

simple enough for each by his own separate act to burden his own share with a servitude or with any other liability which could be made effectual upon land. But *pro indiviso* proprietors are not part owners but joint owners; and since each and all of them are proprietors of each and every part of the subject held in common, it is impossible to impose a servitude upon their separate rights since they have no separate right, and just as impossible for one by his own separate act to impose a servitude upon the common property. The only way of creating a servitude on property held on these terms is by the whole proprietors combining and imposing a burden, not upon their rights *pro indiviso*, but upon the subject itself. That one *pro indiviso* proprietor out of a number should, by a conveyance of his own interest in the common property, create a servitude by contract with his disponent, either upon his own interest which he is giving away, or upon the common property, is, in my opinion, for the reasons your Lordship has given, a legal impossibility.

The conclusion I come to is, in the first place, that there was no separate and independent right of servitude vested in the proprietor of Mr Crombie's house over the common property, but merely a right of common property, and in the second place, that when he conveyed his whole right of property in the street and pleasure ground it was impossible for him to create over that subject a servitude in favour of his own house or in favour of any other dominant tenement. On the whole matter therefore I entirely concur with your Lordship.

LORD PEARSON—I concur.

The Court pronounced this interlocutor—

“Recal the said interlocutor in so far as it finds with respect to the objection of the defenders the Governors of Heriot's Trust, ‘that on the just construction of the said defenders' titles and of the disposition executed by their author John Crombie in favour of the Improvement Trustees, dated in May 1873, the defenders' said author retained, and the defenders as his successors still retain, not only as against the Improvement Trustees and the other defenders, but as against the pursuer and the other proprietors in Brown Square, a common interest equivalent to a servitude *non edificandi* sufficient to entitle them to prevent the bringing forward of the pursuer's houses or the other houses on the north side of the Square beyond the present line of the sunk area walls of said houses;’ and in so far as it ‘finds that without the consent of the defenders the Governors of Heriot's Trust the pursuer's proposed operations cannot proceed,’ and in so far as it ‘sustains the defences of said Governors, and assoliszes them from the conclusions of the summons,’ and finds them entitled to expenses: *Quoad ultra* adhere to the said interlocutor, and further repel the defences stated for the defenders the Governors of Heriot's Trust, and find,

and decern against the defenders in terms of the conclusions of the summons, but under the declaration always that any rights hereby declared in favour of the pursuer shall be exercised by him only with the consent and concurrence of the defenders the Incorporated Dental Hospital and School and their assignees and successors in title: Find the pursuer entitled to expenses as against the defenders the Governors of Heriot's Trust, but excluding therefrom the expenses so far as caused by the opposition of the Magistrates and Town Council of Edinburgh; and remit the account of said expenses to the Auditor to tax and to report,” &c.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—Guthrie, K.C.—T. B. Morison. Agents—Somerville & Watson, S.S.C.

Counsel for the Defenders and Respondents The City of Edinburgh—W. J. Robertson. Agent—Thomas Hunter, W.S.

Counsel for the Defenders and Respondents The Dental Hospital—A. Moncrieff. Agents—Stuart & Stuart, W.S.

Counsel for the Defenders and Respondents The Governors of George Heriot's Trust—Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agent—Peter Macnaughton, S.S.C.

Thursday, March 15.

## FIRST DIVISION.

[Lord Ardwall, Ordinary.]

### JOHNSTONE v. HENDERSON.

*Process—Caution for Expenses—Reclaiming Defender—Trust Deed for Behoof of Creditors Granted after Reclaiming.*

A defender in an action reclaimed and subsequently executed a trust deed for behoof of creditors. On the trustee's refusal to sist himself in the action, the pursuer, in a note, craved the Court to ordain the reclaimer to find caution for expenses. The Court *refused* the prayer of the note.

On 17th May 1905 Alfred Johnstone, stockbroker, 10 St Andrew Square, Edinburgh, raised an action against William Henderson, 12 Affleck Street, Aberdeen, to recover a sum of £499, 2s. 5d., which he averred and pleaded was the balance due to him on the purchase and sale of certain stocks which he had carried through for the defender. By interlocutor dated 1st December 1905 the Lord Ordinary (ARDWALL) granted decree in favour of the pursuer for the sum sued for with interest and expenses. Against this judgment the defender reclaimed on 15th December 1905, and on 29th December he granted a trust deed for behoof of creditors. On 30th January 1906 the trustee intimated to the respondent's agents that he would not proceed with the reclaiming note nor sist himself as a party thereto.

The respondent presented a note asking the Court to ordain the reclamer to find caution for expenses.

In the Single Bills the reclamer argued—The general rule was that a defender was not bound to find caution—*Weir v. Buchanan*, October 18, 1876, 4 R. 8, 14 S.L.R. 18; *Buchanan v. Stevenson*, December 7, 1880, 8 R. 220, 18 S.L.R. 132—although it might be more stringent when the defender was in reality insolvent as he was not in the present case—*Stevenson v. Lee*, June 4, 1886, 13 R. 913, 23 S.L.R. 649. But even in the case of an insolvent defender caution was not invariably required—*Taylor v. Fairlie's Trustees*, March 1, 1833, 6 W. and S. 301—but the matter was one of circumstances. Here the pursuer was the only non-acceding creditor, and the decree reclaimed against had been greatly instrumental in bringing about the defender's financial difficulties; caution should not be ordered.

Argued for the respondent—The whole matter lay in the discretion of the Court. In the present case the reclamer was practically bankrupt, and in spite of inhibition had disposed to a trustee who refused to sist himself in the action. The respondent's position was not that merely of a pursuer as he was in possession of a judgment. The reclamer should find caution.

At advising—

LORD PRESIDENT—In this case a motion has been made that the defender should be ordained to find caution as a condition of being allowed to proceed with his reclaiming note. The only reason that was given for the motion being granted was that the judgment in the Outer House was against the defender, and that the defender had executed a trust deed in favour of his creditors. I have looked into the authorities, and it is not easy to extract from them any rule other than the general doctrine that in a case of insolvency a pursuer is usually bound to find caution but a defender is not. There may, of course, be special circumstances, but in this case there are no special circumstances. The defender has been found to be wrong by the Lord Ordinary. He has taken a reclaiming note, which is his right. To compel the defender to find caution would in effect be to force him to acquiesce in the judgment against him. I do not think that we can grant this motion unless your Lordships are prepared to go the whole length of saying that wherever a defender has granted a trust deed for creditors he must as a general rule be ordained to find caution. That does not seem to me to be an expedient general rule. There are obvious distinctions between the position of a person who has been sequestrated and the position of a person who has granted a trust deed. Accordingly, there being no special circumstances brought to our knowledge, I think the reclaiming note ought to be allowed to proceed in the ordinary manner.

LORD KINNEAR—I agree. I would only say in addition that it would, in my opinion, require a very exceptional ground to justify

an order upon a defender to find caution merely because he has granted a private trust deed for creditors. I know of no authority for so restricting the right of defence. The distinction between an insolvent who has become bankrupt and an insolvent who has granted a private trust deed is vital. In the case of a bankrupt his whole estate vests in the trustee to the entire exclusion of the diligence of creditors, and therefore if a contending litigant obtains a decree for expenses he cannot enforce it against his opponent or his estate unless the trustee in bankruptcy has made himself a party to the suit. But in the case of an insolvent who grants a trust deed his property is not protected in any way but is still open to the diligence of any creditor who may not have acceded, and even to the diligence of the creditors who have acceded so long as any other creditor holds out.

We cannot, in my opinion, compel a defender who has not been divested of his estate, however little, to find caution at the instance of the very person who has called him into Court, merely because his circumstances make it doubtful whether he will be able to meet the pursuer's costs if he is unsuccessful. He is still entitled to say that decree shall not pass against him until he has been heard.

LORD M'LAREN and LORD PEARSON concurred.

The Court refused the note with expenses modified to two guineas.

Counsel for the Reclamer and Defender—Aitken, K.C.—Wilton. Agents—Mackay & Young, W.S.

Counsel for the Respondent and Pursuer—Morison—Ballingall. Agents—P. Morison & Son, S.S.C.

Thursday, March 15.

#### FIRST DIVISION.

[Jury Trial.

CAMPBELL AND OTHERS *v.* SCOTTISH EDUCATIONAL NEWS COMPANY, LIMITED.

*Reparation—Slander—Process—Jury Trial—Action of Damages for Slander—Application for New Trial on Ground Verdict Contrary to Evidence.*

In actions of damages for slander a motion to set aside the verdict as being contrary to evidence and to grant a new trial is to be granted or refused on precisely the same grounds as in any other action. *Ross v. M'Kittrick*, December 17, 1886, 14 R. 255, 24 S.L.R. 190, approved.

*Observations per Lord President on criterion to be applied in reviewing verdicts in such cases.*

*Expenses—Jury Trial—Slander—Verdict for Defender on Pursuer's Issue—No Verdict Returned on Defender's Counter*