

£4000 loan. Of the balance of that loan he obtained payment at once of £1550, and the remainder (£2101) was carried to his credit in a suspense account, to be paid by instalments on the certificate of the company's inspectors as the buildings (which were not at the date completed) on his ground progressed. On the same day (the 22d February 1878) M'Kay authorised the society to place the above-mentioned sum of £2101 to Martin's credit, and to accept Martin's receipt for payment of instalments therefrom as sufficient. The society agreed to do so, and accordingly Martin granted receipts for the instalments of the loan, and otherwise acted as true obligant in the bond. The interest due thereon to the society at Whitsunday and Martinmas 1878 was paid by being deducted from the amount thereof in the suspense account, and in the same way were deducted the instalments or subscriptions due on M'Kay's shares at 30th November 1878, viz., £134. That sum, however, just as the sum of £138 deducted on 22d February, was placed to M'Kay's credit in the company's ledger. These two sums, which, under certain small deductions regarding which no controversy arose, constituted the fund *in medio*, were on 29th January 1879 arrested by Hugh Wilson on the dependence of an action in the Court of Session against M'Kay. Martin subsequently paid up the whole loan to the building society without receiving credit (which he claimed to be entitled to) for the two sums in question. He now claimed the whole fund *in medio*.

On 13th February 1880 the Sheriff-Substitute (LEES) pronounced the following interlocutor:—
“ Finds that William M'Kay, builder, Glasgow, having become a shareholder of the pursuers' society in order to obtain a loan of money, granted to them a disposition in security over certain heritable subjects owned by him in Hillhead, and *simul ac semel* granted (1) a disposition of the same subjects to the claimant Martin, who had become personally bound along with him for repayment of the loan, and (2) an order to the society to hold the balance of the loan at Martin's credit and subject to his control: Finds that the whole of the money paid to the society in connection with said loan was paid by Martin, and that he was dealt with by the society as the true grantee thereof: Finds that the fund *in medio* consists of two sums deducted from the loan, and falls to be viewed as money paid by Martin, and therefore repayable to him: Finds that in these circumstances the arrestments used by the claimant Wilson of any funds in the pursuers' hands belonging to M'Kay could not validly attach the fund *in medio*, seeing that at no time was M'Kay a creditor of the society under the transactions that took place in regard to the loan or to his acquisition of shares in the society: Therefore repels the claim of the party Wilson; ranks and prefers the claimant Martin for payment to him by the nominal raisers of the whole fund *in medio*; finds them liable in only once and single payment thereof; and on payment as aforesaid, or consignment with the Clerk of Court, exonerates and discharges them of their whole actings and intrusions had with said fund, and decerns: Finds the party Wilson liable to the party Martin in payment of his expenses so far as due to the unsuccessful opposition of his claim,” &c.

To this interlocutor the Sheriff (CLARK) adhered on appeal.

The claimant Wilson appealed to the Court of Session, and argued—The effect of the transactions which took place on the 22d February 1878 was to make Martin absolute proprietor of the property and true obligant in the bond: And in that position of matters he should, under the rules of the society, have taken a transfer of the shares, but not having done so, and having to serve his own purposes left them in the hands of M'Kay, the subscriptions paid to account of these became arrestable by M'Kay's creditors, who were ignorant of their true ownership. Martin's claim here was, assuming him to be true owner of the shares, simply a personal claim for repayment by M'Kay, and could not stand against Wilson's arrestment. It was impossible to contend that there were here in reality no funds to arrest at the date when the arrestments were used, inasmuch as M'Kay was a shareholder of the society entitled to participate in profits and liable for losses to the extent of his holding. He was therefore the society's creditor to the extent of the subscriptions standing at his credit in their books, Martin being the true debtor and the society having by their actings recognised him as such; the instalments of the loan paid to him could not in a question with M'Kay's creditors be deducted from or set against the amount of the subscriptions paid upon the shares.

Authorities—Bell's Com. i. 269-71; *Redfearn v. Somerville*, 5 Pat. Ap. 707; *Burns v. Lawrie's Trustees*, 2 D. 1348; *Hunter v. City of Glasgow Bank*, 6 R. 728.

Argued for Martin—There was here really nothing to arrest. At the date of Wilson's arrestment M'Kay's indebtedness to the society in respect of instalments paid to account of the loan much exceeded the amount at his credit to account of subscriptions on shares. Setting the one against the other, at the date of the arrestment the result was, so far from M'Kay being a creditor of the society, it was in a much greater degree his creditor.

The Court adhered to the Sheriff's interlocutor on the ground that at the date of the arrestments used by Wilson there were in reality no funds standing at M'Kay's credit in the books of the society, and that therefore nothing had been attached.

Counsel for Wilson—Ure. Agent—J. Gillon Fergusson, W.S.

Counsel for Martin—Guthrie Smith—Jameson. Agent—Knight Watson, L.A.

Wednesday, July 6.

FIRST DIVISION.

MACPHERSON *v.* CALEDONIAN RAILWAY COMPANY.

Process—Jury Trial—Change in Place of Trial.

This was an action of damages for injury sustained in an accident at Pennilee, on the Glasgow and Paisley joint line, partly owned by the defenders. The defenders admitted liability,

but contended that the damages claimed were excessive. The pursuer, passing over the ensuing sittings, had given notice of trial for the Glasgow Autumn Circuit. The defenders now moved to have the trial fixed to take place at Edinburgh, either at the sittings or before one of the Lords Ordinary. They argued that as the question related to the amount of damages, it depended entirely on the evidence of a few skilled witnesses, and would therefore be much more cheaply tried in Edinburgh, for the other expenses were necessarily higher when the trial took place away from Edinburgh. In a recent case arising out of the same accident the Auditor had allowed an addition of one-third to counsel's fees. Further, there were so many season ticket-holders who travelled daily by the line on which the accident took place that it was almost impossible to get an impartial jury at Glasgow. In the former case a gentleman who was claiming damages for this very accident had served on the jury. The pursuer contended that no sufficient reason had been shown for interfering with his right. All the witnesses belonged to Glasgow, so that the expense would be less by having the trial there. The fact of being a season ticket-holder was no objection to a juror, and as regards the juror who was himself asking for damages the defenders ought to have objected to him.

The Court refused the motion.

Counsel for Pursuer—Shaw. Agents—Cumming & Duff, W.S.

Counsel for Defenders—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Thursday, July 7.

FIRST DIVISION.

[Dean of Guild, Edinburgh.]

PITMAN AND OTHERS *v.* SANDFORD AND OTHERS (BURNETT'S TRUSTEES) AND OTHERS.

Jurisdiction—Dean of Guild—Competition of Heritable Rights.

In order to raise a competition of heritable right sufficient to exclude the jurisdiction of the Dean of Guild it is essential that the averments should, *ex facie* of the record, set forth a good title of property in the one party or the other to the subjects in question. *Averments* which were held not sufficient to exclude the jurisdiction of the Dean of Guild.

The Scottish Conservative Club proposed to build a new club-house on the site of their existing house, which formed Nos. 112, 113, and 114 Princes Street, Edinburgh, and they presented a petition to the Dean of Guild for the necessary authority. The several proprietors on the west side, viz., of Nos. 115, 116, and 117 Princes Street, and of Nos. 1, 7, 9, and 13 Castle Street—which intersects Princes Street at right angles at this point—objected to the proposed plan on, *inter alia*, the following ground:—Behind Princes Street and parallel with it was Rose Street, and between Princes Street and Rose Street and

parallel with both was Rose Street Meuse Lane. At the west end of Rose Street Meuse Lane was a short passage a few feet wide leading southwards towards Princes Street, and consequently parallel with Castle Street. This passage was bounded on the west side by the walls of the Castle Street back-greens, and on the east by the western wall of the back-green of No. 114 Princes Street (the petitioners' property). From the petitioners' property there was at the date of the petition no direct mode of communication with this passage, but, as the respondents averred—“The plans lodged by the petitioners shew drains, conductor, pipes, two sunk areas, and a back door in the said private lane or passage leading southwards from Rose Street Lane, on the west of the petitioners' property. The external size of the respective areas is 7 feet 6 inches long by 3 feet wide, and 5 feet long by 2 feet 6 inches wide or thereby, and they are stated to be covered with iron gratings, while the back door leading into the said private lane or passage is 4 feet wide or thereby. It is proposed to excavate said areas out of the *solum* of said lane, in which the petitioners have no right either of property or entry as already averred. Further, the said plans show considerable encroachments of the petitioners under walls, foundation and concrete, upon the said private lane or passage, which are projected beyond the western boundary of the petitioners' property. The petitioners' proposed uses of the said private lane or passage are in gross violation of the respondents' interests and right of property and use in the same as already narrated. The petitioners have not, nor have they or their authors or the public ever had, any right of entry to the said private lane or interest in the *solum* thereof.” The petitioners substantially admitted the proposed changes, but denied that the respondents had any title to object.

The property No. 114 Princes Street, which is the westmost of petitioners' properties—that adjoining the passage in question—was described in the disposition by Robert Burn in favour of Adam de Cardonnel, Esq., of the Customs, Edinburgh, dated 31st day of December 1787, as “All and Whole that house in Princes Street, consisting of a sunk storey and the two storeys immediately above the same; together also with the whole of the back ground or area lying immediately north of the house hereby sold, as also the two cellars under the pavement in front of the said house, and communication with the common sewers; which subjects are bounded as follows, viz., on the east by the other house built by me, and now sold to John Clerk, Esq., of Eldin, on the west by part of the ground feued to me by the Magistrates of Edinburgh, lying betwixt the said house and Castle Street, on the south by Princes Street, and on the north by the meuse lane; lying within the parish of St Andrews, royalty and sheriffdom of Edinburgh; which subjects above disposed are built upon and are a part of that piece of ground contained and particularly described in the charter granted to me by the Magistrates and Town Council of Edinburgh, dated the 21st day of November last” (1787).

The petitioners averred—“The lane on the west of the petitioners' proposed buildings, and running from south to north, is part of the petitioners' property, and is included within their