place, whether, even as between the sellers and Sime's Trustees, the pursuer, as the purchaser of the upper stories any such right as the defender now contends for could have been held to have been reserved. But we are dealing with parties who are both singular successors. It was quite well known that there was to be a separation of the properties, and the defender, before he purchased the shop, should have asked an express conveyance of this right, and now says that he relied upon it as an incident upon or pertinent of the property. It is indeed fixed by the old cases that a reasonable right of this sort will be binding even although it does not enter the titles.

But in this case the purchaser of the tenement above the defender's shop, although he examined the tenement and saw the sign there, was entitled to rely upon his titles, and as he found no right relating to that sign in favour of the defender reserved in them, to conclude that there was no such right. Both parties must have been aware that when the two subjects belonged to one proprietor there were accidental uses which ought to be put an end to upon the separation of the properties. Moreover I am of opinion that this does not come up to the definitions of a reasonable enjoyment of a subject, although no doubt useful, and that there does not seem to be any difficulty in the defender placing his sign somewhere else.

I go further, and think that, in Scotland at least, if a burden is to be created which does not enter into the titles, it must be referable to some one or other of the known servitudes; but I confine the ground of judgment to what I stated first, viz.:—that in this case there was no implied grant.

Lord Rutherfurd Clark.—(who gave his assistance in the absence of the Lord Justice-Clerk)—The defender in this case claims a right of servitude over part of the property of the pursuer for the purpose of displaying his sign. It is not maintained that the alleged servitude has been made the subject of express grant, but it is said that there is an implied grant. The reason urged is this: that prior to the division of the property the wall, as the defender now claims to use it, was used for the purpose of displaying the sign of the occupant of the shop, and that this use of the wall is necessary for the comfortable enjoyment of the shop. There is neither averment nor proof to this effect, and I cannot draw the inference.

It is a question whether, supposing there was an agreement for a servitude of this kind, the burden would hold good against a singular successor without entering the titles, but on this point I do not express any opinion.

Lord Neaves was absent.

The Court adhered with expenses.

Counsel for Pursuer — Guthrie Smith—Strachan. Agent—D. Milne, S.S.C.

Counsel for Defender—Dean of Faculty (Watson)—Wallace. Agent—Henry Buchan, S.S.C.

Friday, November 26.

SECOND DIVISION.

[Lords Mackenzie and Young.

THOM AND OTHERS *v.* MACBETH AND OTHERS.

Property—Division and Sale—Pro indiviso *proprietors.*

In an action for the sale and division of a *pro indiviso* estate—*held* that where a division cannot be made having a due regard to the interests of all concerned, no *pro indiviso* proprietor can insist upon such a division, but that the estate should be sold, parties having a right to appear as offerers at the sale.

This was an action at the instance of Catherine Thom, Mrs Thom or Annan, and her husband James Annan, all residing in Rothesay, against Daniel Macbeth, writer in Rothesay (both as trustee under a trust-disposition and settlement executed by the deceased Robert Thom of Ascog, cotton-spinner in Rothesay, father of the female pursuers, and as an individual), and also against the children of Mr and Mrs Annan, and certain other parties interested in the estate of the late Robert Thom.

The summons concluded for a sale of the estate of the deceased Robert Thom, or, in the event of its being found that a sale was inexpedient, then that the estate should be divided in certain proportions amongst the pursuers and the defender Daniel Macbeth, who was himself entitled to a certain share as *pro indiviso* proprietor, and also bound as trustee to hold certain shares for Miss Thom and Mrs Annan. Several parties at first appeared to oppose this action, but in the later stages of the case Mr Macbeth and his son Daniel Macbeth junior were the only defenders.

The defenders disputed the title of the pursuers to bring this action, and also maintained that in any view they were not entitled to insist upon a sale of the estate. On 5th December 1872 the Lord Ordinary (Mackenzie) found for the pursuers upon the matter of title, and although a reclaiming note was presented by the defenders it was afterwards withdrawn. Accordingly the sole question came to be, whether, on the one hand, the pursuers were entitled to have the estate sold, or, on the other, the defender could insist upon a division.

A report was given in by Mr Hugh Kirkwood, to whom a remit had been made, in which he stated that in his opinion the estate was "incapable of division in the proportions referred to without great depreciation of value." Afterwards, upon a second remit being made, he adhered to his original report. Mr Macbeth maintained that he was entitled to have a proof at large for the purpose of establishing the expediency of a sale; but this was refused by the Lord Ordinary on the ground that Mr Macbeth had acquiesced in the remit to Mr Kirkwood, and had taken part in the proceedings under that remit. The Lord Ordinary accordingly, on 9th June 1874, found that a sale of the estate was proper and necessary, and afterwards remitted to Mr W. S. Fraser, W.S. to prepare and lodge in process a draft of the articles and conditions of roup. As

that gentleman reported that the whole of the estate was not included in the summons, a supplementary action was brought to which similar defences were lodged by the Messrs Macbeth. Lord Young, acting for Lord Mackenzie, conjoined the actions upon 19th May 1875, and afterwards, upon 7th July, issued an interlocutor finding that the subjects included in the supplementary action should also be sold. Against these interlocutors of Lords Mackenzie and Young, approving of a sale, the defenders reclaimed.

Argued for them—The defenders are entitled to insist upon a division in virtue of their rights as *pro indiviso* proprietors, assuming that the subject possessed is physically capable of division. They are not barred by the reports of Mr Kirkwood, as the remit to him was "before further answer," and there was therefore a reservation of any objections on their part.

Argued for pursuers—The reports of Mr Kirkwood are conclusive upon the subject of the expediency of a sale, and the defenders cannot now object to them. A division cannot be insisted upon if it be prejudicial to the estate.

Authorities—*Brock* v. *Hamilton*, Jan. 27, 1852, reported as a note to *Anderson* v. *Anderson*, Mar. 17, 1857, 19 D. 701, Stair iv. 3, 12, Bell's Com. i. 62–3, Justinian's Institute, 6, 20; *Bryden* v. *Gibson*, Feb. 4, 1837, 15 S. 487; *Craig* v. *Fleming*, March 14, 1863, 1 Macph. 612; *Dickson* v. *Monkland Canal Coy.* H. L., June 29, 1825, 1 W. and S., 636; *Wilson* v. *Struthers*, Feb. 10, 1837, 15 S. 523.

At advising—

THE LORD JUSTICE-CLERK—The only question in this case is whether the property admits of a reasonable division so as to protect the just interest of all concerned. What Lord Mackenzie did was to make a remit to an able man of skill to report, and he reported that in the circumstances such a division was next to impossible. I imagine that that is conclusive upon this question.

If it be the fact that it is next to impossible to divide this property, there must be a sale. But it is right that Mr Macbeth, who is insisting upon a division, should have an opportunity of bidding at the sale, and I propose that we should make a remit to proceed in the cause with the view of allowing the parties to bid at the sale.

LORD ORMIDALE — As to the competency of an action of division and sale at the instance of a joint proprietor, there can be no doubt; it would be impossible to maintain that it is not competent. The joint proprietors are not bound to remain in the union against their will. But the question is, upon what principle is such a union to be dissolved? It was maintained that if it was physically possible to divide the subject there must be a division, but I think, looking to the authorities, and especially to the case of *Fleming*, that where a division cannot be made having a just regard to the interests of all the parties concerned, it cannot be insisted upon. It is always a matter of degree. Such a division might in some cases cause great sacrifice, and here it is reported to us that it is not practicable. The interests of Mr M'Laren's clients, who are of opinion that the property should be preserved, will be sufficiently protected by their having an opportunity of purchasing at the sale, and I understand that your Lordship would approve of a clause in the articles of roup to the effect that any one of the parties may appear at the roup and bid.

LORD GIFFORD—I agree with your Lordships. I think that in this case the proper remit has been made. The true criterion is the interest of all concerned, for almost any subject is capable of division. It has been determined by a fit and proper person that it would be inexpedient in the circumstances to divide this property, and it appears to be next to impossible to adjust the interests of the various parties on the theory of a division. But it is quite competent for a *pro indiviso* proprietor to appear as an offerer at the sale. Allow me, however, to add this, to prevent misunderstanding, Mr Macbeth appears here in two capacities, but he can only bid in his individual character.

LORD NEAVES was absent.

The Court pronounced the following interlocutor:—

> "The Lords having held counsel on the reclaiming note for Daniel Macbeth and another against Lord Young's interlocutor of 7th July, 1875, refuse said note, and adhere to the interlocutor complained of, and remit the cause to the Lord Ordinary to proceed with the same: find the reclaimers liable in expenses since the date of the interlocutor complained of, and remit to the Auditor to tax the same and to report, and to his Lordship to decern for the expenses now found due."

Counsel for Pursuers — Balfour — Wallace. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Defenders — Dean of Faculty (Watson)—M'Laren. Agents—J. & A. Peddie, W.S.

Saturday, November 27.

SECOND DIVISION.

[Bill Chamber.

CLARK *v.* HAMILTON & LEE.

Process—Suspension of Charge—Lis alibi pendens.

Suspension of a charge upon an extract-decree having been brought upon the ground of an error in the messenger's execution, the charge was abandoned, and while the question of the expenses in the suspension was still undisposed of, a second charge was given proceeding upon the same warrant. In a suspension of this second charge, *held* (*dub.* Lord Justice-Clerk) that as the first was withdrawn as a charge for payment, the second was competently brought.

Messrs Hamilton & Lee, stockbrokers, London, under a decree of the Court of Session, in January 1875 charged John B. Clark, solicitor, Mauchline, for payment of the sum of £494, 13s. 6d., together with interest, expenses of process, and dues of extract. The charge bore to be dated 1st *December* 1865, and required payment to be made within fifteen days after date. On 6th April 1875 Clark was imprisoned upon a warrant follow-