

of which is under their management and control, if there were such a company,—in order to obtain proper facilities for the working of that traffic. I would be disposed to hold, if it were necessary for the decision of the case, that the joint-committee are within the meaning of the authoritative branch of section 3 of the statute persons "working the railway," and under section 11 having "traffic to be forwarded."

But while I think so, I again say, that assuming that power to be in the joint-committee, it does not in my opinion in the least degree exclude the right of the owners of the railway—the Wemyss Bay Company—who have an interest in the profits derived from the traffic, to come forward and make this application.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—  
Lord Advocate (Watson)—Kinneir—Johnstone.  
Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders—Balfour—Asher—  
Moncreiff. Agent—John Carment, S.S.C.

Tuesday, July 9.

## FIRST DIVISION.

[Sheriff of Banffshire.

STEUART v. LEDINGHAM AND OTHERS.

*Lease—Landlord's Hypothec—Assignment—Act 30 and 31 Vict. c. 42 (Hypothec Amendment (Scotland) Act 1867), sec. 5.*

Where a landlord, in the exercise of his right of hypothec under the Act 30 and 31 Vict. c. 42, had sequestered cattle belonging to a sub-tenant, who had taken a grass park on lease from the tenant, held that the sub-tenant was not entitled to demand from the landlord an assignation of his right of hypothec upon consigning the amount of the rent unless he could show that such assignation would not operate any prejudice to the landlord.

This was a petition brought in the Sheriff Court of Banffshire in August 1873 by Mr Stuart of Auchlunkart, praying for sequestration of the bestial and horses belonging to Alexander Ledingham, his tenant in the farm of Netherton, and others, to whom Ledingham had granted a sub-lease of the grazing on his farm, in security of the sum of £63, 4s. 5d., being the half-yearly rent of the farm due at Martinmas following. The petition set forth section 5 of the Hypothec Amendment (Scotland) Act 1867, which was as follows:—  
"In the event of the tenant or lessee of any farm or lands having received, and taken thereon to be grazed or fed, any sheep, cattle, or other livestock belonging to any other person, and having agreed with the owner of the same for a *bona fide* payment equal to the just value of such grazing or feeding, such sheep, cattle, or other stock shall be liable to the hypothec of the landlord, lessor, or person entitled to the rent of the farm or lands to the extent of the amount of such payment, and no further: Provided always that so long as any portion of such sheep, cattle, or other live stock shall remain on the farm or lands, the hypothec over such portion shall continue to the full extent of the payment originally agreed upon for the

grazing or feeding of the whole of such sheep, cattle, or other live stock, and that in the event of the removal of the sheep, cattle, or other live stock, or any portion thereof, from the farm or lands, the right of hypothec shall, so long as the payment or any part thereof shall remain unpaid, continue to apply to such sheep, cattle, or other live stock to the extent of the amount of the payment or such part thereof as shall be unpaid." It was further averred that Ledingham was to some extent in arrear of his previous year's rent. The cattle were sequestered, but the sequestration was afterwards withdrawn from some of the animals, and the sub-tenants, under an arrangement, eventually consigned in Court the amount of their rents.

It appeared that when they took the parks the sub-tenants had, according to practice in such cases, granted bills for the rents respectively payable by them to the tenant, and one of their pleas, which was given effect to by Sheriff-Substitute (GORDON) and Sheriff (BELL), was as follows:—"The respondents being entitled to the benefit of the petitioner's hypothec as the correlative of paying the rent, the petitioner is only entitled to the said sums on assigning to them said right, or otherwise securing them therein, in terms of the arrangement by the parties." It is unnecessary to refer to the nature of these arrangements.

The petitioner appealed, and argued that he could not be compelled to assign his hypothec unless it could be shown that such an assignation would not prejudice his interests. Now, there was due to him not merely the half-year's rent which was payable at Martinmas, but the tenant was in arrear, and he was entitled besides to exercise his right for the ensuing half-year's, due at Whitsunday—*Graham v. Gordon*, March 9, 1842, 4 D. 903.

The respondents argued that on the broad principle that a surety paying for a debtor was entitled to an assignation of the creditor's right, they were entitled here to an assignation—*Bell's Comm. ii. 523* (M'Laren's ed. 417).

At advising—

LORD PRESIDENT—This sequestration was applied for on 20th August 1873, and the statement was that the rent of the farm was £126, 8s. 10d. for crop and year 1873—one-half of that being due at Martinmas 1873, the other at Whitsunday 1874. Now the landlord was quite entitled to use his hypothec for the half-year due at Martinmas following, and that was the extent to which in his petition he proposed to go. In exercising his right he attached not only the stock of the tenant but also the cattle belonging to certain graziers to whom the tenant had let the grazings on some of the parks of the farm, and these graziers have consigned the amount of their sub-rents, if one may so speak. The question is whether the landlord is entitled to receive those sub-rents without being liable to a demand for assignation of his right of hypothec over the principal tenant's stock.

The Sheriff-Substitute and the Sheriff occupied fifteen months in preparing a record, and five years in deciding the case. They have now decided that the landlord is bound to grant an assignation.

If the case were a pure one under the Act of Parliament, and if it could be shown by the sub-tenants that the landlord would suffer no prejudice

by granting an assignation, a question of a somewhat delicate nature would arise—a question namely, Whether, if a sub-tenant chooses to pay his rent before it is due, and has been made to pay twice over, he can demand from the landlord an assignation such as this? I think it extremely doubtful that he could make this demand, seeing that he has placed himself in this position by his own imprudence—I say by his own imprudence, because he has in the statute a distinct warning of the risk to which he made himself liable.

But I rather think it is unnecessary to decide this question, because the landlord has shown that he would be prejudiced. His hypothec was available for the rent of 1873, the second half of which was not payable till Whitsunday 1874, and he would have had an opportunity of sequestrating the principal tenant's stock over again for the second half-year. And that is a sufficient answer, because no right can be granted in equity which is not entirely without prejudice to the person granting it. I am therefore for recalling the Sheriff's interlocutor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court pronounced the following interlocutor:—

“Recal the interlocutor of the Sheriff-Substitute of 27th February 1875, and all the subsequent interlocutors: Grant warrant to the appellant to uplift the consigned money mentioned in the interlocutor of the Sheriff-Substitute of 2d September 1873, without granting any assignation of the sequestration or of his right of hypothec: *Quoad ultra* dismiss the sequestration, and decern: Find the appellant entitled to expenses both in the Inferior Court and in this Court; Allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for the Petitioner (Appellant)—R. V. Campbell. Agent—George Andrew, S.S.C.

Counsel for Respondent—Asher—Moncreiff. Agent—A. Morison, S.S.C.

Wednesday, July 10.

## SECOND DIVISION.

[Lord Young, Ordinary.]

### MACKENZIE v. MACKENZIE'S TRUSTEES.

*Trust—Revocation of a Trust-Deed Executed by a Lady before Marriage—Equitable Powers of the Court.*

A lady having, eight days previous to marriage, but (in the opinion of the majority of the Court) not in view thereof, executed a trust-deed dealing with funds over which she had absolute control, by which the income of her estate was to go to herself and the fee to her children if she had any, and any husband she might marry was strictly excluded from both interest and principal, afterwards upon her marriage, and previous to the birth of any child, desired to execute a renunciation of the trust to the extent of making a provision for her husband. She brought an

action (in which her husband sued along with her) against the trustees for declarator (1) that the deed of trust was revocable, or (2) that notwithstanding of that deed she was entitled “to execute a reasonable postnuptial contract” making provision for her husband. A child was subsequently born of the marriage.

The Court (after a report by a curator *ad litem* to the pursuer approving of the course desired) (*dub.* Lord Gifford) gave effect to the second conclusion of the summons, the deed having been when executed perfectly gratuitous, and no *jus crediti* having in their opinion been created in anyone.

*Opinion (per Lord Justice-Clerk)*, in the view of the fact that the deed partook of the nature of a voluntary interdiction rather than of any other, that the prior birth of a child would not have barred revocation; and (2) that if the deed were truly irrevocable, there would have been no propriety or expediency in the Court interfering with it upon a subsequent marriage.

*Opinion (per Lord Gifford)* (1) that the deed, judging from the facts of the case, must be held to have been executed *intuitu matrimonii*, and that upon marriage it became irrevocable; and (2) that it was inexpedient for the Court to interfere to the effect of sanctioning the proposed postnuptial deed.

By his trust-disposition Mr Thomas Shepherd, who died in 1858, *inter alia* directed his trustees to divide the free residue of his estate among his children, and to pay over the shares to them on their respectively reaching twenty-one years of age. Mrs Mackenzie, the pursuer of this action, was a daughter of Mr Shepherd's, and attained majority on 27th January 1874, and her share of her father's estate, amounting to £21,145, was thereupon or shortly thereafter paid over to her. She was then unmarried. There was a provision in Mr Shepherd's trust-deed that the shares falling to his daughters were granted by him in their favour to the entire exclusion of the *jus mariti* of any husbands they might marry, but should be to his daughters an alimentary fund, and not affectable by their husbands' debts or deeds; and further, that all deeds granted by his daughters alone without their husbands' consent should be held sufficient.

After the pursuer's share had been paid over to her she lived more extravagantly than was prudent, the result being that within two years and a-half after she came of age she had spent, besides the interest of her money, a considerable part of the capital. In consequence of this, and acting upon the advice of her friends and her agents Messrs Leburn, Henderson, & Wilson, she on 5th September 1876 executed a trust-deed for the management of her affairs, the trustees under which were her brother Mr Thomas A. Shepherd and Mr Charles Henderson, S.S.C., her agent. These gentlemen were the defenders in the present action. By this trust-deed the pursuer assigned and disposed to the defenders as trustees, and to such other persons as might be assumed to act, heritable and irredeemably all her heritable and moveable estate, the trustees having under the deed all the powers, &c., granted by Act of Parliament, and also full powers of investment, &c. The purposes for which