Agents for pursuer—Scott, Moncrieff, & Dalgetty, W. S.

Agents for defender—Hunter, Blair, & Cowan, W. S.

Thursday, June 27.

SHEDDEN AND OTHERS, PETITIONERS.

Trust—Deed of Assumption—Sequestration of Trust-Estate—Judicial Factor—Recal of Factory. A trust-estate being in the hands of a sole trustee, the Court, on the prayer of beneficiaries, sequestrated the estate, and appointed a judicial factor. Sometime thereafter the trustee executed a deed of assumption and conveyance in favour of himself and two new trustees, whereupon the beneficiaries prayed for recal of the sequestration and factory. Prayer granted by the Court in the exercise of its equitable jurisdiction.

Mrs M'Ewan, by trust-disposition and settlement, conveyed her property to trustees, for behoof of her children. On the death of the truster, John Kennedy Donald, as the sole surviving and accepting trustee under the settlement, entered upon the possession and management of the estate. He continued to intromit with the estate until 1862, when he became insolvent, and was rendered notour bankrupt. He had at that time funds of the estate in his possession. On his refusal to assume new trustees at the request of two of the beneficiaries, and on an application to the Court, the Court sequestrated the trust-estate, and appointed Mr W. J. Carswell judicial factor thereon. Thereafter the judicial factor managed the estate. On 8th March 1865, Mr Donald, as sole surviving trustee, executed a deed of assumption and conveyance, assuming two new trustees to act along with him in the administration of the trust-estate. The beneficiaries now applied for recal of the sequestration and factory.

Lord Mure reported the case.

Lancaster for the petitioners.

The Court took time to consider.

Lord President—This is a petition for recal of a sequestration and factory under somewhat peculiar circumstances, which has been reported to us by Lord Mure, and which we have thought it worth our while to consider. It seems there was a trust by M'Ewan which got into such a position, by there being only one trustee, that the trust could not be administered, and it was thought right to apply for the appointment of a judicial factor. A petition was presented in 1862, praying for service on the sole trustee, and for appointment of a judicial factor. The prayer has been apparently amended,—a circumstance which was not brought under our notice at the discussion,—and there is added a prayer for sequestration of the trust-estate. And, accordingly, an interlocutor was pronounced by the Lord Ordinary on the Bills, sequestrating the estate, and nominating Mr Carswell to be judicial factor for the purposes of lhe trust, and with the usual powers. It appeared to us formerly that the Lord Ordinary, in sequestrating the trust-estate, had gone beyond the petition; but it now appears that this was justified by the prayer as amended. Any irregularity is very trifling. The usual powers are given, as well as the powers in the trust-disposition and settlement; but there is nothing material in that. The question is whether, standing the estate under the management of the factor, it is competent for the sole trustee to execute a deed of assumption assuming two new trustees, and whether that deed can be given effect to by recalling the appointment of the judicial factor, and allowing the trust to revive? I believe your Lordships are all of opinion that that is competent. At first there is a technical difficulty in holding that a trustee who has been superseded, and out of whose hands the estate has passed, can execute a conveyance to himself and two others. But this objection is one of form more than of substance, and in administering our equitable jurisdiction we are not bound to give effect to it. The deed of the trustee is now brought into active operation, for the first time, by our deliverance of recal, and I therefore think the prayer of this petition may be granted.

The other Judges concurred.

Agent for Petitioners—John Ross, S.S.C.

Thursday, June 27.

HALLY *v.* LANG.

Landlord and Tenant—Summary Application—Removing—Ejection—Vicious and precarious possession. An application presented to a Sheriff-court for summary ejection of parties in possession of house and lands held to be incompetent, there being no allegation that the possession was either vicious or precarious.

This was an advocation from the Sheriff-court of Dumbartonshire. George Hally, trustee on the sequestrated estate of George Lang, cattle dealer and flesher at Baillieston, in the county of Lanark, presently residing at Blackmailing, in the county of Dumbarton, presented a petition in the Sheriff-court of Dumbarton, against the said George Lang and his son Robert; Mrs Elizabeth Lang, widow of the deceased Robert Lang; John Lang, son of the deceased Robert Lang; and Mary, Elizabeth, and Ann Lang, daughters of the deceased Robert Lang, setting forth that he, as trustee, was heritable proprietor of the lands of Blackmailing by virtue of act and warrant of the Sheriff and disposition by George Lang; that the respondents George and Robert Lang presently occupied and possessed the whole of the said lands of Blackmailing, except a dwelling-house and garden occupied and possessed by the other respondents; that he, as trustee, was about to sell the lands and others, but the respondents refused to remove from the premises. He prayed for a warrant for summary ejection and removal of the respondents. Condescendence and answers were ordered by the Sheriff. The petitioner, in his condescendence, narrated his title as trustee for behoof of George Lang's creditors, and the disposition by George Lang in his favour; alleged that the respondents, the widow and daughters of the deceased Robert Lang, and his son John Lang, ocpied the dwelling-house and garden at Blackmailing; that he, as trustee, was about to sell the said lands with immediate entry to the purchaser, but the respondents refused to quit the premises. He then stated that the titles of Blackmailing consisted of a precept of *clare constat* by the commissioners of the late Lord Blantyre in favour of the deceased Robert Lang, dated in 1793; sasine thereon in favour of Robert, recorded in 1855; Robert's infeftment had been reduced in 1863; George, passing over his father, completed a title to his grandfather

in February 1865, and then conveyed the lands to the petitioner. The petitioner then stated that Robert Lang at his death had left a settlement whereby the lands of Blackmailing, which he possessed on apparency, were destined to George Lang, the bankrupt, burdened with annuities and liferents in favour of his widow and daughters to nearly the annual value of the lands, and his whole personal and moveable estate was bequeathed to the same respondents. The answers put in for the widow and daughters of Robert Lang, narrated the possession of the subjects since Robert Lang's death in 1858, under the provision in his settlement, and stated that the respondents had never been warned to remove. John Lang denied that he was or had been in possession. No appearance was made for the other respondents.

The Sheriff-substitute held that George Lang must be held to have incurred a personal responsibility for the onerous debts and deeds of his father, who possessed on apparency, in terms of the Act 1695, c. 24; that the provisions to Robert's widow and daughters were onerous, and fell to be sustained in this action; and assoilzied these respondents. He assoilzied John Lang on the ground stated in John Lang's defence. The Sheriff adhered.

The trustee advocated.

Mackenzie and Thoms for him.

A. Moncrieff (with him Solicitor-General Millar).

Lord President—There is a very clear ground of judgment in this case. The facts of the case necessary for our consideration are simple. Robert Lang, the proprietor of Blackmailing, died in 1858. He left a trust-disposition and settlement, by which he conveyed to trustees his lands of Blackmailing. His widow, and daughters, so long as they were unmarried, were to have a liferent of the house and garden at Blackmailing; and, on the extinction of the liferent, the lands were to be conveyed to the eldest son of the truster, George Lang, who was to have right to the remaining or unliferented part of the lands on payment of certain provisions to the mother and sisters. There can be no doubt that by this deed, if it is to receive effect, the eldest son of the truster is to have the estate of Blackmailing, subject to the liferent of the dwelling-house in favour of the truster's widow and daughters. It is now to be taken as conceded that the truster was possessing on apparency only. But George Lang having made up a title by writ of *clare constat*, in which he was recognised as heir of his grandfather George Lang, passing over his father Robert, the consequences in law are, that if George Lang had been solvent he would have been liable to fulfil this provision in favour of the widow and daughters. In these circumstances, it turns out that George Lang had been sequestrated four years before his father's death, in 1854, but the trustee in the sequestration, so far from interfering with the provision in the deed of Robert Lang, allowed the possession of the widow and daughters to continue undisturbed, in virtue of this deed of Robert Lang, for about seven years. Whether it was for more than seven years is of very little moment. That possession is had under the settlement from Whitsunday 1858 until the presentation of this petition in 1865. At that time the trustee appears to have taken a fit of unusual activity. He first got the bankrupt to make up his title by *clare constat* in February 1865, and then to execute a disposition in his favour; and that disposition is made effectual by registration on 25th March 1865, two days before the petition was presented. So that, down to March 1865, the trustee never thought of disturbing the possession of the widow and daughters under the trust-disposition and settlement. He recognised that trust-disposition and settlement as a good title of possession down to that time. But then, by this petition on 27th March, he seeks to eject them summarily. In these circumstances one would demand from a petitioner a most distinct statement of the grounds on which he asks such a summary ejectment. But here there is no allegation of the petitioner's grounds whatever. It is not said here that the respondents are possessing without a title. It is not said that they are vicious or precarious possessors. Nothing but that there is a title to Blackmailing in the person of the petitioner, and that the respondents are in possession of the dwelling-house and garden; and, from that, the conclusion is deduced that they should be ejected therefrom. That is utterly incompetent. It would be so under any circumstances, but still more clearly under those here. Mr Hunter, in his "Landlord and Tenant," has justly observed that there is a good deal of confusion of language about summary removing; and that summary removing and ejection have been mixed up, so that it is difficult to keep them apart. Summary ejection can only be had in certain well defined cases. I don't propose to enumerate all the cases, for there are some very special cases not coming under the general category; but generally the proper ground is, either that the possession is vicious—*i.e.*, obtained by force or fraud; or that it is precarious—*i.e.*, held by the mere tolerance of the proprietor of the estate. But here there is no allegation of either in the petition; and when an opportunity for stating such is given by ordering a condescendence, which was indulgently ordered by the Sheriff, so far from stating it, all he says is (1) that he is trustee on the estate of George Lang; and (2) that the respondents are in possession. The rest, to the 7th article, have nothing to do with the question of possession, but refer to his own title, and in the 7th article he says that on the death of Robert Lang a pretended settlement by him was alleged to have been found; that, by that settlement, the lands of Blackmailing, which he possessed on apparency, were destined to George Lang, the bankrupt, burdened with annuities and liferents in favour of the widow and daughters. Anything more loose in stating a case I cannot imagine, and I am the less concerned to do anything to avoid an objection of incompetency when the petitioner does not avail himself of the opportunity of stating his real ground of action. The plain ground of judgment for us is, that the petition is incompetent, as not founded on an allegation of vicious or precarious possession, or any other relevant averment.

Lord Curriehill—The question is, Whether this is a competent remedy? I think it is not. I think that all the argument overlooked the nature of that proceeding which we call an ejection. We must not confound that with an action of ejection. That is an action competent to a party unlawfully ejected against the party ejecting him. An ejection such as that here is not a proper action at all. It is a kind of legal diligence provided by the law for carrying into execution an action of removing. That is plainly stated by Erskine, who says, that "if a tenant, or other possessor, who is decreed to remove from or quit possession of lands, shall forcibly oppose the execution of the decree, or shall ob-

stinately refuse to give obedience to it, notwithstanding a charge given him upon letters of horning, the obtainer of the decree may procure letters of ejection, issuing from the Signet, and directed to the Sheriff, who is required to dispossess him, and to put the pursuer in the possession; or, if the decree be pronounced by a Sheriff, he himself may grant a precept of ejection, directed to his own officer, for the same purpose" (iv, iii, § 17). Here we have an application at once for the diligence of law, without any removing applied for. On that ground, I think this petition is altogether incompetent. Whether even an action of summary removing would have been competent, it is not necessary to inquire. I think it would not have been competent; because the party had been seven years in possession without challenge. In an action of removing, that might have been a good defence. But I find it sufficient here to rest my judgment on the ground that the remedy here sought was incompetent.

Lord Deas—I arrive at the same result. I think there are grounds on which we must dismiss this petition apart altogether from the merits of the question. I am disposed to think there are three grounds, any one of which would be sufficient. The first is that on which your Lordship in the chair mainly went—that there is not set forth here any such ground of action as, according to the forms of process in the Sheriff-court, will warrant an ejection. An ejection is only competent when a party is either a vicious possessor or a precarious possessor, in the sense of having no title at all. These are the cases in which a summary ejection is competent, and a party asking it must set forth something *ex facie* to support his allegation. There is nothing here setting forth that the case comes under either category. The facts set forth in the petition may be all true, and yet be no warrant for summary ejection. It is not said that the respondents are either vicious or precarious possessors. It is quite consistent with all in the petition that the party was in possession on a good right of liferent. There might be a well constituted burden of liferent under which the widow might possess all her life. I doubt if a defect of that kind in the petition could be remedied by a condescendence. A condescendence is an exceptional proceeding. The parties were heard before the condescendence was ordered, and the petition might have been disposed of at once. But the condescendence, after it was put in, does not, any more than the petition, set forth a good ground for summary ejection. Secondly, the case, if you go beyond the petition and look at the condescendence, does not fall under the provisions of the Act of Sederunt—whereby you can only have such a summary petition in a case requiring extraordinary dispatch. The title of the trustee has been the same as it is now during the whole period of possession. When a party allows peaceable possession for years, the law refuses to consider that as a case requiring extraordinary dispatch. That is different from the preliminary objection arising on the petition itself. But when the nature of the action was seen by the Sheriff, it was quite competent for him to send it out of court as not requiring such dispatch. Thirdly, even if this were an action of removing, it is a question if this is not a case where the possession would entitle the party to a possessory judgment on an *ex facie* valid title. Possession has been had for more than seven years in the time of the trustee on a deed of conveyance *ex facie* good. Moreover, the heir who granted it had been infeft on a *clare constat* long unchallenged, and it was only in 1865 that that was reduced, on the ground, then discovered, that the granter had died before infeftment. If that had not been done, the title would have been good. Apart from that, to show that the disposition was not a good conveyance to the liferentrix would require the whole of the elaborate argument we have had from the advocator. The benefit of a possessory title is, that it requires discussion to make out the title to be bad. On all three grounds, either of which is sufficient, the petition is incompetent.

Lord Ardmillan concurred.

Agents for Advocator—Lindsay & Paterson, W.S.

Agents for Respondent—M'Ewan, & Carment, W.S.

Friday, June 28.

DICKSON *v.* MATTHEW.

Bankruptcy — Claim — Loan — Bond — Acknowledgment of Debt — Preference—1696, *c.* 5—1621, *c.* 25—*Husband and Wife.* A husband, within sixty days of bankruptcy, granted a bond in favour of his wife, acknowledging receipt in loan of various sums of money at different times from his wife, from her own funds, binding himself to repay the accumulated sum of principal, amounting to £531, and interest, amounting to £120, under a penalty of one-fifth more of the foresaid principal sum of £652; and to pay interest on the said principal sum, from the date of the bond. Held (Lord Deas dissenting) that this was a mere acknowledgment of debt, not struck at by the Act 1696, c. 5, and that the wife was entitled to rank for the accumulated sum in the bond, with interest upon the principal sum therein from the date of accumulation; but not for interest upon the interest accumulated in the bond. Held that in a reduction of a deed under 1621, c. 25, or as fraudulent at common law, proof *prout de jure* is competent in support of the deed.

In the sequestration of William Matthew, formerly grocer in Broughty Ferry, afterwards manufacturer in Arbroath, his wife, Mrs Agnes Harris or Matthew, on 2d July 1861, lodged an affidavit and claim, in which she deponed, "that the said William Matthew, above designed, is at this date justly indebted and resting-owing to the deponent, exclusive of his *jus mariti* and right of administration, the sum of £652, 11s. 1d. sterling of principal, contained in a bond granted by the said William Matthew to the deponent, dated the 20th day of June 1866; together with the sum of £1, 1s. 5d., being the interest thereof at the rate of 5 per cent. from said 20th June 1866 to this date, amounting together to the sum of £653, 12s. 6d." The bond narrated that Mrs Matthew had received various sums of money from the trustees of her deceased sister, Elizabeth Harris, in implement of a direction to them by the testator to convey the whole fee residue of her trust-estate to her sister, the claimant, exclusive of her husband's *jus mariti* and power of administration; that Mrs Matthew had at different dates advanced "to me, on loan, the several sums above mentioned, as received by her as aforesaid, amounting in all to the sum of £531, 18s. 2d. sterling, of which I hereby acknowledge the