

to prevent an heir of entail in possession from doing the same.

If I could have found any restrictive words in the statute I should have been ready to have given effect to them, but I cannot find any. Then the expediency of the transaction is beyond all question. It is clearly for the benefit of the entailed estate over which the servitude is to be created that this public park should be made, and it cannot be made without the proposed servitude. It seems also that the power of sale under sec 19 may embrace a sale of a limited interest, and the creation of a servitude over lands adjoining these which are sold is nothing more than the sale of a limited interest.

I am therefore for granting the authority craved.

LORDS DEAS, MURE, AND SHAND CONCURRED.

The Court remitted to the Lord Ordinary to grant the authority craved in the petition as amended.

Counsel for Petitioner—Graham Murray.
Agent—J. A. Campbell & Lamond, C.S.

Saturday, June 30.

SECOND DIVISION.

(Sheriff of Stirling and
Dumbarton.

M'CAUL'S TRUSTEES v. THOMSON AND OTHERS.

Bankruptcy—Sale—Security over Moveables.

M. being in pecuniary difficulties executed a sale of certain furniture belonging to him in a house which was occupied by him, and which belonged to his marriage-contract trustees, to R., by whom the price was paid to a private trustee for behoof of M.'s creditors. R. allowed M. to retain possession of the furniture on a contract to pay up the price by annual instalments. M. continued in possession of the furniture, and paid several of the annual instalments until he became bankrupt and was sequestered. The furniture was then claimed by a person coming in right of R. and by M.'s trustee. *Held* that M. was proprietor of the furniture at the time of his sequestration, on a contract to pay the price by instalments, and his trustee was therefore not entitled to it.

This was an appeal in an action of multipointing in the Sheriff Court of Dumbartonshire, of which the nominal raisers were certain marriage-contract trustees, the subject *in medio* being certain articles of furniture. The circumstances out of which the case arose were narrated in a joint minute of admissions lodged by the parties in course of the process, and were to the following effect:—The furniture forming the subject *in medio* was purchased by Mr M'Caule, manufacturer in Glasgow, at the time of his marriage in 1867, and was in 1876 placed by him in Hayfield Villa, Helensburgh, where he then went to live. Hayfield belonged to his marriage-

contract trustees, the nominal raisers, and the M'Caules occupied it, by agreement with them, continuously from that date till June 1882, with the exception of a short period in 1878-9, when it was let by the trustees.

In 1878 M'Caule, being in pecuniary difficulties, granted a trust-deed in favour of Walter Mackenzie, C.A., conveying to him his whole estate, including the furniture in Hayfield Villa. Mackenzie wound up his affairs, but did not enter into possession of Hayfield or remove any of the furniture, which still remained there at the time of the raising of this action.

In August 1878, after M'Caule had put his affairs under trust, James Robertson, his brother-in-law, and one of the marriage-contract trustees, with the knowledge and approval of the M'Caules, arranged to buy from Mackenzie, as M'Caule's trustee, the furniture in Hayfield House.

In September 1878 Robertson, on the occasion of his going abroad, granted a factory and commission in favour of his agent Laurence Thomson, writer in Glasgow, the appellant.

On 26th October 1878 Mr and Mrs M'Caule granted the following letter of obligation addressed to Laurence Thomson's firm, Messrs Laurence Thomson & Miller:—"Dear Sirs,—In consideration of the fact that your clients, Mr Hugh Robertson and Mr James Robertson, Plantation Engine Works, Glasgow, have made payment to the trustee upon the estate of Mr James S. M'Caule, manufacturer, Ingram Street, Glasgow, of the sum of £300 on my household furniture and effects within my dwelling-house at Hayfield, Helensburgh, and have obtained an assignation of same in their favour, conform to inventory thereof made out by Hutchison & Dixon, licensed valuers in Glasgow, I, the said James S. M'Caule, and I, Isabella Dixon Robertson or M'Caule, wife of the said James S. M'Caule, jointly and severally agree and undertake that we shall pay to you, on account of your clients, the sum of £50 per annum, payable by two instalments of £25 at each term of Whitsunday and Martinmas, commencing the first term's payment at the term of Whitsunday 1879, and continuing the same until the amount of said advance, with periodical interest at 5 per cent. on the balance from time to time remaining, shall be repaid. We further agree and consent that this letter shall be intimated to the trustees under our antenuptial contract of marriage, dated 24th December 1867, and recorded in the books of Council and Session 27th August 1873. It is of course understood that when the balance shall be finally paid the household furniture, &c., shall be conveyed by your clients as we may direct."

On 7th March 1879 Mackenzie, as M'Caule's trustee, in fulfilment of the previous arrangement with Robertson, in consideration of the sum of £300, partly paid in cash and partly representing an estimated dividend due to Robertson from M'Caule's trust-estate, assigned and conveyed to Thomson, as Robertson's factor and commissioner, the furniture in Hayfield House—Robertson, who had then returned home, signing the deed as a consenting party. The M'Caules subsequently paid three of the yearly instalments of £50, £125 thereof being paid to Robertson himself, and £25 to Thomson as his factor and commissioner. The furniture still remained in Hayfield House after the date of this assignation.

About the end of 1881 the marriage-contract trustees advanced £600 of the trust-funds to Mr and Mrs M'Caul, obtaining in return a bond and assignation in security of a policy for £700 over M'Caul's life.

In June 1882 the M'Cauls left Hayfield, which was then let by the trustees to a tenant for one year. M'Caul received the rent paid for this period, and none of it was claimed by Thomson in respect of the purchase of the furniture.

On 7th November 1882 Robertson recalled the factory and commission in favour of Thomson. On an accounting between them at that date the former was due to the latter the sum of £160, 17s. 8d.

On 15th November M'Caul's estates were sequestered, and James Affleck, C.A., was appointed his trustee. On 27th November Robertson's estates were likewise sequestered, and William Albert Davis, accountant, appointed trustee.

The furniture being then claimed by Thomson and by Affleck, the present action of multipointing was brought in name of the marriage-contract trustees, the real raiser being Thomson, Affleck and Robertson's trustee, Davis, being also called as defenders.

Thomson lodged a claim in the following terms:—"The said Laurence Thomson claims the subject *in medio* to the intent and effect of recovering payment of the said debt due by the said James Robertson as aforesaid, and hereby undertakes to pay the free balance or hand over the furniture unsold after his said debt, with expenses, is satisfied, to the claimant who may be found entitled thereto: Or, in the event of the furniture being sold by order of the Court or arrangement of parties, the said Laurence Thomson claims preferably therefrom the amount of the said debt, with expenses."

He pleaded—"The said Laurence Thomson being vested in the said subject *in medio*, and the said James Robertson being indebted to him as condescended on, and being now bankrupt, the said Laurence Thomson is entitled to be ranked and preferred to the extent of the said debt due by the said James Robertson to him, with expenses."

Affleck claimed the furniture as the property of M'Caul at the time of his sequestration, and pleaded—"(1) The said furniture being the property of the said James Sloane M'Caul, and his estates having been sequestered under the Bankruptcy Statutes, and the claimant appointed judicial factor thereon, the claimant is entitled to be preferred to the said fund *in medio*. (2) *Separatim*, the said furniture having all along remained and been in the possession, use, and enjoyment of the said James Sloane M'Caul, is in law held to be his property, and so to fall under the said sequestration, and the claimant, as the judicial factor foresaid, is entitled to be preferred to the same." "(1) The said Walter Mackenzie not having completed his title to the furniture forming the fund *in medio* the assignation by him to the claimant is inept, and the claim falls to be dismissed with expenses. (2) *Separatim*, the said Laurence Thomson not having acquired the said furniture by a *bona fide* purchase, his claim ought to be dismissed with expenses. (3) *Escto*, that the said Laurence Thomson acquired the said furniture from the said Walter Mackenzie by virtue of the assignation founded on, the said assignation

not having been followed by delivery and possession, the same is inept, and the claim ought to be dismissed with expenses."

Davis also claimed the furniture as having been purchased by Robertson, and falling under this sequestration.

The trustees also lodged a claim, pleading a right of retention over the furniture as the property of M'Caul in security of their advance of £600.

The Sheriff-Substitute (GEBBLE), after findings in conformity with the admitted facts, found in law "that the furniture was the property of James Sloane M'Caul, and was carried by his sequestration, and now belongs to his trustee: Therefore ranks and prefers the claimant James Affleck to the fund *in medio*: Repels the claims for the marriage-contract trustees and Laurence Thomson."

"*Note*.— . . . It appears to me that the true legal position of the M'Cauls under their letter of obligation was that they were purchasers of the furniture at a specific price, payable in certain instalments. There is nothing in its tenor to indicate that it is of the nature of a lease except it be the terms of payment, which are just as commonly used in other transactions; on the contrary, the terms used in reference to the payment of the instalments 'until the advance, with periodical interest at 5 per cent. per annum on the balance shall be repaid,' exclude the idea of a lease, and unequivocally point to that of sale. It is simply a sale with delivery to the purchasers, who have paid only part of the price, otherwise it is to be regarded as an attempt to create a security over moveables which cannot be, at least has not competently been, done. On the assumption that the opinion expressed is the true one, it follows that the trustee must take all the interest M'Caul had in the subject *in medio*."

Thomson appealed to the Court of Session.

Authorities—*Robertsons v. M'Intyre*, March 17, 1882, 9 R. 772; *Orr's Trustees v. Tullis*, July 2, 1870, 8 Macph. 936; *Anderson v. Buchanan*, December 22, 1848, 11 D. 270; *North British Railway Company v. White and Others*, November 16, 1882, *ante*, p. 129.

At advising—

LORD YOUNG—This is a case of some interest—indeed all cases of this kind are interesting—the material facts of which may be shortly represented thus—The claimant Robertson (for Thomson is just Robertson), a friend of a bankrupt (or at least of a person under pecuniary difficulties), buys his furniture and pays the price to his creditors. The bankrupt is allowed by his friend to retain possession on a contract to pay back by annual instalments the price of the furniture which his friend had paid to his creditors.

There was thus, I assume, a perfectly good sale of the furniture by the bankrupt to his friend, the price to go to his creditors, the contract being that the bankrupt should have the use of the furniture on a contract to pay up the price by annual instalments. That is the truth of the matter, in whatever language you may try to express it. The bankrupt has remained in possession, sometimes taking the use of the articles himself, and sometimes letting them to a third party along with the house. The furniture is in that house throughout, either in his own personal

possession or in that of some-one to whom the trustees have let the house, he agreeing that their tenant was to have the use of his furniture. He continues to pay the annual instalments up to the date of his bankruptcy.

The question then is, whether M'Caul is a seller of the furniture, retaining possession thereof undelivered to the buyer, or whether he is in possession of the furniture on a contract whereby he is allowed to continue to hold it on condition of paying up the price of it by instalments. I think the latter. He was proprietor of the furniture on a contract to pay the price by instalments, and that contract could have been enforced while he was in a position to admit of anything being enforced against him, and on the other hand he could retain the furniture against Robertson so long as he continued to pay his yearly instalments. There is no doubt of that whatever. He is a debtor on that contract so far as it remains unimplemented—to what extent does not signify—and the claimant here is just a creditor. I know of no principle in the law of Scotland on which he can say that his debt is secured by lien or pledge, or by any other form of security. He has simply a claim for the balance of the debt due to him by the bankrupt under the contract expressed in the letter of 26th October 1878, and he must rest content with his dividend like the other creditors.

LORDS RUTHERFURD CLARK and M'LAREN concurred.

The LORD JUSTICE-CLERK and LORD CRAIGHILL were absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant (Real Raiser and Claimant)—Mackintosh—Lang. Agents—W. & J. Burness, W.S.

Counsel for Respondents—R. V. Campbell. Agent—A. Gordon, S.S.C.

Tuesday, July 3.

FIRST DIVISION.

[Lord Fraser, Ordinary.

M'LARENS v. SHORE.

(*Ante*, p. 638, 7th June 1883.)

Proof—Reference to Oath—Judicial Reference.

The parties to a petitory action referred the whole cause to a judicial referee. The referee after hearing parties issued a report sustaining a plea for the pursuers that the defender was barred from defending the action by his own actings and the actings of his trustee and creditors, and finding a balance due to the pursuers. The Lord Ordinary decerned for that balance in terms of the report. *Held* incompetent for the defender thereafter to refer it to the oath of the pursuers whether he was resting-owing to them the sum sued for.

Opinion (per Lord Shand) that after a

cause has been referred to an arbiter reference to oath is incompetent.

This was an action at the instance of T. & W. A. M'Laren, W.S., Edinburgh, against John Shore, sole partner of the firm of John Shore & Co., builders, Grindlay Street, Edinburgh, to recover the sum of £151, 13s. 5d. This amount included compositions due by the defender's bankrupt estate paid by the pursuers, remuneration to his trustee, and the expenses of his sequestration, together with law charges and disbursements in connection therewith.

The Lord Ordinary (FRASER), after hearing parties in procedure roll, in respect of a minute for both parties in which they stated that they "had agreed to refer the whole cause, and the question of expenses therein, to Mr Edmund Baxter, W.S., Auditor of the Court of Session, as judicial referee, and they accordingly moved the Lord Ordinary to interpose authority hereto," pronounced an interlocutor interposing authority to the minute of reference, and remitting in terms thereof to Mr Baxter, with power to him to take such probation as the justice of the case might require.

The judicial referee accepted the reference, and after hearing parties issued his report, by which he sustained the first plea-in-law for the pursuers, which was to this effect—"The defender, by his own actings and the actings of his trustee and creditors, is barred from defending this action," repelled the defences, and found that the defender was liable to the pursuers in the sum of £146, 19s. 4d. and £48, 15s. 2d. of expenses. The terms of this report are fully quoted in the opinion of the Lord President.

On 12th May 1883 the Lord Ordinary pronounced this interlocutor:—"Having heard counsel on the report by the judicial referee, approves of said report, interpones authority thereto, and in terms thereof ordains the defender to make payment to the pursuers of the sum of £146, 19s. 4d., with interest thereon at 5 per cent. from 3d June 1882, the date of citation: Ordains the defender further to make payment to the pursuers of £48, 15s. 2d. of expenses of process and of the judicial reference, and decerns: Finds the defender liable to the pursuers in the sum of £2, 2s. of modified expenses occasioned by this discussion, and decerns against him therefor accordingly."

Thereafter the defender lodged a minute of reference to the oath of the pursuers in these terms—"The defender refers it to the oath of the pursuers whether he is resting-owing to them the sum of £151, 13s. 5d., except to the extent admitted by him in the record."

The Lord Ordinary refused to sustain this minute of reference.

The defender reclaimed—*Gordon v. Glen*, January 19, 1828, 6 S. 393; *Dickson on Evid.* 1554-55; *Clark v. Hyndman & Others*, November 20, 1819, F.C.; *Watmore v. Bruce*, May 17, 1839, 1 D. 743.

The pursuers replied that the reference to oath was incompetent—*Shiels, &c. v. Shiels' Trustees*, February 11, 1874, 1 R. 502.

At advising—

LORD PRESIDENT—In this case, after the record had been closed and parties had been heard in