

an executor who pays away funds to beneficiaries or legatees without paying or satisfying the creditors' debt does so at his peril, and that it will not free him from personal liability in the event of ultimate deficiency of funds, that he has set aside for the purpose of satisfying the creditors' claim a fund or security which at the time was sufficient. I understand it to be decided by that case that it is no defence to the executor in the event of an ultimate deficiency that the creditor has not called up his debt, but continued to receive interest upon it from the executor. But that and similar cases do not involve, and are not applicable to a question between onerous creditors and legatees who have received payment *bona fide* when the funds were sufficient to satisfy the creditors' claim in full.

No case has been cited, and I know of none, which militates against or modifies the law laid down by Erskine, and although the present case presents features of novelty and differs in its circumstances from some of those which I have cited, I think the defender is entitled to the benefit of the principle which was recognised in the case of *Robertson*, and the cases which followed on it. On these grounds I shall assoilzie the defender.

I have scarcely alluded to the defender's plea of delegation. In the view which I take, it is not necessary to say whether I should or should not sustain that plea if it had stood alone. But the facts on which it is rested have, I think, a material bearing upon the question whether the pursuers unduly delayed to claim against the executor of Dr Forbes, and have gone far to enable me to reach the conclusion at which I have arrived. It may be that the pursuers' transactions with Charles Forbes in 1886; and their failure to communicate with Dr Forbes, might have even been held to free the latter from his obligation. But even if the pursuers' actings fall short of what is required to constitute delegation, the result shows that they looked so exclusively to Charles Forbes as regarded the loan and payment of interest on it, that they entirely lost sight of their original debtor, and did not know whether he was alive or dead. I think that in a question with the defender it is impossible to acquit the pursuers of such neglect in pursuing their claim against Dr Forbes' estate, while in the hands of the executor, as disentitles them to succeed in their present claim.

Counsel for the Pursuers—Vary Campbell—Pitman. Agents—Gillespie & Pater-son, W.S.

Counsel for the Defender—W. C. Smith. Agents—Lindsay & Wallace, W.S.

Wednesday, December 13.

SECOND DIVISION.

[Dean of Guild Court,
Dunfermline.

TURNER v. FRASER AND ANOTHER.

*Church—Churchyard—Churchyard-Wall,
Interference with—Tombstone—Heritors—
Heritors' Right of Compromise.*

The proprietor of a tenement, bounded on the south by a churchyard, applied to the Dean of Guild to warrant operations which included taking down the churchyard wall and rebuilding it as the back-wall of his proposed tenement. The heritors objected that this "would form an encroachment on the heritors' sole or mutual right of property" in the churchyard wall. The Dean of Guild, finding a competition of heritable right, sisted process, but ultimately, on a joint-minute for the parties, granted warrant finding that the petitioner's operations would not interfere with or prejudice the tombstones or rights of anyone in the wall.

The proprietor of a tablet in the wall, and of a family burying-ground adjoining, who had been sisted as a defender in the Dean of Guild process, appealed to the Court of Session against the interlocutor, maintaining (1) that the proposed operations would injure his tablet, and (2) that the arrangement in the minute was *ultra vires* of the heritors.

Held that it was within the power of the heritors, as guardians in the public interest of the churchyard, after reasonably and judicially considering the matter, to enter into the arrangement expressed in the joint-minute.

Upon 22nd June 1893 Alexander Fraser, merchant, Dunfermline, lodged an application in the Dean of Guild Court there for warrant to erect a tenement on his own property, as shown upon plans produced.

The titles of the petitioner described his property as "lying within the liberties of the burgh of Dunfermline on the south side of the street called the Maygate, and bounded . . . the church-yard upon the south, and by the said street called the Maygate upon the north parts." The petition was served upon John Landale, solicitor, Dunfermline, clerk to the heritors of the parish of Dunfermline, as well as upon the various authorities in the public interest. The building as finally arranged would have the effect of raising the churchyard wall several feet, and using it as a back-wall of the petitioner's tenement.

The heritors entered appearance and lodged answers, in which they averred—"The petitioner's plans show that he proposes taking down the said enclosing wall and rebuilding and carrying it up as the back-wall of a large warehouse. In par-

ticular, the said plans show that the petitioner proposes inserting windows in said wall below the level of the tombstones presently inserted therein. Such operations and uses would form an encroachment on the heritors' sole or mutual right of property, and be inconsistent with the purposes to which said wall has been and is dedicated."

Upon 10th July 1893 Daniel Turner, solicitor-at-law, Edinburgh, lodged a minute in which he craved to be sisted a party to the process. He averred—"The petitioner states that the southern boundary of his property is the churchyard of the Abbey Parish burying-ground. That is ambiguous. The boundary there of the churchyard is a stone wall in which the tombstone of the ancestors of the minuter has formed a part for forty years and upwards. The petitioner by his petition and plans craves warrant to remove the wall in question, and on the site of it, and of his other ground, to erect a tenement of three storeys. The petition and plans are blank of any provision or arrangement as to the preservation or restoration of the tombstone. There is produced the burial right in favour of Daniel Turner, nail manufacturer, Reform Street, Dunfermline, and the heirs-male of his body, of the burial place immediately to the south of the wall in question, dated 11th April 1838. That burial right certiorates that the said wall is the wall of the churchyard, and not the property of the petitioner. The minuter, through his father Archibald Turner, nail manufacturer, Dunfermline, is the grandson and heir-male of the said Daniel Turner, nail manufacturer, Dunfermline."

The burying-ground right referred to in that minute contained these boundaries—
... "The said burying-ground consists of two rooms, and is bounded on the north by the north wall of the churchyard."

The petitioner pleaded—"(1) As the proposed alterations are lawful, and will be beneficial to the petitioner's property, and as they can be carried through with perfect safety, the petitioner is entitled to warrant as craved. (4) The said wall being the exclusive property of the petitioner, and the memorial tablet or tombstone inserted in said wall not being to be interfered with, the prayer of the petition ought to be granted."

The heritors pleaded—"(2) The said back-wall being the sole property of the heritors, or at any rate they having a joint or mutual right thereto, the petitioner is not entitled to interfere therewith."

Turner pleaded—"(3) The prayer of the petition *quoad* the said wall is inept, and ought not to be granted, in respect (1st) of the dedication and designation aforesaid, followed by undisturbed possession for forty years and upwards; (2nd) of the wall not being the exclusive property of the petitioner; (3rd) of the terms of the petition and plans; and (4th) the proposed operations of the petitioner in the churchyard and on the wall thereof are unlawful,

ultra vires, and contrary to good morals and common decency. (4) *Esto* that the wall in question of which the tombstone forms a part is the property of the heritors, or a mutual or party wall, the petitioner has no title to interfere therewith as prayed without the consent of the heritors and respondent."

Upon 14th August 1893 the Court pronounced this interlocutor—"Finds that the pleadings of parties raises a question of competition of heritable rights to the wall in dispute, which it is not competent for this Court to decide; and therefore sists process, leaving it to the petitioner, if so advised, to have the question as to the extent of his right to the said wall settled by a competent Court."

Upon 4th September 1893 the petitioner and the respondents the heritors of Dunfermline lodged this joint-minute—"Fraser for the petitioner, and Landale for the respondents the heritors, concur in stating that the parties have agreed, without prejudice to their rights and pleas, and in order to obviate further litigation, to settle the action on the following footing, namely—That the respondents the heritors agree to give their consent to petitioner's proposed operations conform to the new plan, No. 25 of process, and relative letter by Mr Houston, architect, No. 54 of process; that petitioner will place the existing copestone on the top of the wall when it is lowered to the height at which it stood before it was raised by petitioner's predecessors; that the petitioner's windows shall not come below the copestone when so lowered and placed; which copestone shall form the sole of the windows to be put in the back-wall of petitioner's property. . . . They further concur in craving the Court to recal the sist pronounced on the 14th day of August 1893, and to grant warrant in terms of the prayer of the petition as varied by and under the conditions expressed in this minute."

Upon the same date the Dean of Guild pronounced this interlocutor—"On the motion of the petitioner, recalls the sist pronounced on fourteenth August last, allows the joint-minute for the petitioner and the respondents the heritors of the parish of Dunfermline to be received, and having considered the said joint-minute and relative amended plan of petitioner's south wall, and heard the respondent Daniel Turner and the agents for the petitioner and heritors, Finds that by the amended plan, No. 52 of process, as varied by the joint-minute, the petitioner's operations will be carried out without any interference with the memorial tombstones or tablets in the wall in dispute, including that belonging to the respondent Daniel Turner, and without prejudicially affecting any rights which the said Daniel Turner may have in the said wall: Therefore grants warrant for the erection of the south wall of the petitioner's tenement in terms of the said amended plan, as varied by and under the conditions expressed in said joint-minute: Finds no expenses due to or by the parties."

Turner appealed to the Court of Session.

Authorities cited — *Wright v. Lady Elphinstone*, July 20, 1881, 8 R. 1025; *Hill v. Wood*, January 30, 1863, 1 Macph, 360; *Russell, &c. v. Marquis of Bute*, December 8, 1882, 10 R. 302; *Thomson v. Dundee Police Commissioners*, December 8, 1887, 15 R. 164; *Brown v. Gibson & Wilson*, June 29, 1859, 31 Jur. 607.

At advising—

LORD YOUNG—The property of the *solum* of the churchyard is vested in the heritors, but as trustees with a duty to use and see that it is used only as a churchyard, and in the performance of that duty they may be controlled by this Court at the instance of anyone having a legitimate interest. Should a question arise as to the limits of this *solum*, as, for instance, whether it includes the site of a surrounding wall, or of the wall bounding it on any side or at any part, or whether it is altogether within the wall, the proper parties to try the question are, on the one hand, the heritors as the proprietors of the *solum* of the churchyard, and on the other the proprietors of the *solum* immediately adjoining at the place in dispute.

Here such a question occurred regarding the site of the wall on the north side of the churchyard of Dunfermline, where the respondent was and is proprietor of the *solum* immediately adjoining that of the churchyard—the respondent maintaining that the wall at that part was on his *solum*, and the heritors that it was on theirs—*i.e.*, part of the churchyard. The question occurred in the Dean of Guild Court, and the Dean of Guild properly, I think, thought that this being a question of heritable right was not within his competency, and therefore sisted process that the respondent might take steps to have it settled by a competent Court.

In these circumstances it was, I think, very proper that the heritors should consider whether it was fitting and required of them, in the discharge of their public duty as the trustees and guardians of all legitimate interests in the churchyard, that they should engage in such a litigation with the respondent, or whether it would be more prudent to come to terms with him regarding his contemplated operations. They did so consider the matter, I assume with a becoming desire to do their duty as the guardians of all legitimate interests in the churchyard, which they certainly are, and with the result that they saw fit to arrange the matter with the respondent in the manner expressed in the joint-minute of 4th September 1893.

No one interested in the churchyard, no one in the parish, questions or complains of this proceeding on the part of the heritors except the appellant, a fact which is *prima facie* adverse to the notice that the heritors have thereby violated or neglected their trust duty as guardians of the public interest in the matter, so as to call for or warrant the interference of this Court under the controlling power which I have referred to. Another fact of similar ten-

dency was mentioned to us, viz., that other and immediately adjoining parts of the same north wall have been used in the same way by the conterminous proprietors.

But the appellant contends that under the burying-ground right specified in the document No. 33 of process, he is entitled to stop the operations as assented to by the heritors until the question of heritable right which I have referred to, and which the Dean of Guild has held himself incompetent to try, is tried in the competent Court in an action with him, or (which seems the only other alternative view on which we could hinder the Dean of Guild from acting on the arrangement with the heritors) that we should hold that it is the public duty of the heritors to litigate this question of heritable right, and that they violated this duty by becoming parties to the joint-minute.

I am unable to assent to either of these views. I think it was within the power of the heritors to make the arrangement expressed in the joint-minute, and that they did not thereby violate or neglect, but legitimately, and, so far as I can judge, reasonably and judicially performed their duty as the proprietors of this churchyard in trust and as guardians of the public interest therein.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered to the Dean of Guild's interlocutor.

Counsel for Appellant—Trotter. Agent—Daniel Turner, S.L.

Counsel for Respondents—Jameson—C. N. Johnstone. Agents—Carmichael & Miller, W.S.

Friday, December 15.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

BALLANTINE v. THE EMPLOYERS INSURANCE COMPANY OF GREAT BRITAIN, LIMITED.

Insurance — Policy — Post-mortem Examination — Condition-Precedent.

A policy of insurance provided that if the insured sustained personal injury caused by accidental, external, and visible means, and the direct effect of such injury should occasion his death, the insurers would pay to the legal personal representatives a certain sum, subject to provisions which were agreed to be conditions-*precedent* to the right to recover, including the following—
“(5) In case of death the legal representatives of the deceased must deliver to the company a certificate from the