

maintained by him (the respondent) that there was no restriction upon his use of the subjects during the period in question, either at common law or in virtue of any arrangement to that effect. It was, on the other hand, maintained by the advocator that the use of the subjects as an auction room was (1) illegal, as an inversion of the use for which the subjects were let to Fraser; and (2) contrary to an express condition alleged to have been made verbally by the advocator in consenting to the subsetting of the shop by Fraser.

The Sheriff-substitute granted interim interdict; but, on a record having been made up and proof led, he recalled that interdict and refused the advocator's petition. The Sheriff adhered, and the advocator now brought the present advocacy, in which it was agreed to cancel the proof taken in the Inferior Court, and have a new proof before the Lord Ordinary. On advising that proof, the Lord Ordinary adhered to the judgment of the Sheriff.

His Lordship pronounced the following interlocutor:—

"Finds that the advocator (petitioner in the Sheriff-court) has failed to prove, as matter of fact, that it was a condition of the consent given by her, or on her behalf, to the occupation by the respondent of the shop No. 88 Union Street, Aberdeen,—of which she was proprietrix, and of which the witness William Fraser was the tenant for the period between the 6th October 1862 and 1st June 1863, when the lease held by the said William Fraser was to terminate, and a lease in favour of the respondent for five years was to commence to run,—that no public sale or sales of books by auction was to be permitted therein during the period foresaid: Finds in point of law that, having relation to the character of the subjects so held in lease by Mr Fraser, and let to the respondent, there existed no implied prohibition against carrying on sales by auction therein: and further, Finds that such sales by auction did not operate an inversion of the use and possession of the premises; and, with reference to the foregoing findings, Repels the reasons of advocacy; remits *simpliciter* to the Sheriff; and decerns: Finds the advocator liable to the respondent in the expenses incurred by him in this Court: Allows an account thereof to be lodged, and remits the same to the auditor to tax and to report.

(Signed) "CHARLES BAILLIE.

"*Note.*—This case is not free from difficulty. But the Lord Ordinary is of opinion that no general principle of law or decision can be referred to by the advocator which fixes that it is illegal to carry on sales by auction in a shop such as that here in question, within burgh. If special damage through such use be done and proved, the interference of the proprietor therewith would be warranted on grounds which would be distinct and sufficiently intelligible. But that is not the case with which the Lord Ordinary has had here to deal, and, in the whole circumstances, he is of opinion that the advocator has failed to show reason sufficient to set aside the judgments in the Sheriff-court, which form the subject of this advocacy. (Initd.) C. B."

The advocator reclaimed.

MACKENZIE and BALFOUR for her.

MUIR and REID in answer.

The Court held that the use as an auction room of subjects let as an ordinary shop was an inversion of the possession, and was illegal without the consent of the proprietor; that there was no reliable evidence of such consent; and that being so, it was

unnecessary to inquire whether there had been any express prohibition introduced into the consent given by the landlord to the subset by Fraser.

Agents for Advocator—Hill, Reid and Drummond, W.S.

Agent for Respondent—W. Officer, S.S.C.

Friday, May 15.

TODD v. SANDISON AND OTHERS.

Poor—Assessment—Lands and Heritages—Parish.

Circumstances in which *held*, on advising a proof, that certain lands were situate within a parish, and therefore liable to contribute assessment for the relief of the poor laid on lands and heritages, and that certain other lands were not so situate and therefore were not liable.

This was an action brought by Archibald Todd, Inspector of Poor of the parish of Eyemouth, against Magnus Sandison of Highlaws, George Webster of Hallydown, Robert Cosens of Bogangreen, and Mr John Johnston, Inspector of Poor of the parish of Coldingham; and the object of the action was to have it declared that certain lands belonging to the defenders were situate in the parish of Eyemouth, and liable to assessment in that parish for relief of the poor.

After various procedure, and a proof taken by commission of the averments of parties, the Lord Ordinary (JERVISWOOD) found (1) with reference to the estate of Highlaws, that three fields forming part of that estate lay within the parish of Eyemouth, but that, *quoad ultra*, the defender Sandison was entitled to absolvitor; (2) with reference to the estate of Hallydown, that three fields known as Bennesty, Longbron, and Short Crimmels lay within the parish of Eyemouth, but that, *quoad ultra*, the defender Webster was entitled to absolvitor; (3) with reference to the estate of Bogangreen, that no part of that estate lay within the said parish, and therefore that the defender Cosens was entitled to be entirely assolized.

His Lordship added the following note:—

"The questions, which have been fully discussed before the Lord Ordinary, and on which he has been called on to pronounce judgment, are, in some respects, of a peculiar character, whether they be regarded in relation to the matters of fact, or to the legal principles which bear upon their determination.

"One point of leading importance, on which the Lord Ordinary feels it due to the parties to endeavour to explain his views here, is that which arises under the second plea in law for the pursuer, which is rested on the effect due to the Act of Parliament there and in the record mentioned.

"If, as has been maintained on the part of the pursuer, the extent of the parish be so distinctly fixed and ascertained under the provisions of that Act that any competent authority having the Statute to administer can, from its own terms, arrive at a safe conclusion as to the subjects which it embraces and to which it applies, the contention of the pursuer on this point might at once prevail.

"But if it be true, as the Lord Ordinary holds it to be, that the Act of Parliament is open to, and requires construction by extraneous inquiry in relation to the terms in which the subjects which are to form the new parish are therein described, it becomes all-important to ascertain how the provi-

sions of the Statute have been understood and acted on from the date of their enactment downwards to the date of the present contention.

"As bearing on this matter, a mass of evidence has been referred to by the respective parties; and the conclusion which the Lord Ordinary has drawn from the best consideration he has been able to bestow upon the whole of it, is, that, from the earliest date to which it has relation, the Statute has never been held as having application to lands or subjects other than those which truly and fully fell within the description of them as given in the Act of Parliament itself, and so has not been held applicable to lands which, although they might be bounded on all sides by lands which were properly portions of the newly disjoined parish, were truly no part of the specific *territory* of which it was constituted.

"The leading feature in the evidence, which more than any other has here had weight with the Lord Ordinary, and has aided him in putting the construction on the Statute of Erection to which he has now given effect, is that which shows that, in matters properly and purely parochial, the portions of the lands in question, as possessed by the defenders, have been continuously treated as in the parish of Coldingham.

"The evidence which established that in relation to county rates and assessments the same mode of treating the subjects has been adopted, and apparently so without cavil or question, throughout a long period of time, tends directly to support the case of the defenders, although it may not be entitled to the same amount of consideration here as that to which the Lord Ordinary has first adverted.

"But, taking the evidence as a whole, the Lord Ordinary cannot reconcile the proved state of the facts with the construction which the pursuer would give to the Statute; while that for which the defenders, on the other hand, contend, accords with and renders intelligible the proceedings of those affected by its provisions since the time of their enactment down to the date of the present dispute.

"In the view which the Lord Ordinary has taken of the case he has not felt himself called upon to deal specially with the apparently vexed question as to the true extent of a 'husbandland.' But while his impression is that this varies in different districts of Scotland, it was probably affected everywhere by the circumstance whether the particular lands were 'outfield' or 'infield.' He thinks it due to the pursuer to say that that party has brought forward evidence of great cogency here to prove that in the county of Berwick a husbandland extended to twenty-six acres or thereby, and that there is some direct evidence tending to show that in the district of Eyemouth in particular this was so."

The pursuer reclaimed.

GIFFORD and DUNCAN for him.

COOK and BALFOUR for Sandison.

JOHN MARSHALL and LEE for other defenders.

At advising—

LORD BENHOLME—In these conjoined actions the inspector of the parish of Eyemouth concludes to have it declared that certain specified lands, belonging respectively to three several parties, defenders, lie within and form parts and pertinents of the parish of Eyemouth. Certain portions of these lands are admitted by the defenders, their proprietors, to lie within that parish. It is only with regard to the remaining lands that any question has been raised.

It is admitted on all hands that the said parish was erected out of the parish of Coldingham by a Statute passed in 1633, by which there was ratified a letter and gift of dissolution and erection granted by King James I., dated 27th January 1618.

The true construction of this Statute has formed the main subject of dispute between the parties, and in truth affords the key to the solution of most of the details involved in the case.

According to the pursuer's contention, the terms of the Statute are so distinct, as well as imperative, as at once to dispense with and to exclude any explanation to be afforded by subsequent usage or practice; whilst the defenders maintain that it is impossible with any accuracy to ascertain the limits of the parish which the Statute detached from the old parish of Coldingham without referring to a considerable mass of evidence, documentary and oral, which has been brought to bear upon the question.

The inductive cause of separating the two parishes was plainly the convenience of the indwellers and inhabitants of the town of Eyemouth, in respect of the far distance of the said town and of the kirk built therein from the parish kirk of Coldingham, of which it had hitherto been a pendicle.

Accordingly, the general description of the subjects erected are—"All and hail the town of Eyemouth, with all lands, aikers, tenements, and cottages thereof, together with the mill of the same; together lykewise with all other lands, parts, and pendicles whatsoever of the said town of Eyemouth within the bounds, jurisdiction, and territory thereof." A special subject, apparently not immediately connected with the town, is added as follows—"With the lands now callit Beinrighouse lying within the territory of the said town of Eyemouth."

This last special subject is referred to as being within the territory, though apparently forming no part of the proper lands of the town. And this observation has led to a difficult question as to the extent or rather the meaning of the *territory and jurisdiction* of the town of Eyemouth. The most plausible answer to this question seems to be that before the Reformation, and the annexation to the Crown of the church lands of the Priory of Coldingham, there had been a subsidiary or subordinate jurisdiction exercised within the town of Eyemouth and its neighbourhood by an official appointed by the prior and his convent. The extent of that territory we have no distinct means of ascertaining. But, even if we had, it would afford no safe guide for ascertaining the boundaries or extent of the new parish; since, although the new parish appears to have all been within the ancient territory and jurisdiction, it does not appear that the convenience of the inhabitants required that the new parish should have embraced the whole of that territory.

The contention of the defenders, that the new parish embraced only such parts of the ancient territory as properly were parts or pendicles of the town, seems to me to be well founded. And especially the plea maintained by the defender Sandison, that his lands of Hiellaws, which were no part of the proper lands of the town, cannot be held from their mere local situation to have been embraced within the parish, appears not only from the terms of the Statute itself, but from the understanding and usage of centuries to be well founded.

Subsequently to the Reformation the temporality of the Priory of Coldingham, after being annexed to the Crown in 1587, appears to have been divided

between two great families—Home of Wedderburn, whose grant in 1597 comprehended what afterwards was erected into the parish of Eyemouth, and the Earl of Home, in whose favour was erected the lands of the Priory situate in the present parish of Coldingham. The royal charter in favour of the former has been produced in this process. The terms of the grant in favour of the Earl of Home are ascertained from the retours of his successors in 1621 and 1632 (Thomson's Retours, Berwickshire, Nos. 121 and 174).

It is remarkable that the grant in favour of Home of Wedderburn contains a number of husbandlands, which appear to have been larger portions of land. These appear to have been sub-divided into a great number of minute portions, which afterwards figured as runrig or rundale property. It is probable that in early times the inhabitants of Eyemouth, the dependents of the priory, each possessed in separate property a ridge or ridges, a number of which went to make up a husbandland. This seems a more natural way of accounting for the minute subdivision of this property than the hypothesis that this intermixture of interest was devised as affording a greater security against a common enemy. The view thus suggested as to the true extent of the new parish is strongly confirmed by the fact that within the grant of Home of Wedderburn there was contained a borough of barony created in 1597, previous to the erection of the parish of Eyemouth. I think the boundaries of the burgh must have coincided with those of the new parish.

In process of time these minute portions of lands belonging to the inhabitants of the burgh had been alienated in detail by the inhabitants of Eyemouth in favour of the neighbouring landholders. And at last the whole Eyemouth lands came into the hands of half-a-dozen proprietors. But as these proprietors must have acquired the several plots of the Eyemouth inhabitants from time to time as occasion offered, the district which at an early period had constituted the separate holding of a great number of cottars, came to be converted into runrig estate held by a few great proprietors, giving occasion to an action of division in the year 1763.

This peculiarity of tenure has afforded, perhaps, the surest criterion for ascertaining the extent of the new parish. *Prima facie*, the runrig lands, composing husbandlands, and so conveyed in the charter of 1597, were the lands within the territory of Eyemouth held anciently in small portions by its inhabitants.

Lord Home's grant, on the other hand, contains a variety of lands described under special names, which do not appear to have been subdivided like the Eyemouth husbandlands, but in general to have been of considerable extent. Within Lord Home's grant are contained the lands of Hielaws, Mawisbank, and Mawisacre, belonging to the defender Sandison, and Haliden or Hallidoun, belonging to the defender Kemp, now represented by Webster.

I. Under the first conclusion of his summons, the pursuer alleges that not only the portions of the runrig lands allotted in 1763 to the predecessor of the defender Sandison, but also his lands of Hielaws, Mawisbank, and Mawisacre, which were not embraced in the division of 1763, are comprehended within the parish of Eyemouth. But it is clear that these lands were not contained within the Eyemouth barony, but were erected with the Coldingham properties in favour of the Earl of Home. That they were locally surrounded by the

runrig lands seems to be the only plausible argument brought forward by the pursuer in support of his contention that they must have been embraced within the new parish. I cannot say that I have been moved by this argument. And if there were any doubt on the question, that doubt is removed by the proof led by Mr Sandison, from which it is demonstrated that his estate, consisting of Hielands on the one hand, and the particular fields allotted to his predecessor in 1762 on the other, have been assessed in the two parishes of Coldingham and Eyemouth for parochial and public burdens ever since the date of the division.

An alternative conclusion of the pursuer's summons against this defender, is intended to curtail the extent of his lands in the Coldingham parish to a comparatively small extent. In support of this conclusion, the arguments of the pursuer are altogether inconclusive. The defender's lands within the parish of Coldingham are stated in the titles to be a seven merk land, a five shilling land, and a four shilling land. His lands in Eyemouth, formerly runrig, are clearly ascertained in extent; are of considerably less extent; and cannot be confounded with the other. He admits that these are contained within the parish of Eyemouth. And I agree with the Lord Ordinary that the rest of his lands are in the parish of Coldingham.

II. Under the second conclusion of the summons, the only question that occurs relates to the lands of Hawkslaw; for the defender Webster does not resist this conclusion of the summons in regard to certain other portions of land mentioned in the Lord Ordinary's interlocutor.

These lands of Hawkslaw, consisting of about 20 acres, were the share of the runrig lands allotted to Mr Bogie of Halidoun in lieu of several small portions formerly belonging to him, and held in runrig. It would appear that these portions must have been acquired by the proprietors of Halidoun, and annexed to that estate, previous to the disjunction of the parish of Eyemouth from Coldingham. In the titles of the Halidoun estate, of which they thus formed part, the only parish mentioned is Coldingham. The newly erected parish, it would appear, did not therefore embrace these portions of land which, previous to its date, had ceased to constitute any part of the lands connected with the town of Eyemouth.

In this respect these 20 acres seem to be contrasted in the process of division with the great body of the runrig lands to be divided, in as much as the latter are stated to lie in the parish of Eyemouth, whilst the former are stated to lie in the parish of Coldingham. This is expressly stated in the condescendence for the pursuers of the action; and the statement is not denied in the course of the proceedings. It was not unnatural that the lands acquired by Bogie should be held as ex-cambed for the lands given up, so as to pass under the same titles and to remain subject to the same parochial division and assessments.

Accordingly, it is proved beyond doubt that these 20 acres, now called Hawkslaw, have been for a very long period of years, and indeed, as it would appear, ever since the date of the decree of division, treated as situated in the parish of Coldingham. From 1779 till 1817 they have been stated as in Coldingham in the County Cess Rolls, upon which parochial assessments have been made, as appears from the testimony of the witnesses William Turnbull Kelly and George Peat. The matter of the parochial assessments is spoken to by

the witnesses, John Johnstone, James Cox, James Bowhill, and John M'Gall.

III. The third conclusion of the summons relates to the property of the defender's heirs' trustees.

The case is, if possible, more clear in their favour than in regard to Mr Webster. The lands embraced in the third conclusion of the present summons are what were allotted in the division in lieu of certain runrig acres, stated in the process of division to amount to about 20 acres, belonging to Mr Wilkie of Foulden, being pertinents of the farm of Alemiln, and to be parts of the parish of Coldingham. The lands thus allotted are clearly proved to have always been held as contained within the parish of Coldingham.

I am therefore of opinion that the Lord Ordinary has taken a correct view of this case in all its parts, and that his Lordship's interlocutor ought to be adhered to.

This was the opinion of the Court.

Agents for Pursuer—Adam & Sang, S.S.C.

Agents for Defenders—Robert Hill, W.S.; James Webster, S.S.C.; Hamilton & Kinnear, W.S.

Friday, May 15.

1. ADV. CALDER AND GRANT *v.* MACKENZIE.
2. ADV. CALDER AND GRANT *v.* MACKENZIE.
3. MACGREGOR AND CRUICKSHANKS *v.* MACKENZIE.

*Bankrupt—Trust-Deed—Disposition omnium bonorum—Act of Grace—Acts 1621 and 1696—Bankrupt Act, 9th section—Action or Exception—Reply.* A debtor after being charged on a bill, granted a trust-deed, and also a disposition *omnium bonorum*, in favour of a creditor. On the expiry of the charge the debtor was incarcerated, and, having applied for the benefit of the Act of Grace, he granted a disposition *omnium bonorum* in favour of the incarcerating creditor, in terms of the Act of Grace. *Held* that a disposition *omnium bonorum*, granted under the Act of Grace in favour of an incarcerating creditor, conferred a good title on him to set aside a trust-deed and disposition *omnium bonorum* (1) under the Act 1621, as in default of begun diligence, and (2) of the Act 1696, as executed within 60 days of bankruptcy. *Held* that the words "action or exception" in the ninth section of the Bankrupt Act include "reply."

These advocations were from the Sheriff-court of Inverness-shire, and the questions arose out of the following circumstances:—

The advocator Calder, who was a farmer at Cran-nich, in Strathspey, was indebted to the respondent in the sum of £47, contained in a bill for that amount. On 19th April 1865, Calder was charged at the instance of the respondent to make payment of the contents of the said bill. On 21st April, Calder executed a trust-deed in favour of John Grant, messenger-at-arms, Grantown, for behoof of his creditors. On 27th April, he was incarcerated under Mackenzie's diligence; and, having applied for and obtained the benefit of the Act of Grace, he, on 3d May, at the request of the said John Grant, executed a disposition *omnium bonorum* in his favour. This not satisfying the provisions of the Act, on 11th May 1865, Calder executed in favour of Mackenzie, the incarcerating creditor, a similar

disposition *omnium bonorum* as provided for by the Act.

John Grant having advertised the stock on the farm of Cran-nich to be sold, Mackenzie presented an application to the Sheriff to interdict the said sale. This forms the subject of the process first above mentioned.

Mackenzie, being unable to obtain possession of the effects conveyed to him in the disposition *omnium bonorum* of 11th May 1865, presented an application to the Sheriff for warrant to take possession thereof. This forms the subject of the process second above mentioned.

After this last application was presented, John Grant sold the stock on the farm of Cran-nich to Macgregor and Cruickshanks. Mackenzie then pointed the effects, and Macgregor and Cruickshanks presented an application to the Sheriff for interdict against any sale under the said poiding. This forms the subject of the third process above mentioned.

The question for the determination of the Court was, Whether the disposition *omnium bonorum* of 11th May 1865, in favour of the incarcerating creditor Mackenzie, superseded the trust-deed of 21st April and the disposition *omnium bonorum* of 3d May 1865 in favour of John Grant,—these having been granted after Mackenzie's diligence had begun, and within sixty days of Calder's bankruptcy.

The Sheriff-substitute (Thomson) held that the trust-deed and the first disposition were good and effectual. His Lordship observed, in a note to his interlocutor:—

"Taking the two deeds as in competition with each other, the Sheriff-substitute can discover no authority for holding that the disposition executed in prison is entitled to supersede the voluntary trust, which is prior to it in date; and it is only on the ground of fraud, or of its falling under some of the classes of deeds struck at by the Act 1621, or the Act 1696, that the deed in favour of the respondent Grant can be held inoperative. As already observed, there is no reason to be found in the evidence for holding that the whole transaction is not real and in good faith. The trust-deed is not a gratuitous alienation, nor an alienation of a special subject, after diligence suitable for the attachment of that subject has begun in the sense of the Act 1621. It is no doubt a deed granted within sixty days of notour bankruptcy, and might, at some former period in the history of the law, have been held to be reducible under the first branch of the Act 1696. All the more recent authorities and decisions, however, support the view that deeds of this kind, if their *bona fides* be undoubted, and there is no reason to hold that the trustee (*he being fairly invested*) will manage the estate for the equal benefit of all concerned, will be allowed to operate, unless superseded by actual sequestration under the Bankrupt Act. That the trust-deed in favour of Grant is in this position, the Sheriff-substitute sees no reason to doubt."

The Sheriff (Ivory) altered this interlocutor. His Lordship explained his judgment in the following note:—

"It was not disputed at the debate that the respondent was rendered notour bankrupt on the 29th April 1865, and that the two dispositions granted by him in favour of John Grant were executed within sixty days of his bankruptcy. The respondent, however, maintained that as these deeds were granted for the purpose of an equal distribution of his estate among his whole creditors,