

(Mure) conjoined the two petitions, and sequestrated the estates of "Alfred R. Gordon, trading under the firm of Gordon & Co., of which firm he is sole partner, and also of the said Alfred R. Gordon as an individual."

Cadby reclaimed.

F. W. CLARK, for him, stated that the Lord Ordinary should have sequestrated the estates of the firm of Gordon & Co., of which firm there was at least one other partner besides Mr Gordon.

No appearance was made for Mr Gordon.

The Court, while explaining that in the proceedings (which are *ex parte*) the Lord Ordinary had been misled by the claimer's own statement in the petition, that Mr Gordon was the only known partner of the firm, recalled the interlocutor, and remitted to the Lord Ordinary to sequestrate the estates of the firm, and also those of Mr Gordon, without finding that Mr Gordon was the sole partner. The prayer of the reclaiming-note was that the two petitions should be disjoined, and a remit made to the Lord Ordinary to appoint intimation of the claimer's petition, and to proceed therein in terms of the statutes; but the Court refused to disjoin the petitions.

Agent for Reclaimer—L. Mackersy, W.S.

DOWNIE v. DOWNIE'S TRUSTEES.

Heritable and Moveable—Jus Relictæ—Stat. 1661, c. 14—Mortgage. In an action by a widow against her husband's trustees for payment of *jus relictæ*, held (1) that a mortgage granted by the Glasgow Corporation Water Commissioners was heritable, and (2) that a mortgage over property in Australia was moveable, its character falling to be determined by the law of Australia.

This action was raised by Mrs Downie against the trustees of her deceased husband for payment of the sum of £12,000 sterling, being the amount or value of her *jus relictæ*, or the just and equal one-third part or share of the free moveable means and estate left by her said deceased husband under the charge of the defenders as trustees foresaid; or of such other sum as the said *jus relictæ* or share may amount to, as the same shall be ascertained in the course of this process; together with the sum of £3000 sterling as the amount of the fruits, profits, or interest which have accrued or may yet accrue on the said share of the said estate in the hands of the defenders, or such other sum as may, in the course of this process, be ascertained to be the amount of such fruit, profit, and interest; and there was also a conclusion that for the purpose of ascertaining the extent of the pursuer's rights, and the amount of the *jus relictæ* or share of the said moveable estate payable to her, and accruing fruits, profits, and interests, the said defenders, as trustees foresaid, ought and should be decerned and ordained, by decree foresaid, to exhibit and produce a full, true, and particular account of the said moveable estate, and of the profits and interests which have accrued or may yet accrue thereon, and of the intrusions had by them therewith, together with all writs and vouchers necessary to instruct the same.

The pursuer averred that she was entitled to *jus relictæ* out of, or to one-third of the following sums belonging to her deceased husband at his death, and constituted by the following documents of debt, viz.—(1) The sum of £10,000, being the balance of a bond or mortgage for £14,000, granted in his favour by Henry Langlands, Melbourne, dated 29th January 1855, and rent or interest

thereof due at the deceased's death amounting to £619, 2s., together with one-third of the interest due thereon. (2) The sum of £5000, being the amount of a bond or mortgage granted in his favour by the Glasgow Waterworks Commissioners, dated 11th March 1858, and interest thereon from the date of the last payment thereof prior to the truster's death, and to fall due thereon in time coming. (3) The sum of £700, being the amount of a bond or mortgage granted in his favour by the Glasgow, Dumbarton, and Helensburgh Railway Company, dated 23d March 1860, and interest thereon from the date of the last payment thereof prior to the date when the same was paid off, and of the said principal sum thereafter. (4) Rent due by Alexander Downie, farmer, for land belonging to the deceased at Yanyean, Victoria, from 1st October 1858 to 20th February 1862, at £80 per annum, less received to account, £233. (5) Amount due on mortgage by James Callender, merchant, Melbourne, £100.

The defenders admitted the pursuer's right to *jus relictæ* out of Mr Downie's moveable estate, but they pleaded that her claim was untenable, in so far as participation was sought—(1) in property which is not moveable; and (2) in sums which have not been recovered, and cannot be dealt with as available assets.

It was considered advisable that the law of Australia, with reference to the heritable or moveable character of the mortgages over property in that colony, should be ascertained before judgment. Accordingly a case was prepared on the subject, and submitted to W. W. Mackison, Esq., barrister-at-law, for his opinion.

The Lord Ordinary (Jerviswoode) thereafter found, with reference to the particulars of the pursuer's claim, as above set forth, that the five sums specified by her formed part of the moveable estate of the deceased, and were affected by her *jus relictæ*, with the exception of the sum second mentioned, being that contained in the bond or mortgage granted by the Glasgow Corporation Waterworks Commissioners, which he held to be heritable, as respects the rights of the pursuer as relict. He added the following

Note.—The only question of real difficulty here is, as the Lord Ordinary thinks, that which has relation to the claim of the pursuer to the one-third of the sum of £5000 under bond or mortgage granted by the Glasgow Waterworks Commissioners. Looking to the terms of the bond under which the debt is constituted, it appears to the Lord Ordinary that prior to the Statute 1661, cap. 32, that debt must have been held as heritable, as being in its character a bond for the payment of the principal sum at a certain term—viz., 15th May 1861—and with a stipulation of interest at 4 per cent. per annum from the date of the bond until the principal sum shall be fully paid and satisfied.

On this question the Lord Ordinary has adopted the views, as he understands them, expressed by Professor Bell in his Commentaries, vol. ii. p. 7, sec. 12; in his Principles, sec. 1495; by Mr Erskine, b. 2, tit. 2, sec. 10, and b. 3, tit. 9, sec. 22; and by Lord Stair, b. 3, tit. 4, sec. 24.

C. B.

Both parties reclaimed.

After hearing oral argument, the Court on 16th March 1866 appointed the parties to lodge cases.

Argued for the pursuer—1. *In regard to the mortgage by the Glasgow Water Commissioners.* This debt is moveable in its own nature. If it is heritable *quoad* the rights of the pursuer, it must

be so either (1) in respect of its being heritably secured, or (2) in respect of its falling within the description of personal bonds, which previous to the Act 1661, c. 32, were heritable to all effects, and are still heritable as regards the fisk, and husband and wife. (1) It is not heritably secured. It is essential to the constitution of a heritable security that it shall give to the creditor some definite rights in a heritable subject (Bell's Prin., sections 898-900). The mortgage confers on the mortgagee no feudal or real right in any heritable subject. It does not contain words sufficient to convey heritage, nor is it made heritable by the provisions of the Glasgow Water-Works Act by virtue of which it is granted. It is granted in favour not of heirs, but of "executors, administrators, and assigns." By the Glasgow Water-Works Act, 28 Vict., c. 69, passed since the date of this mortgage, it is provided that all such mortgages shall be moveable or personal estate, and transmissible as such. This Act was declaratory of the law. (2) The doctrine of the old law prior to the Act 1661 did not apply to all obligations, but only to personal bonds, having a clause of annual-rent. But this mortgage is not a bond at all. It contains no obligation whatever. An action for payment founded upon it as containing an obligation to pay could not be maintained against the Water Commissioners. It merely pledges the works and the water rates until the loan is repaid. "Mortgage" is an English law term, and corresponds to the Scotch term "wadset," and both instruments are intended to secure parties in payment *without* obligation (Wharton's Law Lexicon, 1 Stephen's Com., 289, Ersk. 2, 2, 5; Hamilton v. Hope, 26th March 1853, 15 D. 594). Farther, this mortgage, even if it is a bond, contains no clause of annual-rent. As the law stood before 1661, only such bonds were heritable as indicated on the part of the creditor a desire to make a permanent investment (Ersk. 2, 2, 9, Bell's Prin., Sec. 1495; Menzies' Lectures, p. 195). In this case it is plain that the creditor considered the sum as moveable. The mortgage is dated in 1858, and the sum lent is to be repaid in 1861. The following cases were referred to:—Smith, M. 5503; Douglas, M. 5504; Stewart, M. 5505; Breadalbane's Trs., 15 S. J. 389; Porteous, M. 5463; Fraser, Hume's Dec. 210; Haining, Hume's Dec. 214. 2. *In regard to the funds in Australia.* Their character as heritable or moveable must be determined not by the law of Scotland, where the creditor was domiciled, but by the law of the country in which the funds were invested, and the debtors reside (Egerton, 27th November 1812, F. C.; Ross, 4th July 1809, F. C.; Newlands, 11 S. 65; Clarke, 14 S. 488; Breadalbane's Trs., 15 S. J. 389; Story's Conflict of Laws, sec. 447). This being so, Mr Mackison's opinion is conclusive that the funds are moveable estate.

Argued for the defenders—1. Bonds or provisions bearing interest were held prior to 1661 to be *quasi feuda*, and to be heritable. The Act 1661, making them moveable, expressly excepted widows and husbands from its operation (Stair, 2, 1, 3; 3, 4, 24; 3, 8, 47; Ersk., 2, 2, 9; Bell's Prin., sec. 1495; Menzies' Lectures, p. 195; Duff on Moveable Rights, pp. 6, 8, 14; and More's Notes, p. 146). The criterion by which the character of the mortgage is to be determined is the clause of interest. Interest was payable on this mortgage until May 1861, and this term of payment was afterwards extended to May 1866. There are here (1) the postponement of the payment of the principal sum to a distant period; (2) an obligation for

payment of interest in the interval; and (3) the creditor's survivance till February 1862, the first payment of interest under the extended arrangement being due at Martinmas 1861. Such a mortgage may be moveable as regards children, but it is heritable in regard to a widow. There is no importance in the nature of the destination. An intention to exclude the heir will not advance the cause of the widow; but, farther, the terms of the destination are not the test, but the presence or absence of a clause of annual-rent. Again this mortgage assigns in security the property and works vested in the Commissioners which are heritable subjects. It is a statutory document, and does not profess to be in the ordinary form of an heritable bond. The words which are used in it being statutory are *habile* to convey heritage. 2. The sums due under the Australian mortgages are heritable estate. As the trustor died domiciled in this country, his succession must be governed by our law; but if he has left real estate in a foreign country, the law of that country, if different from ours, will prevail. These mortgages are not real estate fixed in the colony; they are simply vouchers of debt secured over property abroad, and the creditor may carry them about with him wherever he goes. The law of the domicile must therefore regulate the interests of all concerned; and by the law of Scotland the debts are heritable in a question with the widow, because they are secured over real estate and contain an obligation for the payment of interest.

The defenders did not reclaim against the Lord Ordinary's finding in regard to the £700 contained in the mortgage by the Glasgow, Dumbarton, & Helensburgh Railway Co., the moveable character of which was fixed by the Company's Act of Parliament.

At advising—

The LORD PRESIDENT—This is an action at the instance of a widow against the trustees of her deceased husband, for the purpose of having it determined that she is entitled to participate in certain funds out of which she claims *ius relictae*. The funds are—(1) a sum of £5000 which was invested on mortgage by the Glasgow Water Commissioners; and (2) the balance of a sum of £14,000 invested in Australia. The Lord Ordinary has found in regard to the £5000 that it is heritable, and that the widow is not entitled to participate in it. Upon that point it appears to me that the Lord Ordinary has arrived at a right conclusion. The question is not whether this sum has been made heritable by the nature of the security given, and therefore I do not take up the question as argued to us by Mr Balfour on that ground. What appears to me to be the law of the case is, that this bond would have been heritable before the statute 1661. The statute applies to all contracts and obligations for payment of money containing clauses for payment of annualrent. Nice criticisms have been made upon the terms of the mortgage. It is said that it does not contain any obligation to repay, and there are no proper words of conveyance. But I think it is a contract or obligation. The money is invested on an obligation under which the party is entitled to get it back. Then I think its character is to be determined by the consideration that it is a loan of money for a tract of time, bearing interest which is to be payable before the period of payment of the principal. There is a distant time fixed for payment of the principal—three years—which is extended again to a more distant time. The interest was payable termly, and had been so paid before

the time arrived. Now, the statute of 1661 which removed such obligations from the class of heritable to that of moveable, excepted the interest of the widow. No doubt our institutional writers continue to say that these obligations are moveable except as to the widow and the fisk. This is not quite correct. They are moveable by force of statute, but the widow and the fisk are excepted from the operation of the statute. Then in regard to the sum invested in Australia, on security there, if it had been invested on similar security in this country it would have been heritable, and it must be kept in view that Mr Downie was domiciled in this country. But it was not invested here, but in another country, and the principle has been recognised that the character of the subject is to be ascertained according to the law of the country where it is placed. The right to participate is to be decided by the law of this country, in which the subject falls to be distributed. Seeing that we have it fixed that by the law of Australia, in which the subject here is situated, it is regarded as moveable or personal estate, we must also hold it to be moveable and not heritable. I therefore agree with the Lord Ordinary on this point also.

Lord CURRIEHILL—I am of the same opinion. I have no difficulty at all about the £5000 mortgage. The other question is nicer, but I hold it to be settled by the cases. I don't go so much on the case of Ross, but I think that of Newlands is conclusive.

Lord DEAS—In regard to the mortgage for £5000, the only question is, whether it is a bond bearing interest. I think it is. It is one of those *quasi feuda* which are likened to land. If the question had occurred before the Act of 1661 passed, the sum would have been heritable in a question with the widow, and in regard to her the Act made no alteration in the law. On the other point I concur with your Lordship.

Lord ARDMILLAN concurred.

The Court therefore refused the reclaiming notes for both parties.

Counsel for Pursuer—Mr Young and Mr Balfour. Agents—J. & J, Gardiner, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Millar. Agents—J. & R. Macandrew, W.S.

SECOND DIVISION.

WESTERN BANK LIQUIDATOR *v.* BAIRDS

(*ante*, p. 172.)

Appeal to House of Lords—Leave to Appeal. Circumstances in which a motion for leave to appeal to the House of Lords *refused*.

In these cases, on 6th July, the Court, recalling interlocutors of Lord Kinloch, remitted to Charles Pearson, C.A., Edinburgh, to examine into the books of the bank in connection with the various accounts and transactions libelled in the summons, with the view of simplifying the cases before sending to the jury the question of the defenders' negligence. On the intimation of this judgment, the pursuers asked for expenses, contending that the effect of it was to find that they had been substantially successful. Expenses were reserved. Thereafter the pursuers moved the Court for leave to appeal the judgment to the House of Lords.

The LORD ADVOCATE, MILLAR, and SHAND, in support of the motion, argued.—It is a difficult question whether the judgment of the Court in holding these actions not to fall under the enumerated auses is well founded, and the pursuers are en-

titled to have the review of the House of Lords on that question, because upon it depends the competency of the peculiar step which the Court has adopted. Further, besides the danger of the remit proving unavailing, the carrying of it out will be attended with considerable delay and expense.

The DEAN of FACULTY (with him YOUNG, A. R. CLARK, GIFFORD, and LEE) contended that the motion should be refuted. It was certainly odd that the pursuers, having formerly claimed the judgment in their favour and asked for expenses, should now disavow it and ask leave to appeal it to the House of Lords.

The Court unanimously refused leave to appeal.

The LORD JUSTICE-CLERK said that the two grounds relied upon in support of the motion were just the considerations they had induced the Court towards the step they had followed. The Court were unanimous in holding that there was no doubt whatever that these actions did not fall within the enumerated causes; and they were quite satisfied that both delay and expense would be avoided by the remit which they had made.

Agents for Pursuers—Morton, Whitehead, & Greig, W.S.

Agents for Defenders—Webster & Sprott, S.S.C.

Tuesday, July 17.

FIRST DIVISION.

CUNNINGHAM *v.* SPIERS AND CO.

Jury Trial—Fixing Trial. Motion to have a case tried at the Glasgow Circuit *refused*.

This is an action of interdict for infringement of a patent for improvements in the weaving of shawls, in which issues have been adjusted. The pursuers gave notice of trial for the ensuing sittings which they countermanded, giving at the same time a new notice for the Christmas sittings.

GUTHRIE SMITH, for the defenders, now moved the Court to fix the trial to take place at the Glasgow Autumn Circuit. The proceedings were commenced in May 1865, and the defenders were entitled to have the case tried before Christmas. Besides, the case would be much more advantageously tried at Glasgow, where the jury might have a view of machinery such as used by both parties, which they could not have in Edinburgh.

WATSON, for the pursuers, opposed the motion.

The motion was refused. The Court did not think there was much in the suggestion of the advantage to be derived from a view, and similar cases had been often satisfactorily tried in Edinburgh with the assistance of models. They did not see any reason for interfering with the notice given for the Christmas sittings. But they fixed the trial to take place then.

Agents for Pursuers—Hamilton & Kinnear, W.S.

Agent for Defenders—Macnaughton & Finlay, W.S.

THOMSON *v.* ADAM (*ante*, vol. i. p. 27).

Process—Amendment of Issue—Clerical Error.

Leave granted to amend a clerical error in an adjusted issue.

This case is set down for trial at the ensuing sittings. In the issue which had been adjusted, the wrong complained of was by a clerical error stated as having been committed on 17th October 1864, instead of 18th October 1864.

MACDONALD, for the pursuer, moved for leave to amend the issue.