

Saturday, June 30.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

BALLANTINE, PETITIONER.

Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), sec. 19—Sale of Entailed Lands—Servitude.

An heir of entail proceeding to sell part of the entailed estate under the powers of the Entail Amendment Act 1882, allowed, with the view of enhancing the price of the part sold, to create a servitude over the part retained for the advantage of that sold.

This was a petition at the instance of A. F. C. R. Bowman Ballantine, Esq., heir of entail in possession of the estates of Ashgrove and Castlehill, Ayrshire, for authority to sell part (extending to 15 acres) of Ashgrove. The petition was founded on sec. 19 of the Entail (Scotland) Act 1882, which provides that "It shall be lawful for the heir of entail in possession of any entailed estate . . . to apply to the Court for an order of sale of the estate, or part of it." The petitioner had offered to sell the portion of Ashgrove which he here asked authority to sell to the trustees of the late John M'Gavin, whose object it was to make a public park for the adjoining town of Kilwinning. The offer had been accepted. The offer contained, *inter alia*, a condition undertaken by the petitioner that, "for the purpose of preserving the amenity of the park, clauses will be inserted in the disposition in favour of the purchasers preventing the erection of any works or buildings, except villas, cottages, or other similar self-contained flatted dwelling-houses, or tenements of flatted dwelling-houses, each dwelling-house having not less than three rooms and kitchen, on the adjoining land, within fifty yards of the ground proposed to be sold—extending to fifteen acres—which might be injurious to the park." The price was to be £3100.

The Lord Ordinary remitted the petition for inquiry and report to Mr James Hope of East Barns, and to Mr J. P. Wright, W.S. The former reported that the value of the ground was £2700, and that the sale was a very advantageous one, the purpose of it being one which would increase the value of the estate by encouraging feuing. After a report from Mr Wright, the Lord Ordinary granted leave to sell the ground as craved, and in respect of a minute for the petitioner and succeeding heirs interested, to whom intimation had been duly made, allowed the sale to be by private bargain, and remitted to Mr Wright to adjust the disposition. Mr Wright made a second report setting forth that in the draft disposition there was a clause by which it was proposed to create upon the adjoining entailed lands a real burden or servitude in favour of the portion sold, against alienation, except under certain restrictions in regard to the class of buildings which might be erected; but that, on the ground that the sale to be made in virtue of the interlocutor could not extend to lands outside the boundary of the portion mentioned in the petition, he had struck out the clause. He further reported that, as the creation

of such a servitude was merely a limited sale, he was of opinion that such a creation was competent under the Entail Act of 1882, and might have been granted if the petitioner had craved authority to sell such a right. He could not, however, assent to the view of the parties that such a servitude could be created by introducing a clause in the disposition of the lands authorised to be sold. He suggested that the petitioner should amend the petition so as to crave leave to include in the sale a right of servitude over the lands retained by him in favour of the portion sold, of the character desired by the parties.

The petitioner applied for leave to amend the petition as suggested, to the effect of craving leave to sell a right of servitude over the fifty yards immediately contiguous to the portion sold in terms of the petitioner's offer and the purchasers' acceptance.

The Lord Ordinary allowed the proposed amendment, and appointed it to be intimated to the curator *ad litem* for the next heir. Such intimation having been duly made, he reported the petition with this note:—

"*Note.*—The point raised by the reporter appears to be proper for the consideration of the Court. There seems to be no doubt that in the circumstances it would be expedient to sanction the clause in question if it be authorised by the statute; and there is great force in the petitioner's contention that the Act relaxes the fetters so far as to enable the heir of entail to sell on the same terms as a fee-simple proprietor, provided the prescribed procedure is duly observed; that the proposed condition is one of the ordinary incidents of such a transaction as the petitioner contemplates; that in many estates similarly situated a beneficial sale could not be effected unless the purchaser could be protected by similar restrictions; and that the power to create such restrictions as subsidiary to a sale is implied in the power to sell, although not expressed in terms. The point is one of great importance, and as it is also a novel point, I have thought it right to report it.

"The reporter's objection that the petition contained no notice of the proposed burden appeared to me to be well founded; but that difficulty may probably be held to have been obviated by the amendment which has been allowed, and which has now been intimated to the curator *ad litem*."

At advising—

LORD PRESIDENT—The points raised by this petition are of considerable importance and novelty, and they are of all the more importance because they are likely to occur again. The effect of the statute of 1882 seems to be that the heir of entail in possession of the entailed estate is put in exactly the same position as a fee-simple proprietor in regard to selling the estate under the authority of the Court. One of the objects of the Act is to enable the heir of entail in possession to convert the land into money. And for that purpose he may use all the powers exercised by a fee-simple proprietor.

If a fee-simple proprietor could do what is contemplated in this petition, and could sell a portion of his estate for the purposes of a public park, and at the same time create a servitude over the portion which remained unsold, I see nothing in sec. 19 of the Act or in any sub-section

to prevent an heir of entail in possession from doing the same.

If I could have found any restrictive words in the statute I should have been ready to have given effect to them, but I cannot find any. Then the expediency of the transaction is beyond all question. It is clearly for the benefit of the entailed estate over which the servitude is to be created that this public park should be made, and it cannot be made without the proposed servitude. It seems also that the power of sale under sec 19 may embrace a sale of a limited interest, and the creation of a servitude over lands adjoining these which are sold is nothing more than the sale of a limited interest.

I am therefore for granting the authority craved.

LORDS DEAS, MURE, AND SHAND CONCURRED.

The Court remitted to the Lord Ordinary to grant the authority craved in the petition as amended.

Counsel for Petitioner—Graham Murray.
Agent—J. A. Campbell & Lamond, C.S.

Saturday, June 30.

SECOND DIVISION.

(Sheriff of Stirling and
Dumbarton.

M'CAUL'S TRUSTEES v. THOMSON AND OTHERS.

Bankruptcy—Sale—Security over Moveables.

M. being in pecuniary difficulties executed a sale of certain furniture belonging to him in a house which was occupied by him, and which belonged to his marriage-contract trustees, to R., by whom the price was paid to a private trustee for behoof of M.'s creditors. R. allowed M. to retain possession of the furniture on a contract to pay up the price by annual instalments. M. continued in possession of the furniture, and paid several of the annual instalments until he became bankrupt and was sequestered. The furniture was then claimed by a person coming in right of R. and by M.'s trustee. *Held* that M. was proprietor of the furniture at the time of his sequestration, on a contract to pay the price by instalments, and his trustee was therefore not entitled to it.

This was an appeal in an action of multiplepounding in the Sheriff Court of Dumbartonshire, of which the nominal raisers were certain marriage-contract trustees, the subject *in medio* being certain articles of furniture. The circumstances out of which the case arose were narrated in a joint minute of admissions lodged by the parties in course of the process, and were to the following effect:—The furniture forming the subject *in medio* was purchased by Mr M'Caule, manufacturer in Glasgow, at the time of his marriage in 1867, and was in 1876 placed by him in Hayfield Villa, Helensburgh, where he then went to live. Hayfield belonged to his marriage-

contract trustees, the nominal raisers, and the M'Caule occupied it, by agreement with them, continuously from that date till June 1882, with the exception of a short period in 1878-9, when it was let by the trustees.

In 1878 M'Caule, being in pecuniary difficulties, granted a trust-deed in favour of Walter Mackenzie, C.A., conveying to him his whole estate, including the furniture in Hayfield Villa. Mackenzie wound up his affairs, but did not enter into possession of Hayfield or remove any of the furniture, which still remained there at the time of the raising of this action.

In August 1878, after M'Caule had put his affairs under trust, James Robertson, his brother-in-law, and one of the marriage-contract trustees, with the knowledge and approval of the M'Caules, arranged to buy from Mackenzie, as M'Caule's trustee, the furniture in Hayfield House.

In September 1878 Robertson, on the occasion of his going abroad, granted a factory and commission in favour of his agent Laurence Thomson, writer in Glasgow, the appellant.

On 26th October 1878 Mr and Mrs M'Caule granted the following letter of obligation addressed to Laurence Thomson's firm, Messrs Laurence Thomson & Miller:—"Dear Sirs,—In consideration of the fact that your clients, Mr Hugh Robertson and Mr James Robertson, Plantation Engine Works, Glasgow, have made payment to the trustee upon the estate of Mr James S. M'Caule, manufacturer, Ingram Street, Glasgow, of the sum of £300 on my household furniture and effects within my dwelling-house at Hayfield, Helensburgh, and have obtained an assignation of same in their favour, conform to inventory thereof made out by Hutchison & Dixon, licensed valuers in Glasgow, I, the said James S. M'Caule, and I, Isabella Dixon Robertson or M'Caule, wife of the said James S. M'Caule, jointly and severally agree and undertake that we shall pay to you, on account of your clients, the sum of £50 per annum, payable by two instalments of £25 at each term of Whitsunday and Martinmas, commencing the first term's payment at the term of Whitsunday 1879, and continuing the same until the amount of said advance, with periodical interest at 5 per cent. on the balance from time to time remaining, shall be repaid. We further agree and consent that this letter shall be intimated to the trustees under our antenuptial contract of marriage, dated 24th December 1867, and recorded in the books of Council and Session 27th August 1873. It is of course understood that when the balance shall be finally paid the household furniture, &c., shall be conveyed by your clients as we may direct."

On 7th March 1879 Mackenzie, as M'Caule's trustee, in fulfilment of the previous arrangement with Robertson, in consideration of the sum of £300, partly paid in cash and partly representing an estimated dividend due to Robertson from M'Caule's trust-estate, assigned and conveyed to Thomson, as Robertson's factor and commissioner, the furniture in Hayfield House—Robertson, who had then returned home, signing the deed as a consenting party. The M'Caules subsequently paid three of the yearly instalments of £50, £125 thereof being paid to Robertson himself, and £25 to Thomson as his factor and commissioner. The furniture still remained in Hayfield House after the date of this assignation.