud leading to or increasing the insolvency. 3d, That all the books had been produced, except certain loose papers and memorandums on which the Appellant when from home was accustomed to note down any occurrences in business, to be afterwards entered in his books, which papers were never intended to be permanently preserved. 4th, That though the

books had been inaccurately kept, there was nothing that evinced a dishonest intention. 5th, That the objections as to various sums of money and quantities of goods being unaccounted for in the books previous to the arrangement with the creditors had been sufficiently obviated; that the statement made to his creditors at the time of the composition was correct; and that the funds collected during his management after the arrangement had been properly disposed of for the expenses of his family, the payment of preferable debts, &c. 6th, That a creditor was not entitled to detain the debtor in prison till his complete and perfect innocence should appear, but that the extent of punishment would be considered, and the relief granted, though all the objections should not be answered, as had been decided in *Thom's* case. 7th, That the *onus* of proving fraud rested upon the objecting creditor; and that the innocence of the debtor applying for the *cessio* was to be presumed till the contrary was proved; and here the contrary had not been proved.

Thom's case, Feb. 11, 1809.

For the Respondent it was contended,—1st, That the interlocutor of the 24th Dec. 1808, had been got without proper notice to the objecting creditors, and was a surprise upon the Respondent; and was not therefore within the principle of the act of *sederunt*. 2d, That the debtor must come into Court on the terms of the summons, and make out a clear *primâ facie* case of honesty. 3d, That a person not engaged in trade becoming insolvent might appear to be innocent, though he had kept no books; but in the case of a trader, books were necessary; and the *cessio* had been refused in a case

Ersk. b. 4. t. 3. s. 26.

Fraser, 4 Fac. Coll. 16.

June 13, 15, 1814. CESSIO BONORUM.

where a trader had kept no books; and books so inaccurate that it was impossible to discover from them whether there was fraud or not, were worse than no books at all. The debtor must show that his transactions were fair; for it could not be enough for him to say that he was innocent. (*Seal*, July, 1812, and *Ritchie v. his Creditors* there cited.) 3d, The debtor had, by an unfair statement of his circumstances at the time of the arrangement with his creditors, induced the Respondent to become one of his sureties for the composition. 4th, He had misapplied the funds which ought to have gone in payment of that composition. 5th, He had kept back cash-books which ought to have been produced, and the presumption therefore was, that something was wrong. 6th, The refusal of the *cessio* by the Court below in Maclean's case was absolute; here it was only refused *in hoc statu*.

Seal, July, 1812.

Replied. A refusal *in hoc statu* was a refusal in this action, which if affirmed would be final. In Seal's case the debt was for aliment of a bastard child, and the delict was the ground of objection. In Fraser's case no books at all were produced. The judgment in Maclean's case was a decision in the Appellant's favour. The trustee under his sequestration was satisfied.

Aug 4, 1803.

Horner for Appellant; *Adam, senior* and *junior*, for Respondent.

June 5, 1814. Observations in Judgment.

Lord Eldon (Chancellor.) A case of this nature seldom came before their Lordships. By the bankrupt laws here, the decision of the Chancellor sitting

in bankruptcy was final; and this policy had been sanctioned by the Insolvent Debtors' Act, by which the sentence of the first Judge was made final in this respect, whether the subjects in England should have the benefit of the *cessio bonorum* or not. It might be permitted to one who had had so much experience in these matters as himself to express a doubt whether it would not be better to say, that the opinion of the majority of the creditors should decide the question at once, than to say, that it should be examined in Court after Court; for this was holding out to the just and honest creditor an alternative, whether he should decline to quarrel with the first decision, or ruin himself by farther process. But where the appeal was given, they ought not to interpose any obstacle in the way, or to do any thing except decide whether, under the circumstances, the debtor was entitled to the remedy.

June 15, 1814. CESSIO BONORUM.

Doubt whether it would not have been better that no appeal had been competent in cases of *cessio*.

The case of *Maclean* had been stated at the bar, and it was to be observed, that *there* the judgment of the Court below had been reversed; and it was their Lordships' habit on such occasions—he wished it always had been their habit when they dissented from the Courts below—to state the reasons of their judgment at length. It was always useful to state the reasons which influenced the mind of the Judge in giving judgment. If pronounced by a Judge from whose decision there lay an appeal, Counsel, and the advisers of parties, had an opportunity of weighing well the grounds of the decision: and when the matter came to the Court of last resort, where the principles were settled which must regu-

Aug. 4, 1803, Maclean's case.

Utility of stating the reasons which influenced the mind of the Judge in giving judgment.

June 15, 1814.

CESSIO BONORUM.

late the decisions of inferior tribunals, it was their duty to consider all the principles to which facts in all their varieties might afterwards be applied.

He recollected, that when the decision in the case of Maclean was pronounced, the Lord who sat on the woolsack had a degree of assistance which it seldom fell to the lot of a person in that situation to have. *Lord Thurlow* attended, so did *Lord Roslyn*; and, even when they gave no reasons in judgment, a great deal of private conference took place; and he might safely state, that he was perfectly sure that the grounds of the judgment in that case had been well considered.

The grounds of judgment in Maclean's case well considered.

He saw no reason, from any thing he had heard to-day, to depart from the principles recognized in Maclean's case. But it was often difficult to say how far the particular case came within the scope of certain principles, when applying these principles to the state of the facts. He could only say this, that he had read these papers with all the diligence in his power to enable him to understand the case, and, attending to the principles which governed Maclean's case, he did not find here any thing which enabled him to say that the judgment of the small majority of the Court of Session was wrong.

Judgment of the Court of Session right.

He found nothing—ably as the case had been argued by the gentleman last at the bar (*Horner*)—which appeared to him a sufficient reason to reverse or alter the judgment. He did not think that the books afforded grounds sufficiently satisfactory to authorize him to do so. This case however depended so much on the facts,—as applied to the principles, about which there would be no dispute,—

June 15, 1814.

CESSIO BONORUM.

that it was necessary to have these facts clearly understood; and therefore he wished that the noble Lord (*Redesdale*) who now sat on the opposite bench—who was particularly conversant with matters of this kind, and the author of an act which rendered the law on this subject nearly, though not entirely, the same here as that of the *cessio bonorum* in Scotland—to give his opinion. He wished to know from him, Whether he thought that the character of the transactions and the conduct of the party were such as to entitle him to this remedy? If any difference of opinion prevailed in this respect, then it would be necessary farther to examine the facts carefully and anxiously. But unless that were so, he could not say that this decision militated against the principles recognized in the case of Maclean.

This decision consistent with the principles recognized in Maclean's case.

Lord Redesdale. As far as he could understand the case of Maclean from what was stated at the bar and in these papers, it did not in any degree press upon his mind in the present case. The principle he understood to be this,—that the irregularity of the books was not of itself a ground for refusing the benefit of the *cessio bonorum*, provided a full disclosure were made; and that if nothing fraudulent appeared on that disclosure, the party was entitled to his discharge. The question with him then was, Whether a full disclosure had been made? and it appeared to him that it had not been made. It appeared to him that the books had been in a great measure made up after the debtor knew that he was insolvent, from memorandums or loose papers; and that they had been so made up

In cases of *cessio*, the mere irregularity of the books not a ground for refusing the benefit, provided a full disclosure is made, and no fraud appears.

Here a full disclosure not made.

June 15, 1814.

CESSIO BONORUM.

to a great amount. There was nothing in Stuart's report to explain this, as stated in Dūndas's report. As to temper, he thought the character of temper belonged more to Stuart that to Dundas; and that Stuart had exceeded his duty as an accountant. Stuart indeed showed that Dundas's account was erroneous in some particulars, but did not contradict it in the most important part, as demonstrating that the books did not afford a full disclosure.

Books withheld.

The manner in which books were kept back was very objectionable, as he had occasion to know from having had much experience in merchants' accounts. He had learned from merchants themselves, that the cash-book was the only book from which a true account could with any certainty be collected; and that the accounts in the other books might be easily fabricated. If Dundas was correct where he was not contradicted by Stuart, there was in this respect strong grounds to suspect fraud. It appeared too, that in many instances the dates were not merely days and months, but years anterior to the entry in the books. They were then manufactured books. He knew, from conversation with Dutch merchants, and with a Dutch lawyer who was examined before this House on a committee, that, by the law of Holland, in the case of a person with such books, if they were made up after the insolvency, without the production of those papers from which the entries were taken, this of itself would be a ground for refusing the discharge.

Manufactured books. By the law of Holland, if books were made up after the insolvency, the papers from which the entries were made must be produced, otherwise there is ground for refusing the remedy.

In the country where he had presided for some time in bankruptcy, there was a provision in the bankrupt law which was a very good one. It rested

on two acts; one of which declared, that unless the books were regularly kept, the party should not be entitled to his discharge. The other qualified this, by saying, that the books, before the debtor could be entitled to his discharge, must have been kept in the way in which such books were usually kept,—alluding to the books of small shopkeepers. He had had reason to regret that a more precise qualification had not been introduced; for under these words, "*usually kept*," much irregularity had prevailed. But he had examined a great many of such accounts, and generally found, that wherever entries were made subsequent to their dates, it was for the purpose of fraudulent concealment; and therefore, unless he had the papers from which the books were thus made up, he always considered that there was great room to suspect fraud.

June 15, 1814.

CESSIO BONORUM.

In cases of entries made subsequent to their dates, unless the papers from which they were made were produced, there was great room to suspect fraud.

Here there was not a full disclosure. It was only stated generally, that such books or papers had existed. But it was most material that they should have been preserved as to every article which was entered out of the proper date, and after the insolvency.

The matter however did not rest there; for, take it that the books were fully shown to be correct in other respects, they might still be fraudulent; for he did not find it denied that, as stated in Dundas's reports, the numbers of several articles were given without the quantities; and as the articles were lump articles, unless the quantities also were stated, it must be impossible to detect fraud.

Not enough to state the numbers of the articles, unless the quantities were also ascertained.

In another respect there had not been a full explanation; viz. in the statement made to the creditors at

June 15, 1814.

CESSIO BONORUM.

the time of the composition. There, too, there appeared to have been a concealment,—he did not know to what extent,—for the purpose of giving a colour to the state of the insolvent's affairs, and inducing the sureties to enter into those engagements which they had undertaken.

Concealment in the statement to the creditors.

Misapplication of the funds after the arrangement.

Another ground of objection was, the fraudulent misapplication of the effects which had come into his hands subsequent to the time of the composition. Some part had been applied to preferable debts, to which there was no objection; but other parts had been applied to purposes to which they ought not to have been applied: he did not quarrel with the expenditure on the farm, as the produce was brought into the general fund; but he had applied the effects to the payment of debts which were not in the composition, the effect of which was, that he saved himself from those creditors who were not in the composition, and left the sureties liable to those who were: any thing more fraudulent could not well be conceived. He had applied 400*l.* and upwards to the expenses of himself and his family, which was liable to this objection, that he ought not to have spent a single shilling in that way. The account, it was said, had been made up by the trustee; but still it demonstrated the misapplication. It was clear then that Ritchie had been defrauded to a considerable amount.

Respondent defrauded to a considerable amount.

Under these circumstances, then, it appeared that a sufficient disclosure had not been made to enable the creditors upon investigation to say with certainty whether there was fraud or not; and that the books were of a description to leave as much room

Where books are so kept as

for suspicion as if there had been no books at all; for such books were equivalent to no books: that a fraudulent representation to some extent had been made at the time of the composition; that sums which ought to have been applied to relieve the sureties had been applied to the payment of the insolvent's own debts not within the composition; and that a large sum had been applied to the debtor's personal expenses. He did not find therefore, that, under the circumstances of this case, the debtor ought to be discharged; but, on the contrary, that the charges of fraud appeared to be proved.

to render it impossible to detect fraud, the conduct of the party is liable to as much suspicion as if he had kept no books at all.

He admitted that the fraud must be proved by the parties resisting the remedy; and the proof here was, the withholding the books or papers, which raised the presumption of fraud; the concealment, to a certain extent, at the time of the composition; and the misapplication of the effects afterwards, which was a gross fraud. On these grounds, he saw no reason to quarrel with the decision of the Court of Session.

In cases of *cessio*, the *onus* of proving fraud rests on the person resisting the remedy.

He concurred in lamenting that questions of this nature should be exposed to so much litigation. He thought it would be infinitely better that the decision should be final in the first instance, as here in cases of bankruptcy, and under the late permanent Act for the Relief of Insolvent Debtors. It was really a question of discretion, requiring a great deal of investigation which could not well be given in a Court of Appeal; and it would be much better that the Court—which, when a doubt arose, might easily send the matter to a farther inquiry—should decide finally.

In cases of *cessio*, it would have been better if no appeal had been competent.

June 15, 1814.

CESSIO BONORUM.

If the judgment should be affirmed, the debtor must seek relief by another rocess.

It might properly be observed, that though, if the judgment should be affirmed, the remedy must be obtained by another process, if fitting to be granted at all, yet the debtor might avail himself of that farther process, if he could give the requisite explanations; which, however, appeared to him impossible, especially as to the last article. But as far as he could judge from the papers then before their Lordships, he thought the judgment of the Court of Session right, and could not therefore vote for its reversal.

Judgment. Judgment accordingly *affirmed*.

Agent for Appellant, GRANT.
Agent for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MILNE—*Appellant*.
SMITH—*Respondent*.

July 6, 1814.

OBLIGATION OF REPARATION IN CASE OF DAMAGE ARISING FROM DELINQUENCY.

IF any artificer, or person employed to do any work in a highway, street, common staircase, &c. makes, or procures to be made, an opening for the convenience of his operations, and then goes away for a time, his work being unfinished, and he intending to return at a future period and complete it, and in the mean time the opening is used by other workmen or persons, it is the duty of these latter persons to secure the opening at night; and the person who so originally made the opening, or procured it to be made, and