

I therefore propose to remit to the arbiter named in the contract the claim and the defences which are set forth in the second, third, fourth, fifth, sixth, and seventh statements of fact. When we see the award we shall know how to dispose of the action.

LORD DEAS concurred.

LORD MURE—I am of the same opinion. I have no difficulty as regards the plea of no title to sue, because it depends upon the terms of the contract itself. The defenders come under certain obligations to the pursuers under the contract, and it is clear that the persons whom the defenders make creditors in the obligations are the proper persons to sue this action.

The other point is a little more difficult, and such clauses as we have here appear to come under our notice with greater frequency every year. In the present clause there appears to me to be no qualifying words; they are quite general, and seem to cover this claim.

LORD SHAND—In the ordinary case, even although a contract has been entered into, and made by an agent for a principal, the proceedings to enforce it fall to be taken by the principal, who must sue in his own name. But there is a specialty here upon the face of the contract. The plea upon the title to sue is met by the pursuers with the fact that the defenders have expressly undertaken to pay such liquidated or fixed damages as they may be found liable for to the pursuers themselves. That disposes of the first plea stated for the defenders.

In regard to the second plea, the case is distinguished from many previous authorities of the same class by the circumstance that there are no words to indicate that the disputes contemplated under the contract to be referred to the arbiter were disputes arising during the course of the work. The decisions of the Court have as a rule proceeded upon the view that disputes falling within clauses of submission were such as were concerned with the execution of the contract. In the present case the terms used are simple and comprehensive. The words used in *Mackay's* case were "matter, claim, or obligations" in connection with the works. Here the words used are the "rights of parties," and I think that those words are sufficiently comprehensive to include the disputes which have now arisen, and I therefore think the case should be remitted to the arbiter as your Lordship proposes.

The Court pronounced the following interlocutor:—

"The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for John & James Thomson against the interlocutor of Lord M'Laren of 19th June last, Adhere to the interlocutor in so far as it repels the first plea-in-law for the defenders: *Quoad ultra* recal the same: Find that the claims of the pursuers stated on the record, and the defences against that claim stated in the 2d, 3d, 4th, 5th, 6th, and 7th articles of the defenders' statement of facts, raise questions which fall within the arbitration clause in the contract libelled: To this

extent sustain the second plea-in-law for the defenders, and in respect the arbiter first named is now dead, remit to Mr H. R. Robson, engineer, Glasgow, the arbiter second named in the contract, to determine the said questions, and continue the cause till his decree-arbitral shall be lodged in process, and decern: Find no expenses due to or by either party since the date of the Lord Ordinary's interlocutor."

Counsel for Pursuers—Mackintosh—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Ure. Agents—Dundas & Wilson, C.S.

Tuesday, July 10.

FIRST DIVISION.

GARRETT AND ANOTHER, PETITIONERS.

Public Records—Delivery of Deed Recorded in Sheriff Court Books for Exhibition to Witness—Informality of Execution—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94), sec. 39.

The executors-nominate under a last will and testament recorded in the books of a Sheriff Court presented a petition under sec. 39 of the Conveyancing (Scotland) Act 1874, to set up the deed. The informality of execution was that the designation of the attesting witnesses was wanting. The petitioners moved the Court to grant warrant for the delivery of the deed to them for the purpose of exhibition to one of the witnesses resident in India. The Court granted the motion on the petitioners' finding caution for the return of the deed *quam primum*, an extract duly executed being previously lodged in its stead.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict., c. 94), sec. 39, provides—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

This was a petition under the provision just quoted presented by J. H. M. Garrett of Saintfield, County Down, Ireland, and another, executors-nominate under the last will and testament of the late Alexander Innes junior, of Cowie House, to set up the said deed. Mr Innes

died on 13th November 1882, leaving the said last will and testament dated 21st September 1881, and recorded in the Sheriff Court Books of the County of Kincardine 6th January 1883.

The petitioners stated—"The said last will and testament was executed in Scotland. It was not holograph of the deceased. In so far as the first witness, the petitioner Mr Garrett, is not designed except in the body of the deed, where he is nominated one of the executors, and there being nothing to show that the executor and the witness of the same name are the same person, and in so far as the second witness Captain Annesley Garrett is nowhere designed in the body of the deed, or in the testing clause thereof, the deed is informally executed in the sense of section 39 of the Conveyancing (Scotland) Act 1874. It is therefore necessary for the petitioners, under section 39 of the said statute, to present the present petition to have it declared that the said last will and testament was subscribed by the grantor or maker thereof, and by the witnesses by whom the said deed bears to be attested. The petitioner Mr Garrett, one of the witnesses, is correctly designed in the said deed. The other witness, Captain Annesley Garrett, Bengal Staff Corps, is Assistant Adjutant-General, Hydrabad Contingent, Bolarum, India."

The petitioners moved the Court to authorise the Sheriff-Clerk of Kincardineshire to deliver to the petitioners or their agents the said deed, for the purpose of exhibiting the same to Captain Garrett, the witness resident in India.

Authorities—*Duncan and Others, Petitioners*, July 14, 1842, 4 D. 1517; *Jolly, Petitioner*, June 25, 1864, 2 Macph. 1288; *M'Laren, &c., v. Menzies*, July 20, 1876, 3 R. 1151; *Inglis, Petitioner*, March 17, 1882, 9 R. 761; *Broune and Others, Petitioners*, Nov. 4, 1882, 20 S.L.R. 76.

The Court pronounced this interlocutor:—

"Grant commission to W. B. Jones, Esq., commissioner, H. M.I.C.S., Lieut-Col. J. G. Bell, judicial commissioner, Lieut-Col. J. T. Bushby, deputy commissioner, Major H. C. A. Lzezepanski, deputy commissioner, respectively, all of them being in Her Majesty's Indian Civil Service, and each of them in order failing the other, for examination in India, upon oath, of Captain Annesley Garrett, Bengal Staff Corps, Assistant Adjutant-General, Hydrabad Contingent, Bolarum, India, as a witness for the petitioners; and to Mr W. J. N. Liddall, Advocate, Edinburgh, for examination upon oath of James Hugh Moore Garrett of Saintfield, County Down, Ireland, one of the petitioners, also as a witness for the petitioners—the said depositions to be taken on written interrogatories adjusted in common form: And on the further motion of the petitioners, Grant warrant to and authorise the Sheriff-Clerk of Kincardineshire or his deputy to deliver to the agents in Edinburgh for the petitioners the last will and testament in the petition mentioned, dated 21st September 1881, and recorded in the Sheriff Court Books of the county of Kincardine of date 6th January 1883, that the same may be produced before the commissioners or commissioner aforesaid at the taking of the said depositions or deposition, the petitioners granting caution

in common form with sufficient security to the amount of £200 to return the said deed to the said Sheriff-Clerk or his deputy *quam primum*; and previously to the same being delivered to their agents, an extract of the same duly executed being lodged with the said Sheriff-Clerk: The depositions above mentioned to be sealed up by the commissioners or commissioner and transmitted in due course to the Clerk of this process, and to remain subject to the orders of the Court."

Counsel for Petitioners—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Wednesday, July 11.

FIRST DIVISION.

[Bill Chamber—Lord Kinnear.

(Before Seven Judges.)

BALERNO PAPER MILL COMPANY v.

MACKENZIE.

Diligence—Imprisonment for Debt—Order to Consign—Decree ad factum præstandum—Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), sec. 4.

An order of Court to consign a sum of money in the hands of the Clerk of Court is a decree *ad factum præstandum*, and the Debtors (Scotland) Act 1880 does not therefore affect the competency of imprisonment for failure to obtemper such an order.

The defender in an action admitted that he was bound to account to the pursuers for a sum of money in his hands, but maintained that he was entitled to retain it pending a full accounting. He was ordered by the Court to consign the money admittedly in his hands in the hands of the Clerk of Court. He failed to do so, and was imprisoned at the instance of the pursuers. *Held*, by a majority of seven Judges (*diss.* Lords Shand and Craig-hill), that the imprisonment was competent, and that he was not entitled to suspension of the warrant of imprisonment.

George Mackenzie, James Good, and John Thomas Tod Scoular were the partners of the Balerno Paper Mill Company. The copartnership was entered into in 1878. The partners made certain contributions to the capital stock of the company, and were to take certain shares of the profit and loss. Good being a paper-maker by trade took charge of the mill, Scoular kept the books, and Mackenzie acted as traveller. Disputes arose between the parties in the course of the years 1881 and 1882. Good and Scoular alleged that in October and November of that year Mackenzie had begun to retain moneys belonging to the copartnership which were collected by him, that the business was injured thereby, and that he refused to give an account of his intromissions. They brought an action of count and reckoning against him, making these averments, and averring also that he was preparing to leave his house and declined to say where he was going. They concluded, failing an account being produced, for a balance of £1500 as the amount of his intromissions. In defence to this action Mackenzie