Thursday, July 3.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PENNEY (SAWERS' FACTOR) *v.* SAWERS AND OTHERS.

Process — Reclaiming-Note — Failure to Print.

Circumstances in which a reclaiming-note was *refused* in respect that the reclaimer had not printed and put before the Court the materials requisite for the determination of the case.

In an action of multiplepoinding raised in the Court of Session by Joseph Campbell Penney, C.A. (judicial factor on the estate of the late Peter Sawers), against James Sawers and others, the Lord Ordinary (M'Laren) pronounced an interlocutor on 17th July 1889, ranking and preferring James Sawers, New South Wales, and Thomas Dodds, solicitor, Bathgate, his mandatory, to the balance of the fund *in medio.*

John Sawers, another claimant, reclaimed, and the case appeared in the Single Bills on 22nd October and was sent to the roll.

The case came on for hearing upon 24th June, when the reclaimer craved the indulgence of the Court in respect of a change of agency, and asked for ten days' delay to enable him to print the documentary evidence.

On the 3rd of July the case was again put out for hearing and the reclaimer craved the further indulgence of the Court, and asked for additional delay to enable him to complete the printing of the evidence, a very small portion of which only was ready.

Counsel for the respondents objected to further delay, alleging that the motion was in pursuance of a policy of obstruction which the reclaimer had been carrying on for some time to delay the decision of the case—*Muir* v. *Mackenzie,* October 15, 1881, 9 R. 10.

At advising—

LORD PRESIDENT—I am of opinion that we must refuse this reclaiming-note in respect that the reclaimer has failed to avail himself of the indulgence which we gave him in delaying the case from the 24th June to the 3rd July in order to enable him to complete the printing of the proof and documents.

I am quite aware that there is no statute or Act of Sederunt requiring that the reclaiming-note should be accompanied by a print of the proof or of the documents to be founded on; but I quite adhere to an observation which I am reported to have made in the case cited, in which, concurring with Lord Deas, I observed that if a reclaimer or appellant, as the case may be, fails to put before the Court the proof or document necessary for the understanding of the case, in print, when the case comes on for hearing in the course of the roll, the reclaiming-note or appeal, as the case may be, should be dismissed.

With the circumstances of this case we are not of course acquainted except in the most cursory way, but I think that we have seen enough of it to enable us to form a pretty clear conjecture that the reclaimer's object has been delay. I am therefore for refusing the reclaiming-note in respect that the reclaimer has not printed and put before the Court the materials requisite to enable them to decide the case.

LORD SHAND—The proof in this case was taken and avizandum made on 13th June 1889, and the interlocutor reclaimed against was pronounced upon 17th July following, so that there has been nearly a year during which the prints might have been put in.

For my own part, I think it is an extremely loose practice which has crept in of late years of parties simply printing a reclaiming-note prefixing the Lord Ordinary's interlocutor without in many cases adding the opinion of the Lord Ordinary, and giving neither the proof nor any of the documents required, and only putting them in two or three days before the case comes on for hearing. I think the practice of former times, of boxing the necessary prints along with the reclaiming-note, was much more satisfactory. In the present case, in justice to the respondent, I think that the reclaiming-note should be refused.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I think that we should not put out cases in our weekly roll unless the necessary prints have been previously lodged. When that has not been done it would then be open to the respondent to move for decree.

One is always unwilling to grant decree by default, but I am satisfied in this case that the reclaimer has had ample indulgence, and that we are doing no injustice by refusing this reclaiming-note.

The Court refused the reclaiming-note.

Counsel for Reclaimer—Rhind. Agent—Andrew Gentle, L.A.

Counsel for Respondents James Sawers and Mandatory—Shaw—Gunn. Agents—R. R. Simpson & Lawson, S.S.C.

Thursday, July 3.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

ROWAT AND OTHERS (SMITH'S TRUSTEES) *v.* D. & J. CHALMERS AND OTHERS.

Process — Maills and Duties — Right in Security — Debtor in Occupation of Security-Subjects.

A heritable creditor obtained decree in an action of maills and duties to recover the unpaid interest due on his bond. It appeared from a proof that

the premises were occupied either by the principal debtor, who was called as a defender, or by a firm of which his sons were members. The latter were not called as defenders.

Held that an action of maills and duties was only operative against a rent-producing subject, that the pursuers were not heritable creditors in possession of the subjects, and an action of sequestration for rent, proceeding on the decree of maills and duties *dismissed.*

This was an action of sequestration for rent founded upon a decree of maills and duties obtained by the holders of bonds and dispositions in security over property belonging to their debtor in the North Back of Canongate, Edinburgh.

This action was raised in the following circumstances—Joseph Rowat, inspector of branches, Royal Bank of Scotland, Edinburgh, and others, trustees of the late Gilbert Innes Smith, were the holders of two bonds granted by David Chalmers senior over the subjects possessed by him at No. 6 North Back of Canongate, Edinburgh.

The interest on the bonds having fallen into arrears, Smith's trustees entered into possession of the security subjects under a decree of maills and duties, dated 21st November 1882. In this action David Chalmers senior was called as principal debtor, as also the trustee upon his sequestrated estate.

After Smith's trustees had entered into possession of the subjects they came to an arrangement with David Chalmers junior, a son of the debtor in the bond, and the sole partner of the firm of D. & J. Chalmers, whereby it was arranged that he should collect the rents of the various properties mentioned in the bond, and pay them over to the agent for Smith's trustees. The Messrs Chalmers continued to occupy the premises from 1882 down to the date of the present action. The decree of maills and duties did not include the names of the firm of D. & J. Chalmers.

Smith's trustees raised the present action of sequestration for two half-years' rent in the Sheriff Court at Edinburgh, and averred that as David Chalmers junior did not carry out satisfactorily their arrangement with him they had terminated it prior to Whitsunday 1888, and engaged another collector. They also alleged that the firm of D. & J. Chalmers and David Chalmers senior had agreed to pay them rent for the premises in question at the rate of £40 per annum, and that sum now sued for was one year's rent at that rate, less £5 paid to account.

The defenders (D. & J. Chalmers and David Chalmers senior) averred that D. & J. Chalmers had been in possession of the subjects 6 North Back of Canongate since 31st August 1882, in virtue of a lease for nineteen years, entered into between D. & J. Chalmers & Company, and David Chalmers senior, and dated Martinmas 1882.

On 26th July 1889 the Sheriff-Substitute (RUTHERFURD) granted warrant to sell as much of the sequestrated effects as could pay the pursuers £35, with interest and expenses; and to this interlocutor the Sheriff (CRICHTON) on 9th August 1889 adhered.

The defenders appealed to the Court of Session.

After hearing parties on the question of the regularity of the proceedings in the action of maills and duties, their Lordships of the First Division upon 9th November 1889 remitted the case to the Sheriff Court for proof, which was taken. The evidence was conflicting, but it appeared that at the date of the action of maills and duties the security-subjects, or at least part of them, were occupied by David Chalmers senior, or that they were let to the firm of D. & J. Chalmers, who had not been called as defenders.

On 31st January 1890 the Sheriff-Substitute (RUTHERFURD), after making various findings in fact, dismissed the action.

To this interlocutor the Sheriff, on 15th March 1890, adhered.

The pursuers appealed to the Court of Session, and argued—The real party in possession of this subject at the date of the decree of maills and duties was D. Chalmers senior's trustee, and he was properly called. Chalmers' position was that of a mere squatter; he was called also for any interest he might have. If a pursuer of maills and duties calls all the tenants in possession at the date of his action, and obtains his decree, it holds even against tenants coming into possession subsequent to the decree—Ersk. iv. 1, 49. In the present case possession by the firm did not follow under this lease until after the signetting of the summons of maills and duties, and the decree in the action of maills and duties was sufficient to entitle the pursuers to sequestrate for rent.

Authorities—*Blair* v. *Galloway*, December 21, 1853, 16 D. 291; *Shaw* v. *Black*, January 15, 1889, 16 R. 336; *Robertson's Trustees* v. *Gardner*, May 31, 1889, 16 R. 705.

Argued for the respondent—An action of maills and duties will give a creditor no right against a proprietor who is in possession of his own premises, because it is only against a rent-producing subject that a creditor can have an action of maills and duties. As D. Chalmers senior was in possession of the subjects at the date of the action of maills and duties, the decree in it could not in any way avail the creditors. If it were held that the firm were in possession at the date of the decree their rights could not be affected, as they were not called in the action.

Authorities—Cases cited *supra.*

At advising—

LORD PRESIDENT—I take a very simple view of this case. I think that if at the time when the action of maills and duties was raised, David Chalmers senior was in occupation of the premises No. 6 North Back of Canongate, the decree could not put the creditors in possession of anything connected with that subject, for he was the proprietor of the subjects, and an action of

maills and duties will give a creditor no right against a proprietor who is in possession of part of his own premises. If the proprietor was in possession of the whole estate, it is evident that there could be no such action, and the same principle must apply if he is in possession of only a part of it. In so far as that part of the estate is concerned it is not a rent-producing subject, but it is only against such a subject that creditors can have an action of maills and duties. But on the other hand, if there was a lease, and if Chalmers' sons were in possession under it, it is impossible that their rights could be affected, for they were not called in the action of maills and duties.

It is quite unnecessary to go into the questions as to the reality of their possession, or of the validity of the disposition by a father to his family which have been raised. All that is out of the case.

The whole question is, whether the pursuers are creditors in possession of the subjects No. 6 North Back of the Canongate. I think they are not.

LORD SHAND concurred.

LORD ADAM—It seems to me that the appellants are on the horns of a dilemma. The action of maills and duties may be regarded in either of two lights. Either David Chalmers, the father, was in possession of the subjects when it was executed, or his sons were. If the assumption be that his sons were in possession, it is certain that the decree was not pronounced against them, for they were not called, and the case falls within the principle of *Robertson's* case.

If an action of maills and duties is not served on the tenants in possession of the subjects the action must fail. But the pursuers must equally fail on the other alternative. That depends upon whether we are to regard David Chalmers as being in possession as proprietor of the subjects. It was said that his trustee in bankruptcy was in possession of the subjects. That is not so. The trustee never interfered with him; he allowed him to continue in possession, and he was in possession as proprietor when the proceedings were begun. If that is so, the decree of maills and duties can be of no avail as regards this part of the subjects, for it was not a rent-producing subject, and the heritable creditor has not entered into possession of it as such. It is impossible to allow the creditor to say to the occupant, "It may be that no rent is being paid, but I shall show what the rent should be." There can be no inquiry to show anything of the kind. The rent is all that can be recovered in such a process; it is either to be ascertained from the lease, or, in the case of a verbal lease, by proof of its terms otherwise. But in any case all that he recovered is the rent.

LORD M'LAREN—It has been overlooked by the pursuers that an action of maills and duties is a kind of diligence which is not competent to creditors in general, and not even to heritable creditors in all circumstances. The proper mode of enforcing a real burden is by a poinding of the ground or by adjudication. But heritable creditors, who hold an assignation of the rents of the security-subject along with a disposition of the property, must have some way of making that right effectual, and the way is by an action of maills and duties, which is nothing more than an action for rents, in which all the tenants are called collectively in one proceeding, and the principal debtor is called in order that the tenants may be in safety to pay—that is, that they may be assured that the debtor is not going to dispute his assignation of the rents. If that be so, an action of maills and duties is evidently inappropriate for the recovery of either principal or interest out of a property of which the proprietor himself is in possession, for then there is no rent to be attached. The creditor has, of course, other remedies available to him in such a case, such as a poinding of the ground and adjudication, and he has also a power of sale.

I agree with your Lordship in thinking that it is not necessary in this case to go further than to find that this diligence is inappropriate in the case of a proprietor who is in personal occupation of the subjects in question. I take that to be the fact, for it is plain that the lease to the members of his family by David Chalmers senior could not stand for a moment if it was questioned by creditors.

The Court pronounced the following interlocutor:—

"Find as matter of fact that the pursuers are not heritable creditors in possession of the subjects No. 6 North Back of Canongate referred to in the prayer of the petition: Therefore adhere to the interlocutors of the Sheriff-Substitute and of the Sheriff, dated 31st January and 13th March 1890 respectively, in so far as they dismiss the action and find thepur suers liable to the defenders in expenses: *Quoad ultra* recal said interlocutor, assoilzie the defenders from the first and second conclusions of the petition, and decern," &c.

Counsel for the Pursuers—Shaw—Clyde. Agent—Thomas White, S.S.C.

Counsel for the Defenders—Jameson—Crole. Agent—Edward Nish, Solicitor.