

LORD DEAS had no doubt that a mutual contract could be framed in such a way as that the obligation upon the survivor in favour of third parties would be effectual even where the fee was given to the survivor, as the case of *Wood* was an instance in point. But the circumstances of every case must be examined to discover the intention of the parties. He thought that the stipulation in favour of the wife's relations in this deed had not been intended to be binding on her if she survived. There was no counter stipulation in favour of the husband's relatives, and it was to be observed that the provision was made for their personal benefit, and not for their heirs. The predecease of the two parties to be benefited also weighed with him in concurring with his Lordship.

LORD ARDMILLAN concurred.

LORD KINLOCH absent.

Agents for Pursuers—J. & J. Gardiner, W.S.
Agent for Defenders—D. Curror, S.S.C.

Friday, May 27.

SECOND DIVISION.

RITCHIE v. M'LACHLAN AND OTHERS.

Assignment—Mandate—Stamp Acts—Arrestment—Subjects Arrestable—Effect of Corrupt Practices Act 1867—Election Agent—Common Debtor. A was a candidate for the representation of a county at a general election. B was his agent for election expenses. C was employed to do election services; and having rendered his account, it was disputed by B, who, along with C, entered into a reference of the claim. In the submission an award was ultimately pronounced, finding C entitled to a certain sum as the reward of his services. Prior to the date of the reference C had assigned his claim on A to D in the following terms:—"Pay the within account;" and the assignation was subscribed by him on a penny receipt stamp. The award was dated 9th September 1869. On the same day an arrestment was used by a creditor of C in the hands of B, as an individual and as agent for A. On 2d March 1869 another creditor of C used an arrestment on the dependence of the action in the hands of B, simply as an individual. On 2d March 1869 B was in possession of funds belonging to A, and payable to C. A multiplepointing was brought in the name of B by a creditor of C, the fund *in medio* consisting of the sum to which C was found entitled under the award. *Held* (1) that the assignation prior to the reference in favour of D was of the nature of a mandate, and effectually transferred A's right to D; (2) that an arrestment in the hands of B "as election agent" by a creditor of C, effectually attached the fund *in medio*, there being a valid *concursum* of debtor and creditor; (3) that an arrestment in the hands of B, as an individual, by a creditor of C, effectually attached the fund *in medio*, there being a concurrence of indebtedness to C, and of the possession of funds. *Held* (Lord Benholme *diss.*) that an arrestment on the dependence attaching the sum of £50 sterling money, more or less, "with all goods, gear, debts, and sums of money," was effectual to entitle the arrestor to claim in a multiplepointing, and

in competition with other arresting creditors to be ranked on the fund *in medio* for a sum in excess of that specified in the schedule of arrestment. *Observed* (per Lord Cowan) that an arrestment being laid, an arrestee would be in danger to pay away any part of the funds belonging to the common debtor in excess of the sum specified in the schedule as arrested.

This is an action of multiplepointing and exoneration brought in the name of James Ritchie, writer in Glasgow, agent for election expenses for Sir Norman Macdonald Lockhart of Lee and Carnwath, Baronet, against John M'Lachlan, accountant, Wishaw, common debtor, and Archibald Pollock, accountant in Glasgow, trustee under a trust-deed executed by the said John M'Lachlan, for behoof of his creditors, real raiser, Henry M'Lachlan, accountant, Coatbridge, and others. In the condescendence annexed to the summons the circumstances in which the action is brought are explained:—

"The common debtor was one of the agents at the last election of a Member of Parliament for South Lanarkshire, and in promoting the candidature of the said Sir Norman Macdonald Lockhart there was incurred to him an account for work performed and monies disbursed by him. The said account having been disputed, was referred by the said common debtor, with consent and concurrence of the defender Henry M'Lachlan, and the said James Ritchie, as agent for election expenses for the said Sir Norman Macdonald Lockhart, to the decision and final award of George Smith, writer in Glasgow, as arbiter mutually chosen by them, conform to minute of agreement and reference entered into between them, dated 2d and 3d June 1869. The said arbiter, after sundry steps of procedure in said reference, pronounced an award on or about 9th September last, finding the common debtor entitled to the sum of £170, being the amount of the fund *in medio*. A copy of the said minute of agreement and reference and of the said award are herewith produced. On or about 19th August 1869 the said common debtor, for the better security and more sure payment of the debts due by him, executed a trust-deed in favour of Archibald Pollock, accountant, Glasgow, defender and real raiser. The said Henry M'Lachlan alleges a right to the said fund *in medio*, or part thereof, in virtue of an assignation, or pretended assignation, by the common debtor in his favour, and the other defenders have arrested in the hands of the pursuer and nominal raiser, for sums alleged to be due to them by the said common debtor. The said real raiser has endeavoured to convene a meeting of the creditors of the said common debtor, with the view of getting some amicable arrangement, and a fair division of the means and estate of the said common debtor, but having failed to do so, the present action has become necessary."

The following are the claimants on the fund *in medio*:—

(1) James Graham, watchmaker, Glasgow, who claims to be ranked on the fund for the sum of £24, 16s. in respect of an arrestment dated 9th September 1869 laid on in the hands of the nominal raiser James Ritchie. The arrestment was laid "in the hands of James Ritchie, writer, Glasgow, as individual and as agent of Sir Norman Macdonald Lockhart."

(2) The said Archibald Pollock, who claims the whole fund *in medio* in virtue of a trust-deed in

the points of law which all parties, as the Lord Ordinary understood, were agreed could be and ought to be disposed of in the present stage of the process.

"If it shall appear to the parties, or any of them, that other points raised by them, which are not embraced in the present judgment, may be decided now, the Lord Ordinary, if moved to that effect, would endeavour to exhaust such matter of question before the period of reclaiming against this interlocutor shall expire."

The claimants Graham & D. and J. Cassels reclaimed.

H. J. MONCREIFF for Graham.

SHAND and W. A. BROWN for D. & J. Cassels.

SCOTT for Henry M'Lachlan.

BRAND for Marshall.

R. V. CAMPBELL for Pollock.

The case was several times before the Court, and was argued by the parties upon a variety of points. The Court ultimately decided as follows:— They held (1) that the arrestment laid on by Graham in the hands of Ritchie, the nominal raiser, was a good arrestment. It was dated 9th September 1869, the date on which under the submission referred to the common debtor became entitled to £170. Ritchie was a party to the submission, and under it he came to be in right of funds which he was bound to pay over to the common debtor. By the Corrupt Practices Act, the agent for election expenses was the only party who could satisfy election claims, the candidate being interpellated from himself making such payments. It was unnecessary to say what might have been the result if Ritchie had had no funds in his hands belonging to the common debtor, but in virtue of the award under the submission he must be taken to have had funds at the date of the arrestment. The Lord Ordinary was wrong in holding that the fund *in medio* was not arrestable, because "it was in its proper character a deposit of a sum of money in the hands of the arrestee for a separate, special, and limited purpose." His Lordship was confounding the case where there was a destination of a fund in favour of particular creditors where an arrestment by a creditor of the party making the destination would not carry off the fund. Here the funds were in the hands of the nominal raiser for the express purpose of paying the common debtor, and as arrestment could not be laid in his hands, it must necessarily be done in the hands of the party in possession. (2) The arrestment in the hands of Ritchie used by D. & J. Cassels was also good. It was different in terms from Graham's arrestment, who had arrested in Ritchie's hands not only as an individual but as an agent; but on the assumption that he held funds there was a concurrence of the two conditions necessary to validate the arrestment—1st, indebtedness by Ritchie to the common debtor; 2d, the possession of funds that might be attached. If funds were due by Ritchie to M'Lachlan, it was immaterial in what capacity the relation of debtor and creditor was established. (3) The assignation in favour of Henry M'Lachlan was not open to the objections stated to it by the arresting creditor Graham. If it were taken to be an assignation in the strict sense of the word, a penny stamp would certainly be insufficient. But it was of the nature of a mandate to Henry M'Lachlan to receive the sum which was due to the common debtor, and therefore fell within the principle of the judgment in *Laurie v. Ogilvie*, 6 Feb. 1810, 15 F.C. 561.

The Lord Justice-Clerk was further of opinion that the deed founded on was liable to no objection under the Stamp Act; but the judgment of the majority was rested on the ground that the mandate was an effectual transmission of the right. (4) The arrestment used by Messrs D. & J. Cassels in the hands of Ritchie was not only good, but although the schedule only specified a sum of £50 as arrested, was valid to enable the claimants to be preferred for a larger sum on the fund *in medio*. There was no doubt that an arrestment on the dependence covered not only the principal debt but all the expenses of recovering it in whatever Court these might be incurred. And the arrestment laid an embargo on all "sums of money" in the arrestee's hands, Lord Cowan observing that an arrestee paying away any part of funds in his hands after an arrestment had been laid on did so at his own risk, and exposed himself to the penalties of a breach of arrestment. Lord Benholme differed on this point. He held that the words in the schedule of arrestment, "together with all goods, gear, debts, and sums of money," were to be read as mere words of style; and that the words "more or less" in the schedule, occurring after the specification of the sum arrested, were to be held as qualifying not the amount specified in the schedule, but the amount of the debt, operating however within the limits specified.

Agents for Pursuer and Nominal Raiser—Bell & M'Lean, W.S.

Agent for Real Raiser and other Claimants—A. Kirk Mackie, S.S.C.

Agent for D. & J. Cassels—Alexander Morison, S.S.C.

Agents for Graham—Murray, Beith & Murray, W.S.

Agent for Marshall—Robert Denholm, S.S.C.

Friday, May 27.

SIMSON v. CARNEGIE.

Landlord and Tenant—Incoming Tenant—Price of Seeds. Terms of a deed which held to constitute an obligation on the incoming tenant to pay, either to the landlord or outgoing tenant, the value of the grass seeds sown with the last crop of the outgoing tenant.

This was an appeal from the Sheriff-court of Cupar-Fife, the appellant being the pursuer in the Court below. The action was brought by Mrs Simson, as trust-proprietrix of the lands of Pitcorthie, against Mr Carnegie, the tenant of the farm of Easter Pitcorthie, and concluded for the sum of £50, 11s., as the price of grass and clover seeds sown down by the late George Simson, the pursuer's author, with the crop of the year 1866, immediately preceding the defender's entry to the farm. The question turned upon the construction of the defender's lease, and there was also involved the further question, how far it is competent to add to the obligations of parties in a formal lease other obligations derived from common law or the custom of the county? The discussion turned on the import of the following documents:—

"1. Excerpt from Tack between George Simson, Esq., and Mr George Russell, dated 7th and 9th April 1849, for nineteen years from Martinmas 1849.

"And in regard to the management of the farm before the conclusion of the lease, the tenant shall