

Saturday, February 4, 1888.

FIRST DIVISION.

M'MURPHY v. EMSLIE & GUTHRIE.

*Arrestments—Recall—Wages Arrestment Limitation (Scotland) Act 1870 (33 and 34 Vict. cap. 62), sec. 1 and 2.*

The Wages Arrestment Limitation (Scotland) Act 1870 provides by section 1 "that the wages of all labourers, farm servants, manufacturers, artificers, and work people shall cease to be liable to arrestment for debts contracted subsequent to the passing of this Act, save as hereinafter mentioned." Section 2 provides—"If the amount of wages earned exceeds 20s. per week any surplus above that amount shall still be liable to arrestment as before the passing of this Act."

Under an agreement with his employers, a lamplighter's wages amounted during the summer months to 18s. per week. During the winter months he received £2, 4s. per week, out of which he was bound to pay the wages of two assistants which reduced his own wages to 19s. per week. *Held* that he was a workman in the sense of the statute, that the agreement in reference to the winter months did not put him in the position of a contractor, and that his wages were not arrestable.

This petition was presented by Donald M'Murphy, lamplighter, Oban, for the recall of arrestments of his wages used in the hands of the Police Commissioners of the burgh of Oban.

The petitioner stated that he came under an engagement for lighting, extinguishing, and cleaning the lamps of the burgh of Oban for a year from 18th August 1887, by acceptance of an offer of the Police Commissioners of the burgh.

Under his engagement he undertook to light, extinguish, and keep clean the lamps from 18th August to 20th April 1888 for the weekly sum of £2, 4s., from which sum he had to pay the wages of two assistants whom, under his engagement, he was bound to employ. The wages of these assistants amounted to the sums of 15s. and 10s. per week respectively, so that his actual income during the period of his engagement was 19s. per week. From 20th April to 18th August 1888, during the lighter work of the summer months, the services of the assistants were dispensed with, he himself doing the work at the wages of 18s. per week.

The petitioner averred that these weekly payments from the Police Commissioners were the only source of income which he possessed, and that from these payments he had to meet the expenses of maintaining a wife and four children.

In the beginning of 1887 the petitioner raised an action of damages for slander in the Court of Session against Peter Campbell, lately Inspector of Police in Oban, and J. C. MacLulich, Procurator-Fiscal for the county of Argyle, and residing at Inverary. In this action he was unsuccessful, and in connection with it incurred liability to Messrs Emslie & Guthrie, S.S.C.,

Edinburgh, who acted as agents for the defender Campbell, to the extent of £31, 10s., the amount of their account.

Upon 20th July 1887 Messrs Emslie & Guthrie obtained decree for this sum as agents disbursers, and upon this decree used arrestments in the hands of the Police Commissioners, of date 11th and 26th November 1887, by which they claimed to have attached the whole wages of the petitioner under his engagement, and the Police Commissioners accordingly, since 26th November, refused to pay the petitioner the sum of £2, 4s. under their contract.

The petitioner stated that, while anxious to discharge his liabilities to the arresters, he was yet unable to set apart from his weekly wages of 18s. or 19s. a sum to that end, as his wages were barely sufficient to secure the necessities of life for himself, his wife, and family. Further, that he was suffering great inconvenience and hardship from the use of these arrestments, as he was unable to employ and pay for two assistants, whom he was bound to employ in terms of his engagement with the Police Commissioners, and thus he might be driven, by the action of the arresters, to an infringement of his contract, and the consequent deprivation of such means of livelihood as he possessed. In these circumstances he averred that the use of the arrestments was unreasonable and oppressive, and the arrestments themselves were incompetent, and he prayed for their recall.

The respondents denied that the proceeds of the contract constituted the petitioner's sole income. They averred that besides receiving remuneration for lighting private lamps from residents, he had the whole day at his disposal for other employment, as his contract involved the discharge of no duties during the day, and any assistants he might employ were also then free to do any work they liked. They submitted that it was incompetent in a petition for recall to determine or affect their rights under the arrestments, and in any view, that the petitioner had not set forth relevant grounds showing them to be incompetent or stated circumstances instructing that their use was unreasonable and oppressive.

Argued for the petitioner—The arrestments were not competent under the Wages Arrestment Limitation (Scotland) Act 1870. The Court was in a position to say that they should never have been used at all—*Vincent v. Lindsay*, November 2, 1877, 5 R. 43; *Dick, Petitioner*, December 24, 1887, ante p. 281.

Argued for the respondents—The petitioner's income was larger than he admitted. He was in the position of a contractor, and was not a workman in the sense of the Act. This was an arrestment in execution following upon a decree, and there was no authority for the Court interfering—*Ersine*, iii. 6, 12.

At advising—

LORD PRESIDENT—The question here is, whether the petitioner is within the first section of the Act, and to be within that section he must be a labourer or workman, for the other descriptions used by the Act do not apply to a man of his class of occupation. If he is a labourer or workman, then he is within the statute. The only other question is, whether his wages are under 20s. per week. It is clear that as regards what

may be called the summer months, from April to August, that the petitioner is the labourer or servant of the Police Commissioners, and receives 18s. per week. So that as far as the first part of the year is concerned there is no doubt. The only question remaining is whether for the other eight months of the year he changes this character of labourer for that of a contractor. I think there is not enough in the agreement to effect this change. No doubt during the latter period he is allowed £2, 4s. a-week, but out of that he has to pay for two assistants, and in practice it just amounts to this, that he makes during these eight months 19s. instead of 18s. I do not think there is enough difference between his payment in one part of the year and the other to take the case out of the statute.

LORD MURE concurred.

LORD ADAM—I observe that in the petition the petitioner is called a lamplighter, and he seems to be properly designed. He is therefore a labourer or workman. The substance of the agreement is that three men shall be employed to do this work, and the petitioner is one of them; and that being so, the law says that his wages under a certain amount must be regarded as alimentary and not attachable. That is the position of the petitioner. His wages seem clearly to be 18s. in summer and £2, 4s. in winter, but the latter sum is so much reduced by what he pays his assistants under his agreement that we must take him as making 19s. per week during this part of the year. Thus his wages are not arrestable.

LORD SHAND was absent from illness.

The Court granted the prayer of the petition and recalled the arrestments.

Counsel for the Petitioner—Lyell. Agents—Smith & Mason, W.S.

Counsel for the Respondents—Forsyth. Agents—Parties.

Tuesday, February 7.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.]

SPENCE v. BOYD AND OTHERS.

*Trust—Breach of Trust—Agreement—Homologation—Bar.*

By antenuptial contract of marriage a wife conveyed to trustees her whole estate for her life use alienarily, exclusive of the *jus mariti*, and for the life use of her husband if he survived her. The fee was to go to the children of the marriage. There was no conveyance of any property by the husband, but he became bound to effect an insurance upon his life, the policy being taken in name of the trustees, and to pay the premiums as they fell due. The proceeds of the policy were to be held for his widow in life use, and the children of the marriage in fee. It was provided by the marriage-contract that in the event of the trustees finding it necessary at any time to

pay the premiums, then the husband should be bound to repay to them the amount so expended. There was a power to the trustees to advance to the husband out of the wife's funds a sum equal to the amount of the policy of insurance, and this was done. Shortly thereafter the husband became bankrupt, and in order to prevent the policy lapsing, the trustees paid the premiums out of the income of the wife's estate. This they did from 1865 until 1877. The wife acquiesced, upon the statement of one of the trustees, who was a law-agent, that it was within the powers conferred upon the trustees by the marriage-contract. In 1875 the wife first consulted an independent law-agent, who suggested that there might be a question raised as to these payments. In 1878 she intimated to the trustee above referred to, who was then the only one surviving, that she could not sanction any further premiums being paid out of her income. A correspondence followed between the wife's legal adviser and the firm of law-agents of which the trustee was a partner, the result of which was that the wife wrote a holograph letter to the trustee in 1878, in which her husband concurred, authorising him to sell the policy, and retain the proceeds as forming part of the trust funds under his management, and undertaking to grant a deed of exoneration, if required, in respect of the sale. The policy was sold, and the proceeds added to the capital of the trust. In 1887 the spouses raised an action against the trustee for the amount of the premiums paid between 1865 and 1877 out of the interest of the wife's estate.

*Held* that the pursuers were barred by the arrangement under which the policy was sold from insisting in their claim.

Miss Mary Munro and Andrew Spence were married on 21st October 1862. An antenuptial contract of marriage was executed by them of the same date. There was an obligation in it by the husband to pay his wife, in the event of her survivance, a free yearly annuity of £100, but there was no conveyance of any property by him to the trustees. By the fourth clause of the contract Mr Spence bound and obliged himself, within three months from the date of the contract, to effect an insurance upon his life with the Colonial Life Assurance Company, for £600, in name of the marriage-contract trustees; "and the said A. Spence hereby binds and obliges himself and his foresaids to make payment to the said Assurance Company, regularly as the same falls due, of the sum of £13, 13s. 6d. as the annual premium on the said policy, or of such other sum as may annually be necessary for keeping the same in force, and to report to the said trustees the receipt thereof, and in the event of the said trustees finding it necessary at any time to advance and pay to the said Life Assurance Company any sum or sums on account of the said premium, the said A. Spence binds and obliges himself and his foresaids to make payment to them or their foresaids of each sum as the same may be instructed by the company's receipts therefor, with interest of such sum or sums at the rate of five per centum from the time at which the same falls due and till payment,