

tion out of these facts by themselves is to my mind extravagant.

The fourth conclusion is for payment of a sum of £10 a-year from 1852 to 1864. Independently of the fatal objections arising from the defects in the statements and conclusions which I have noticed; the nature of the claim and the circumstances under which it is preferred seem sufficient to dispose of it. The Privy Council fix a minimum salary as necessary to be provided, in order that the teacher shall obtain their grant; and, in addition, a house or £10 a-year, to be paid out of voluntary subscriptions. The pursuer got the Government grant. He got £10, and more than that, in addition during every year; but, as he says he will show that the £10 of addition was not raised by voluntary subscription, as the Privy Council thought it was, he shall have the £10 out of the pockets of the defenders. The pursuer having got and pocketed his grant during each of the twelve years without objection, notice, or demand—especially seeing that the body was necessarily changing—could not now insist on it. Moreover, the requirement of the Privy Council was a matter for that body to deal with, as it was simply required by them as a basis for giving what was actually given. Then, that parties should be bound to pay what should have been raised by voluntary subscription, where it is not set out what was subscribed, or that any failure occurred in getting the subscriptions, is not clear. An agreement to such a precise effect would require to be alleged very articulately indeed.

As to the remaining conclusions, they are, if possible, more extravagant.

The fifth conclusion asks payment of a sum of augmented salary "withheld on the ground of a partially unfavourable report" of the Government inspectors, as the Lord Ordinary has stated. The sixth is framed upon the footing of the dismissal on three months' notice stipulated for in his appointment, because these three months did not coincide with the three months before the close of the Privy Council year, and because allowances for parts of years are not made by the Privy Council, assumes that the fundamental conditions of a teacher's appointment in the matter of notice are abrogated by the reception of a Government grant. The last is (1) for an allowance of £3 for wages for teaching a pupil teacher, who had not been taught during the period required; (2) for an allowance for teaching a person who, partly by his own fault, was not retained on the roll of pupil teachers, the actual teaching of a pupil teacher being necessary to found the claim in favour of the pursuer to receive an allowance. Another is said to be rested on terminating the engagement of the pursuer a few days before the close of the school year, which assumes a restriction of the power of dismissal formerly spoken to, or a supposed duty to get the inspector to examine the school on a day sooner than the day of actual examination, for which there is no ground stated.

The result will be, if your Lordships agree, that the interlocutor of the Lord Ordinary should be recalled so far as brought under review by Dr Craik and the other defenders, and adhered to in so far as reclaimed against by the pursuer.

The other judges concurred.

Agent for Pursuer—M. Lawson, S.S.C.

Agents for Defenders—J. & R. D. Ross, W.S.

Thursday, July 16.

FIRST DIVISION.

STEWART V. TENNANT AND OTHERS.

Title—Heritage—Superiority—A adjudication in Implement—Trust—Progress of Titles—Prescription. In 1792 A executed a last will and testament in the English form disposing of, *inter alia*, his Scotch estates. After A's death his eldest son B, in respect that the English testament did not enable the testamentary trustees to make up proper feudal titles to the Scotch estates, executed in 1794 a disposition in the Scotch form disposing, conveying, and making over to them these estates for the uses and purposes expressed in the English will. At the same time B completed regular feudal titles to the estates in his own person in fee-simple, as his father's heir-at-law. The trustees were infert and possessed the estates till 1804, when B took possession, and continued to do so till his death in 1844, having meanwhile acquired the superiority of the estates. His only son C then completed his title to the superiority as heir of his father, and obtained decree of adjudication in implement in the Court of Session against the heirs of the deceased trustees (the last of whom died in 1821) adjudging the estates from them to himself and the heirs-male of his body. After infertment on the decree he consolidated the property with the superiority. Thereafter C sold the estate, but the purchaser being doubtful of his title, he brought an action of declarator of his right to sell. *Held* (1) that B possessed the estate as beneficiary of the trust, and not adversely to the trustees, consequently that positive prescription did not run in favour of B nor negative prescription against the trustees; and (2) that the titles completed by C after his father's death were valid and effectual to vest the lands in him in fee-simple, and enable him to convey the lands in fee-simple to a purchaser.

This was an action raised by Charles Stewart, Esq., of Ardsheal, Argyllshire, against Robert Tennant, Esq., of Ballachelish, and others, to have it found and declared that the pursuer has good and undoubted right to sell the estate of Ardsheal, and to have the defender ordained to pay the price he has by minute of agreement with the pursuer consented to give therefor. The defender demurred to complete the transaction and pay the stipulated price, on the ground that the pursuer's right over the estate was limited, and certain interests in the estate had been created by deeds executed by his grandfather and his father. It appeared that Duncan Stewart of Ardsheal, the pursuer's grandfather, by last will and testament (in the English form) dated 9th August 1792, made a settlement of his whole estate, both real and personal. His personal estate he gave and bequeathed to and among all his children equally, share and share alike, in the terms and under the conditions therein mentioned; and by the same deed he further gave and devised his lands and estate of Ardsheal and other lands in Argyllshire, held by him in fee-simple, to trustees for the uses and purposes, and upon the trusts therein expressed and declared, with a direction to such trustees from time to time to nominate and appoint a new trustee or trustees in

room of any of their number who might die or refuse to act, so that the number of trustees should always be kept or filled up to the number of three. The testator died about a year after the date of this deed, survived by his widow and a numerous family of children. This will having been framed as aforesaid in the English form, was ineffectual and inoperative so far as it purported to convey or to constitute a trust of the Scotch heritable estate, in respect that it did not contain the proper technical words of conveyance, and was neither executed nor authenticated in the manner required by the law of Scotland. On the testator's death, however, his eldest son and heir, Charles Stewart, did not attempt to challenge or impugn the validity of the will, or the settlement of the heritage thereby made, but on 4th August 1794 he voluntarily executed a disposition in the Scotch form, disposing, conveying, and making over the lands of Ardsheal and others to and in favour of the testamentary trustees, and their heirs and assigns upon trust, for the uses and purposes expressed in the will; and in the narrative of the disposition he specially set forth, as the consideration or cause of granting it, that the settlement made by his deceased father "does not contain procuratory of resignation, precept of sasine, or other clauses necessary to enable the said trustees to make up proper feudal titles to the lands and estates thereby conveyed." In order to give efficacy to this deed, Charles Stewart at the same time completed regular feudal titles to the estate in his own person, in fee-simple, as his father's heir-at-law.

The trustees having taken infeftment on the supplementary disposition thus granted in their favour, entered into possession of Ardsheal and the other lands, and continued to possess and manage the same until the death of Mrs Stewart, the testator's widow, which happened in the year 1804. Though Mrs Stewart was herself a trustee, no new trustee was named to supply her place in the trust, nor were any new trustees ever assumed or appointed by the original trustees, or the survivors or survivor of them, in terms of the direction to that effect contained in the will, and the last survivor died so long ago as 6th February 1821.

Immediately after the death of the widow (all the provisions in favour of the younger children being by that time paid or provided for), the said Charles Stewart, the testator's eldest son and heir, and who had made up titles in that character, took possession of the estate, and was thenceforth allowed, without interruption or objection from any quarter, to occupy and possess it, and receive the rents, till the year 1844, when he died.

On the death of the said Charles Stewart he was succeeded by his only son, also named Charles, the present proprietor, who is the grandson and nearest and lawful heir-male of the body of the testator. This last-mentioned Charles Stewart completed titles connected with the investitures of the property which had been established in his father's person. He was confirmed by the Crown in the superiority of the estates which his father had acquired in 1815 from the Duke of Argyll. He further took certain proceedings in the Court of Session in Scotland by way of adjudication against the heirs of the deceased trustees of the will, the result of which proceedings was, that the lands and estate of Ardsheal and others were on 17th November 1846 adjudged from the said heirs, and decerned and declared to belong heritably and irredeemably to him, the said Charles Stewart, and the heirs-

male of his body, whom failing, the other heirs therein specified—these being the whole existing heirs and representatives of the several beneficiaries under the said will of Duncan Stewart, according to the destination, and in the order in which they were by that will called to the succession of the estate. Finally, the said Charles Stewart, having completed titles under the decree so obtained by him, consolidated the property with the superiority by granting to himself a disposition of said lands, followed by an instrument of resignation *ad remanentiam*.

Being thus formally, and, as he had no doubt conceived effectually, vested in the estate in fee-simple, Mr Stewart, in 1865, agreed with the defender, Mr Tennant, for a sale of the estate. The defender agreed to purchase, but was doubtful of the pursuer's title.

For the purpose of trying this question, and having the true extent of his right judicially ascertained, Mr Stewart raised this action, calling as defenders the said Robert Tennant, the beneficiaries under the will, and the heir of the last survivor of the trustees, and concluding to have it found and declared that he, the pursuer, had a good and undoubted right and title to sell the lands and estate of Ardsheal, and to grant a valid and effectual disposition of the said lands and estate to the said Robert Tennant, who had purchased the same from him.

Defences to this summons were lodged on the part of Mr John Stewart, barrister-at-law, grandson of the testator, and the next heir entitled to succeed under the limitations of the will, assuming those limitations to be still in force and capable of taking effect.

There was a cross action at the instance of the defender, Mr Tennant, against the pursuer, brought in the form of a suspension of a threatened charge by the pursuer for payment of £33,000, the agreed on price of the estate. In this process the Lord Ordinary had, on 22d February last, pronounced an interlocutor repelling the reasons of suspension, and finding the letters and charge orderly proceeded. In the note to his interlocutor his Lordship said:—"The question depends very much upon whether the trust is still to be held as existing to the effect of creating an objection as in a question with the complainer as purchaser of the lands in question to the title which the charger has it in his power to give, or whether the trust must not be held as entirely at an end, or at least entirely obviated in regard to any questions with the complainer in consequence of having, so far as it ever could have had, any effect, been struck at by the negative prescription, while another adverse title (being that now founded on by the charger) stands fortified by the positive prescription.

"It is important to notice that the complainer does not aver there has been any possession of the lands in question by any trustees under the trust title for the last sixty years. It is clear, on the contrary, that in point of fact the possession since 1803 has been by Charles Stewart, the charger's father, or by others for him till his death in 1844, and subsequently by the charger himself.

"The inquiry which then suggests itself is—Under what description of title has such possession been had? Was it a title which, in its nature and terms was calculated to keep alive the trust of 1794 and the interests thereby created? Or was it a title which excludes the trust interests, and is now perfectly good and unobjectionable as in any question

at least with a purchaser of or singular successor in the lands?

"Now, first in regard to these questions, it has to be kept in view that Charles Stewart, the charger's father, made up his title to the lands by charter and sasine in 1794. It is true that a title flowing from Charles Stewart was also made up in 1794 in favour of the trustees, but while they have had no possession under either that or any other title since 1803, Charles Stewart and his son, the charger, have, under their individual titles, successively possessed the lands in question fully and uninterruptedly since that date.

"In this state of matters, and supposing there had been nothing more in the case, there could, the Lord Ordinary thinks, be no reasonable ground for doubting that the charger's title, fortified as it is by the positive prescription, is complete and unobjectionable.

"Nor does the Lord Ordinary think that the trust title has been saved from the operation of the negative prescription by the circumstance of the disposition in favour of the trustees in 1794 having been granted by Charles Stewart, who is now represented by the charger, or the circumstance that Charles Stewart had himself a substantial interest under the trust; for while the possession which was had under the trust-title did not extend to more than about nine or ten years at most, the possession which followed (extending to upwards of sixty years) was under a different title altogether—which not only did not include the objects of the trust, but was adverse to and exclusive of them. The case of *Ogilvie v. Erskine*, 26th May 1837, 15 S. 1028, cited and chiefly relied on by the complainer in regard to this point, appears to the Lord Ordinary to be inapplicable, for there the two titles in the same individual who possessed were equally unlimited, whereas in the present case there was only one title in Charles Stewart, without any limitation or burden whatever, while the other title was not in him, but in a set of trustees under limitations and conditions and for behoof of others as well as Charles Stewart. The opinions of the judges in the case of *Waddell v. Pollock and Others*, 19th June 1828, 6 S. 999, illustrate the distinction. The Lord Ordinary therefore holds that not only has the positive prescription run on the charger's individual title, but that the trust title and all interests under it have been cut off and extinguished by the negative prescription on the principles recognised and given effect to in many cases, and among others in the cases of *Kinloch and Others v. Rocheid*, 27th May 1800, M., "Prescription" App. Nos. 4 and 7; *Paul v. Reid*, 8th February 1814, F.C.; and *Barnes and Others v. Hill or Tail and Others*, 5th March 1857, 19 D. 626.

"The superiority title made up by the respondent's father in 1815 is also important, and if not sufficient in itself, with the possession of more than forty years which has followed upon it, is at least strongly confirmatory of that which the charger otherwise has under and by the terms of that title. Although made up more immediately with reference to the superiority, the *plenum dominium quoad* lands and superiority was and must be held to be carried. *Robertson v. Duke of Atholl*, 16th February 1808, Hume 463, and *Wilson v. Pollock*, 29th November 1839, 2 D. 159.

"The proceedings taken and titles made up by the charger himself in 1845, after the succession had opened to him through the death of his father, are likewise, in the view the Lord Ordinary takes

of them, corroborative and confirmative of the charger's title otherwise, for he cannot concur in the suggestion which was made on the part of the complainer that these proceedings and titles must be taken as a recognition of the trust, and are therefore inconsistent with the contention of the charger that it had been then or has been yet cut off by the negative prescription. It appears to the Lord Ordinary to be a conclusive answer to any such view that the proceedings and titles referred to were taken and expedite plainly and manifestly for the purpose of putting an end to the form of any feudal trust-title, and merging such title solely and exclusively in the individual title of Charles Stewart. Even if it could be held that there was by the proceedings referred to some recognition (with whatever object) of the trust, the Lord Ordinary cannot see how, in any sound view, the interests which were created, or might be supposed to have been created by the trust not having been in any way or anywhere made real burdens or fenced by irritant and resolute clauses, can, in the circumstances, come into collision or competition with the complainer as a purchaser of and singular successor in the lands in question under the title which the charger is ready to give him."

The suspender reclaimed. The Lord Ordinary then made avizandum with the declarator to the First Division in order that both processes might be considered and disposed of together.

YOUNG and WEBSTER for pursuer and respondent.
DEAN of FACULTY and WATSON for defender and complainer.

The Court, after hearing argument, directed that, before they expressed any opinion upon the questions at issue, a case should be prepared for the opinion of English counsel, as to the construction and effect, according to English law, of the will of the deceased Duncan Stewart, on the supposition that the estate conveyed by the said will had been a landed estate situated in England.

The clauses especially referred to by the Court were those relating to the testator's settlement of his Scotch estate, and which were imported at length into the supplementary conveyance granted in 1794 by his eldest son Charles Stewart to the trustees of the will.

The opinion returned was to the effect that the trust created by the will of 1792 were not, according to the law of England, such as to qualify the pursuer's right to the extent of disabling him from selling his lands and giving a valid title in fee-simple to a purchaser.

At advising—

The Court were of opinion that the plea of prescription was not well founded. No doubt the pursuer's father and himself possessed the estate for more than forty years. And the pursuer, connecting that possession with the title made up by his father as heir of the truster in 1794, which in its form was fee-simple, pleaded that he thereby acquired a good prescriptive title. Now, if the forty years' possession had been *adverse* possession to the trust possession, it would have had a very important bearing on the question. But in fact the two possessions were the same. The titles expedite by the pursuer's father as heir of the truster created no fee-simple right in him, but merely accreted to and validated the title of the trustees to the *dominium utile* of the estate previously conveyed to them by the pursuer's father by the disposition of 1794. The *dominium utile* was so conveyed to them in order to carry out the intention and provisions of

the trust-deed of 1792, and therefore was to be held by them for the purposes expressed in that deed. On looking at these purposes it was evident that the trustees were to allow the heir to possess the estate. Therefore there could be no doubt that during these forty years the pursuer's father possessed as the beneficiary of the trust, and his possession was the possession of the trustees. On the other hand, negative prescription had not run against the trustees on account of their having all died by the year 1821. Though all the trustees died, the trust did not therefore die. It could at any time be revived by the appointment of a judicial factor to the trust-estate. At the same time, though they did not agree with the Lord Ordinary on the grounds of his judgment, they were disposed to agree with him in the result. There was no ground for the defender's contention that the trustees were bound by the trust-deed to execute an entail of the estate. In short, the whole question was, Whether the pursuer was justified in making up titles as he did in 1845, 1846, and 1847, after the death of his father? On the ground that, as beneficiary under the trust of 1792, he was entitled to a conveyance of the estate in fee-simple, he obtained decree in an action of adjudication in implement against the heirs of the trustees (whom he had charged to enter) whereby the lands were declared to pertain and belong to him and his heirs heritably and irredeemably. Having by this time acquired on a different title the *superiority* of the lands, he, as superior, granted a charter of adjudication in implement in favour of himself, and on this charter he was infeft. He then consolidated the superiority and the *dominium utile*. These deeds were included in the progress of titles offered to the purchaser, and were perfectly good titles to convey the lands to a purchaser in fee-simple.

Interlocutor of Lord Ordinary adhered to.
 Agent for pursuer—Wm. Mitchell, S.S.C.
 Agents for Mr Tennant—Macrae & Flett, W.S.
 Agent for Mr John Stewart—Jas. Dalgleish, W.S.

Friday, July 17.

M'LEOD AND OTHERS v. LESLIE AND OTHERS.

(*Ante*, p. 275.)

Expenses—Diligence for Recovery of Writs. Circumstances where the expense of a diligence was allowed, though no documents had been recovered under it.

Expenses—Counsel's Fees. Held that junior counsel ought to attend the advising of a case as well as senior counsel, and expense of a fee allowed accordingly.

The Auditor reported this case with the following note:—"The sum taxed off this account amounts to £177, 8s. 11d. In this are included the whole expenses of obtaining and executing a commission and diligence at the instance of the pursuers for recovery of certain documents, amounting to no less than £120, 0s. 11d. At the audit, the grounds on which this branch of the account was disallowed were explained by the Auditor, but as the amount is considerable, and it is not improbable that objections to the report may be stated, the Auditor thinks it right to record the grounds on which he has proceeded in disallowing these expenses.

"The summons contains conclusions against the

defenders for exhibition and delivery of two contracts of marriage, the terms of which it was necessary for the pursuers to establish as the basis of the petitory conclusions of the action. Previous to the institution of the action, the pursuers had discovered the existence of the draft of one of these contracts, and in whose custody it was. In the defences it was stated, that the defenders were not, and never had been in possession of the deeds libelled. Before revising the condescendence the pursuers applied for a commission and diligence for the recovery of a great variety of documents enumerated in a specification lodged in process. The diligence was granted, but only to a limited extent, viz., for recovery of the 1st, 2d, and 3d articles of the specification—article 1st being one of the contracts above mentioned, article 2nd the other contract, and article 3d—all drafts or copies of these deeds. The diligence thus limited was executed at great expense in Edinburgh and Aberdeen, but the only document recovered was the draft of one of the contracts, the existence and custody of which were within the knowledge of the pursuers when the action was raised. After reporting this diligence, the pursuers craved and obtained a sist of procedure to enable them to prove the tenor of the contract (of which the draft had been recovered) in a separate action, and the tenor having been proved, the record in this action was completed and closed.

"It appears to the Auditor that, however important to the pursuers it might be to set up the draft of the missing contract as the foundation of their claims, they are not entitled to recover from the defenders in this process the expense of obtaining and executing their diligence in the face of the statement in the defences—that the defenders had not the deeds libelled, and if the failure of the pursuers to recover them or to obtain decree in this action in terms of the conclusions for exhibition and delivery, and that the expenses in question are truly expenses incident to and for the purposes of their separate action of proving the tenor, the expenses of which have not been given against the defenders.

"The Auditor has disallowed these expenses *in toto* as being expenses not covered by the general finding of expenses. But even should a different view be taken by the Court, it seems to the Auditor that the diligence has been executed at an expense altogether disproportionate to the simple nature of the specification *as limited*; and in order that the Court may have the materials (without a further remit to him) for disposing of this branch of the expenses, on the assumption that it is to be sustained to some extent as expenses under the general finding, the Auditor has marked on the margin of the account the items of the expenses of obtaining and executing the diligence which may, on such assumption, be sustained against the defenders. These amount to £43, 0s. 4d. sterling."

The pursuers also objected to the report, in respect the Auditor had disallowed a fee to junior counsel for attending advising of the case in the Inner-House.

NEVAY for them.

CLARK in reply.

At advising—

LORD DEAS—There is no general rule to the effect that whenever a diligence is unsuccessful the expenses are to be disallowed. In this case we thought proper that every effort should be made to recover these documents. I am clearly of opinion