Saturday, January 26.

FIRST DIVISION.

[Lord Lee, Ordinary.

CLARK *v.* THOM & SON.

Bankruptcy — Sequestration — Petitioning Creditor—Sufficiency of Affidavit—Inconsistency in Affidavit.

In a petition for sequestration the creditor produced an affidavit in which he deponed that the debtors were resting-owing to him the sum of £75, 16s., conform to account annexed, which contained these entries:—"1883, June 5.—To one second-hand omnibus, £35. June 8.—To one second-hand brake, £40, 16s." The creditor further in his affidavit reserved claim "for the hire of each machine referred to in account, at the rate of £1 sterling per week from the dates when same were supplied." *Held* that the affidavit was inconsistent in its terms, and petition *refused.*

This petition was presented to the Lord Ordinary on the Bills by Thomas Kinmonth Clark, coachbuilder, Crieff, for the sequestration of the estates of William Thom & Son, hotel-keepers, Grand Hotel, Oban, under the Bankruptcy (Scotland) Act 1856. The petitioner averred that the debtors were notour bankrupt, and he produced the following oath and account:—"Appeared Thomas Kinmonth Clark, coachbuilder, Crieff, who being solemnly sworn and interrogated, depones—That William Thom & Son, hotel-keepers, Grand Hotel, Oban, are justly indebted and resting-owing to the deponent the sum of £75, 16s. sterling, conform to account annexed, and signed by the deponent and the said Justice of the Peace as relative hereto, no part of which is paid or compensated, nor does the deponent hold any security for the same, or any part thereof, nor anyone liable to him for said debt except the said William Thom & Son. The deponent reserves claim for the hire of each machine referred to in account, at the rate of £1 sterling per week from the dates when same were supplied."

"ACCOUNT, Messrs William Thom & Son, hotel-keepers, Grand Hotel, Oban, to T. K. Clark, coachbuilder, Crieff.

"1883.

"June 5. To one second-hand Omnibus,	£35	0	0
,, 8. ,, one ,, Brake,	40	16	0
	£75	16	0

"*Crieff, 7th December* 1883.—This is the account referred to in my affidavit of this date."

The petition was opposed by Thom & Son.

The Lord Ordinary (LEE) refused the petition.

"*Note.*—In this case it is disputed by the bankrupt that the petitioner is a qualified creditor, and the question is whether his affidavit and claim sufficiently instruct that fact to support the petition. It is true that an open account duly sworn to has been held sufficient. But there is a peculiarity in the terms of the oath in this case, inasmuch as it 'reserves claim for the hire of each machine referred to in account, at rate of £1 sterling per week, from the dates when same were supplied.' This shows that there is some ambiguity in the petitioner's claim. It is not the case of goods supplied upon open account in the ordinary course of trade. There is an implied admission that the articles may not have been furnished as by a seller to a purchaser, and on such a footing as to transfer the property. And as it is denied that this was so, and the petitioner's letters (the genuineness of which was not disputed) lend considerable support to the denial especially as regards the omnibus, I am of opinion that the affidavit and claim are not sufficient.

"In arriving at this conclusion I assume that where the oath is sufficient the Court has no discretion as regards awarding sequestration, excepting in very special circumstances (see *Campbell* v. *M'Farlane*, 24 D. 1097, *per* Lord President). But it is undoubtedly within the functions of the Lord Ordinary on the Bills or the Sheriff to see that the petitioning creditor is qualified in terms of sec. 13 of the statute (*Simpson* v. *Myles*, Nov. 8, 1881)."

The petitioner reclaimed, and argued—The reservation of a claim for hire did not spoil the affidavit. The contract disclosed was an ordinary one, being in its inception one of hire, which might be converted into one of sale if the hirer wished it—*Cropper & Co.* v. *Donaldson*, July 8, 1880. The account was a sufficient voucher—*Laidlaw* v. *Wilson*, January 27, 1844, 6 D. 530; *Simpson* v. *Myles*, November 8, 1881, 9 R. 104; *Knowles* v. *Crooks & Balgarnie*, February 1, 1865, 3 Macph. 457.

The terms of the petitioner's letters referred to in the Lord Ordinary's note were not before the Inner House.

At advising—

LORD PRESIDENT—I think it is very much to be regretted that the petitioning creditor here should have put his affidavit in this shape, but I think it is impossible to resist the conclusion at which the Lord Ordinary has arrived. The petitioner says that he reserves a claim of £1 per week for the hire of the goods said to have been sold on the 5th and 8th of June, and that hire at that rate is to run from this date, when according to the rest of the affidavit the sale was made. These two things are quite contradictory. If there was a sale on the 5th and 8th of June, and the goods were delivered on those dates, I think it is quite impossible that there can be any claim for hire. The two contracts cannot stand together. It is quite an ordinary arrangement to deliver an article upon a contract of hiring, with a stipulation that the party hiring the instrument or carriage, or whatever it may be that he has got, may convert the contract into one of sale if after possessing for a time he desires to acquire it in property. From the terms of this affidavit, however, it is plain there could be no contract of sale as at the date of delivery, for the goods are stated in that reservation to have been delivered upon a contract of hiring. There may have been an arrangement that the hirer was to convert the contract into a sale, but the terms of that arrangement are not disclosed. I think it is impossible to sustain this affidavit, and that therefore we should adhere.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am of the same opinion. There is no doubt that this affidavit would have been in

regular form if it were not for the concluding sentence, which contains a reservation of a claim for the hire of the omnibus and brake contained in the account. Then the affidavit would simply have stated that goods were sold and delivered, and this would have been vouched by an ordinary account setting forth the dates of the sale by the builder to the buyer. But the petitioner goes on to reserve a claim for hire of the articles for a period subsequent to the date when according to the account they had been sold. The result is that it is not clear whether the contract was one of sale or of hire. It was explained that the original contract was one of hiring, but that it was converted into a sale in September. If that had been clearly set out in the affidavit I think the oath would have been quite good; if there had been a statement that the articles had been hired for a certain period, and that for that a claim for hire was reserved, and then that they were sold in September, I think that would have been quite good. But what is stated is that the sale was in June, and that the hiring was for the period after June, and therefore I think the affidavit is bad.

The Court adhered.

Counsel for Petitioner—Goudy. Agent—John Gill, S.S.C.

Counsel for Respondents—J. A. Reid. Agents—Adamson & Gulland, W.S.

Tuesday, January 29.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

ORR EWING *v.* EARL OF CAWDOR.

Superior and Vassal — Disposition — Clause of Relief from Public Burden occurring in Disposition in favour of Crown—Transmissibility in favour of Successor of Crown.

A Crown vassal executed in 1767 a disposition of certain lands in favour of the Crown with procuratory of resignation *ad remanentiam.* The disposition contained a clause of relief expressed "in favour of His Majesty and his royal heirs and successors" of certain specified burdens, and of every other parish or public burden which may be demanded from them for and in respect of the lands disponed. In an action raised by a successor of a disponee from the Crown in the lands against the representative of the original disponer for implement of the obligation, the Court *assoilzied* the defender on the ground that the obligation was one strictly and inalienably in favour of the Crown and the royal successors of the Crown in those lands, and therefore not transmissible to the effect of entitling the pursuer to enforce it against the defender.

By disposition dated 22d August 1767, and duly recorded, John Campbell, Esq. of Calder, in consideration of a price paid by the Lords Commissioners of His Majesty's (Geo. III.) Treasury, on behalf of "His Majesty and the public," sold and disponed "to His Majesty and his royal heirs and successors, to remain inseparably annexed with the Crown of these realms, certain lands, part of the barony of Ardersier, on part of which lands now disponed the Fort of Ardersier or Fort George is built . . . possessed by the garrison at Ardersier and others for and in name of His Majesty and the public." The disposition contained the following provisions—"And further providing that His Majesty, his royal heirs and successors, shall, by acceptation hereof, be bound and obliged to make, keep, and maintain the fence between the ground hereby disponed, and the remaining parts of the barony of Ardersier, good and sufficient, so as to keep out horses, cattle, and sheep, and so that there may be no disputes on account of trespasses on their mutual grounds between the possessors of the grounds hereby disponed and my tenants; and providing also, that as in the sums so now paid me full consideration was had and made to me for all feu and teind-duties, stipends, schoolmasters' salaries, land-tax, building, or reparation of kirks and manses, and every other parish or public burden whatever which was or might at any time be due and payable for or furth of the said lands and others foresaid: Therefore it is hereby declared that His Majesty, his royal heirs and successors, are to be freed and relieved by me, my heirs and successors, of and from all payment of any feu or teind-duties, stipends, schoolmasters' salaries, land-tax, reparation of kirk, manse, and every other parish or public burden whatever which might be demanded from them for and in respect of the subjects above disponed since the said year 1750 and in all time coming: And for further security to His Majesty, and his royal heirs and successors, I hereby dispone the remaining parts of the said lands and barony of Ardersier, lying, as said is, within the parish of Ardersier and shire of Inverness, to His Majesty and his royal heirs and successors, and that in real and special warrandice to them against all payment of teind or feu-duties, stipends, schoolmasters' salaries, land-tax, building or repairing of kirks and manses, and every other parish or public burden which may be demanded of or from them for or in respect of the lands and others principally before disponed, and so as that, on their being distressed therefor, they may for their relief have immediate recourse to the lands disponed in warrandice, rents, maills, and duties thereof." The disposition also contained a procuratory of resignation *ad remanentiam*, in which the above-quoted clause of relief was verbatim repeated. On the disposition an instrument of resignation *ad remanentiam* was expede in favour of His Majesty, dated and recorded the 5th and 10th January 1768. By disposition dated 16th May 1851, the Ordnance Department, in whom the lands were vested for the Crown, disponed to George Archibald a portion (known as Hillhead) of the lands conveyed to the Crown by the disposition of 1767, with and under the reservations, declarations, and provisions contained in the instrument of resignation *ad remanentiam*, in favour of His Majesty, following on the procuratory in that disposition, and, in particular, providing, in terms of that disposition, "that the said George Archibald and his aforesaids shall be relieved by the said John Campbell, his heirs and successors, of and from all payment of any feu or