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 disposed. 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

teind duties (except the feu-duty after mentioned), stipends, schoolmasters' salaries, land-tax, reparation of kirk, manse, and every other parish or public burden whatever which may be demanded from them for and in respect of the subjects thereof disponed from the term of their entry thereto and in all time coming;" and for further security the Department disponed the remaining portion of the barony of Ardersier in real and special warrandice against all payment of teinds of the burdens first specified. Archibald was duly infeft in the lands and in the warrandice lands. He was succeeded in them by his son, who conveyed them to a trustee for creditors, from whom in 1881 Archibald Orr Ewing, Esq., of Ballikinrain, M.P. for Dumbarton, purchased them, and the disposition to him contained a special assignation in his favour of the disposition granted by John Campbell of Calder to His Majesty King George III., and the clause of relief from burdens contained therein. The remainder of the barony of Ardersier was also disponed to him in real and special warrandice of the clause of relief. He raised this action against the defender, the Earl of Cawdor, as heir and representative of John Campbell of Calder, the original granter of the obligation of relief, and proprietor of the lands and barony of Ardersier, to have it declared that "the defender, and his heirs and successors, are bound to free and relieve the pursuer, and his 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 may be demanded from the pursuer for and in respect of" the lands of Hillhead, and to have him ordained to pay the pursuer a sum of £57, 3s. 1d. as the amount of poor-rates which the pursuer had paid for and in respect of the lands.

He pleaded—"(1) Under the said clause and declaration of relief, the granter thereof, and his heirs and successors, became bound and liable in relief and payment as libelled. (2) The said clause and declaration of relief having been duly transmitted to the pursuer, the present proprietor of the said lands and others is enforceable at the instance of the pursuer against the defender as representing the granter thereof. (3) Generally, in the circumstances, the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses."

The defender pleaded—"(1) No title to sue. (2) The obligation of relief founded on is not by the terms thereof assignable, and in any view has not been assigned to the pursuer. (3) The pursuer not having been distressed in respect of any burdens except poor-rates, the action, except *quoad* the said poor-rates, is premature. (4) Poor-rates not being a burden for which the Crown is or was liable, the same do not fall within the scope of the obligation founded on, and the pursuer cannot therefore be relieved thereof."

The Lord Ordinary (KINNEAR) sustained the defences and assoilzied the defender from the conclusions of the summons.

"*Note.*—The obligation of relief which forms the basis of this action is one of very common occurrence, and there is nothing at all peculiar in its terms. But it is singular in this respect, that it occurs in a disposition by a Crown vassal to the Sovereign with procuratory of resignation *ad remanentiam*, so that the granter and his representatives have ceased to have any connection whatever with the lands which they are to relieve of the burden falling within the scope of the obligation.

"It is not disputed, however, that the present defender is the representative of the granter, nor, as I understand, that as such he is liable to implement the obligation to anyone having a good title to enforce it. But it is said that the pursuer has no such title, inasmuch as the obligation of relief is not assignable, or, if assignable, has not been assigned. If it be in its nature assignable, I should be disposed to think it had been effectually assigned to the pursuer. But I am of opinion that the obligation was taken in favour of the Crown alone, and that it is not transferable to the Crown's vassals. The disposition sets forth that, in consideration of a price paid by the Lords Commissioners of His Majesty's Treasury on behalf of 'His Majesty and the public,' the lands were conveyed 'to His Majesty and his royal heirs and successors, to remain inseparably annexed with the Crown of these realms.' Then it goes on to describe the lands, and in the course of the description it is explained that the Fort of Ardersier or Fort-George has been built upon them, and that it is presently possessed by the garrison of Ardersier for and in name of His Majesty and the public, and the clause of relief is expressed to be 'in favour of His Majesty and his royal heirs and successors,' who are to be relieved 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.' I think this imports an obligation in favour of the Sovereign, and of no other person. By the natural construction of the language used, the epithet 'royal' appears to qualify the word 'successors' as well as the word 'heirs,' and the word 'successors' must therefore mean His Majesty's successors in the throne of these realms. But if it should rather be held to mean 'successors' in the estate, the result is practically the same, because as the obligation occurs in a resignation *ad remanentiam*, there can be no successor in the estate except the Sovereign. The pursuer is not the successor of His Majesty in the estate created by the resignation. He is the vassal of the King's royal successor, Her present Majesty; and the obligation is not, in my opinion, conceived in favour of the Crown's vassal, but only in favour of the Crown itself.

"The distinction is very material, because such an obligation in favour of a subject would imply a much wider liability than a similar obligation in favour of the Crown, since property held by the Crown for public purposes, or as part of the hereditary possessions of the Sovereign, is exempt from burdens which attach to it as soon as it passes into the hands of a subject. There could not be a better illustration of the manner in which the scope of the obligation would be enlarged by the pursuer's construction than the claim which this action is brought to enforce, because so long as the subjects remain the property of His Majesty they were not liable for poor-rates.—*Adv.-Gen.* v. *Garioch*, 12 D. 447. The burden, therefore, of which the pursuer seeks to be relieved is not within the terms of the obligation, because it is not a burden of

which 'payment' could have been 'demanded' from the King or his heirs and successors if the *dominium utile* had still remained the property of the Crown."

The pursuer reclaimed, and argued—This was a right of relief intended to pass with the lands, into whosoever hands they might at any time go, and was therefore now enforceable at the instance of the present proprietor of them against the representative of the granter of the disposition containing the right.

The defender was not called on.

At advising—

Lord Young—I am of opinion that the interlocutor of the Lord Ordinary in this case is altogether right. I am disposed to agree with his Lordship, although it is necessary to express an opinion upon that point, that if this were a general assignable clause of relief it has been well assigned. I concur with the Lord Ordinary, however, that it is not a general assignable clause of relief, but a clause of relief strictly and inalienably in favour of the Crown and the royal successors of the Crown in that land. As his Lordship has pointed out, it is an obligation of relief of very different significance and value in favour of the Crown and the Crown's royal successors, from what it would be if in favour of a subject. But it is quite unnecessary for me to say more than that I concur in the judgment of the Lord Ordinary and in the grounds on which it proceeds.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuer—Low. Agents—C. & A. S. Douglas, W.S.

Counsel for Defendant—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, January 29.

SECOND DIVISION.

[Sheriff of Argyle.

HUYSSEN & OVENS *v.* SINCLAIR.

Bankruptcy — Sequestration — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 103 *—Debtors (Scotland) Act* 1880—*Cessio.*

A debtor was sequestrated in 1882, and while still undischarged carried on a business. A creditor in this business presented a petition in 1883 to have him ordained to execute a disposition *omnium bonorum*, alleging that by an arrangement with his trustee and creditors he was allowed to appropriate to himself the whole profits of the business. *Held* that the application was incompetent.

Peter Sinclair, inn-keeper, Dunoon, was sequestrated in September 1882, and a trustee was appointed on his estate. In September 1883, while he was still an undischarged bankrupt, Huyssen & Ovens presented this application to have him ordained to execute a disposition *omnium bonorum* for behoof of creditors. The petitioners stated that Sinclair was notour bankrupt by insolvency concurring with an expired charge, dated 18th August 1883, on a bill which he had granted to them for the price of wines. They further stated—"That the defender has for some time past, and still continues, to draw the proceeds of his business as a hotel-keeper at said Clyde Hotel, including the proceeds for the sale of liquors and other effects therein, and has in his possession the said proceeds, and which the defender has not applied and does not mean to apply in payment of his lawful debts."

The Sheriff-Substitute (Campion) decerned Sinclair to execute a disposition *omnium bonorum* in favour of a trustee named in the interlocutor. On appeal the Sheriff (Forbes Irvine) adhered.

Sinclair appealed, and argued — The petition was incompetent, in respect he was at its date an undischarged bankrupt under the sequestration of 1882. The 103d section of the Bankruptcy (Scotland) Act 1856 provided that all estate acquired by the bankrupt after the date of his sequestration, and before he had obtained his discharge, was vested in his trustee. The effect of this application, if granted, would simply be to supersede the old trustee and bring in another.

The respondents, in reply, admitted that the appellant was undischarged from the sequestration, and cited the case of *Abel* v. *Watt*, Nov. 21, 1883, 21 Scot. Law Rep. 118, in support of his contention that the application was nevertheless competent. They further stated at the bar that the appellant was in point of fact in actual possession in his own right of the hotel premises under an arrangement with the creditors and trustee in his sequestration. Even if the sequestration were to receive the effect contended for, the appellant was bound to make a disposition in their favour to the extent of the proceeds from the business his creditors had allowed him to carry on with goods obtained from the respondents.

The appellant denied the alleged arrangement with his creditors as to the carrying on of his business.

At advising—

Lord Justice-Clerk—In this application at the instance of the petitioners there is no allegation made except that their debtor was notour bankrupt and the debt due to them was resting-owing, and the Sheriff was asked in the application to pronounce an interlocutor in terms of the Debtors (Scotland) Act, finding the debtor liable to execute a disposition *omnium bonorum* in name of a trustee. It is now merely stated to us (for there is no printed statement or plea with reference to this part of the proceedings) that the whole of the proceedings were incompetent, because at the date of the application and at the present time the debtor was and is an undischarged bankrupt, and his property, past and present, was vested in the trustee appointed on his sequestrated estate. This is not denied by the petitioning creditors, but it is said that the bankrupt is in possession of some property which was made the subject of a separate contract between his trustee and him, and under which the trustee and his creditors are not entitled to claim that property, which had been apparently retransferred to the bankrupt