

called the firm's glazier business—a business or branch of business which appears to consist in taking and executing contracts for the execution of glazier-work contracts, that is to say, in which the workmanship as well as the material is supplied by the contracting firm. This business, the defender contends, is really a separate business, and is practically confined to Glasgow and its immediate neighbourhood, so that a restraint applying to the whole of Scotland is beyond what is in any reasonable view necessary for its protection as regards that part of the pursuer's business.

"Now, the first observation which I have to make is that the defender is on this part of the case a formidable witness against himself. The contract which he has signed declares in express terms that in respect that it is reasonably necessary for the protection of the interest of the first party, the pursuer, having regard to the nature of the business carried on by the firm throughout Scotland. That is set forth as the foundation and basis of the agreement. Now, that being so, I am bound to ask, can the defender, having so declared, now say that in a material particular the restraint thus stipulated goes beyond what is necessary for the declared object? No doubt the declaration in question is not conclusive. The defender's case rests ultimately on grounds of public policy, and if these grounds exist, they cannot of course be displaced by any declaration of parties. But the declaration is nevertheless the defender's testimony, and we are bound to take it as valuable testimony. The defender knew the firm's business. Nobody except the pursuer knew it so well, and when he is found affirming that, having regard to the nature of that business, the stipulated protection is no more than necessary, it does seem to me extremely difficult to hold that as regards one important branch of the firm's business, that the protection is in fact needless and cannot possibly be required.

"In truth, however, the evidence as a whole does not appear to me to support the defender's contention. For one thing, I greatly doubt whether it is legitimate in this matter to break up the pursuer's business into parts. I rather take it as the result of the evidence that the business is one business, and that it is going much too closely to work to pick out this or that branch, or this or that department, and point out that as regards such branch or department a more restricted area than that stipulated would suffice for protection. But apart from that consideration, I am not able to affirm as the result of the proof that even the pursuer's Glasgow business is confined to Glasgow and its immediate neighbourhood. In point of fact it is proved to extend more or less over the west and south-west of Scotland, and I confess I see no reason why it should not extend like the rest of the business over other parts of the country. It may be true that in certain towns local tradesmen compete at some advantage—that is to say, such tradesmen save what is called the

country allowance, which it appears is always paid to workmen who are sent to work at a distance from their homes. But that advantage does not apply to country contracts. As to these, so far as I can see, the pursuer may quite well compete with anybody, and that being so, I am unable to discover any sufficient grounds for setting aside the restraint in question as a whole, or for curtailing its operation as regards any branch of the pursuer's business. The result is that the pursuer is entitled to a judgment in terms of the leading conclusion of his summons.

"I should add that I have considered the question of damages, and as mentioned at the close of the proof, it appears to me that assuming the pursuer to be right, as I hold him to be right in his contention, the damages should be assessed at £5."

Counsel for the Pursuer—M'Leod. Agent—J. Knox Crawford, S.S.C.

Counsel for the Defender—Salvesen. Agent—John Rhind, S.S.C.

Wednesday, January 8, 1896.

OUTER HOUSE.

[Lord Kincairney.]

M'GREGOR'S TRUSTEES v. BOSOMWORTH.

Succession—Trust—Direction to Trustees—Uncertainty.

By his trust-disposition and settlement a testator directed, *inter alia*, "that after payment of the above legacies the residue of my estate, if any, shall be disposed of at the discretion of my said trustees." *Held* that this direction was void from uncertainty.

By his trust-disposition and settlement the deceased George M'Gregor conveyed his whole estate to the Reverend Robert Davidson, minister of the parish of St Cyrus, and others, as trustees. By the fifth purpose of the said trust-disposition the truster directed "that after payment of the above legacies the residue of my estate, if any, shall be disposed of at the discretion of my said trustees."

After the other purposes of the trust were fulfilled, there remained a balance in the hands of the trustees of £511. 5s. 7d. They alleged that they had the verbal instructions of the granter to employ this residue as a charitable fund for behoof of the parishioners of the parish of St Cyrus, but in respect of questions raised by the heirs *in mobilibus* of the truster they brought a multiplepinding in which the residue was the fund *in medio*.

The fund *in medio* was claimed by (1) the trustees, and (2) the heirs *in mobilibus* of the truster.

The latter pleaded—"The testator's direction as to the residue of his estate being null and void for uncertainty, the claimants

are entitled, as two of the heirs *in mobilibus* of the testator, to be ranked and preferred to the said fund in terms of their claim."

On 8th January the Lord Ordinary ranked and preferred the heirs *in mobilibus* in terms of their claim.

Opinion.—"The residuary clause in the trust-disposition of the late George M'Gregor which has raised the present competition is expressed in these words—"The residue of my estate, if any, shall be disposed of at the discretion of my said trustees."

"The competition is between heirs of the truster *in mobilibus* and the trustees. The heirs *in mobilibus* claim five-sixths of the residue, and if their claim be affirmed the remaining one-sixth part will be payable to another of his heirs, who is said to be at present insane, and for whom no claim has as yet been lodged. This claim is made on the plea that the residuary bequest is void from uncertainty. The trustees, on the other hand, claim to hold and administer the residue 'as a charitable fund to be applied at their discretion for behoof of the parishioners of the said parish of St Cyrus.'

"The trustees have averred that the truster gave verbal instructions to the Reverend Dr Davidson, one of their number, on the subject, and they produce a statement by Dr Davidson as to these instructions. That statement thus becomes in this somewhat irregular manner the averment of the trustees on this point. It is as follows:—"He always said that the parish would benefit from his will, and remembering his own early struggles, his wishes, so far as I could gather, lay in the higher education of one or more scholars belonging to the parish. When his will was made—which was done somewhat hurriedly—no purpose was specified, as he had not fixed on the precise form his bequest should take; but his intention . . . was that none of the relatives should receive any addition to their legacies, and whatever residue there might be was to be held by his trustees for behoof of the parish.' I must take this statement as expressing all that could be proved about the truster's verbal instructions, and I think it is not an averment of verbal instructions at all, but only an averment as to Dr Davidson's impressions about the truster's wishes—impressions to which undoubtedly the trustees would be entitled to give weight if it ever became their duty to exercise the discretion committed to them; but it is not, I think, an averment of anything said by the truster which could limit the absolute discretion which the trust-deed confers on the trustees.

"For the heirs *in mobilibus* it was further maintained that seeing that an absolute discretion was committed to the trustees, any averment about the truster's directions was quite beside the mark, since, if their discretion was absolute, it did not signify what the truster's verbally expressed directions were. Further, it was maintained that it was incompetent to allow a proof of or to give effect to the verbal instructions averred, because to do so would be tantamount to admitting parole proof of

a verbal legacy—See Jarmyn on Wills, vol. i, 379. I think these arguments well founded, but it is unnecessary to proceed on them if it be true that there is no relevant averment of any instructions given by the truster.

"The question therefore is, whether a bequest to trustees, which leaves the disposal of the sum bequeathed to their absolute and unlimited discretion, is a valid bequest effectual against the claim of the heirs? I am of opinion that it is not, and that the direction as to the residue is void from uncertainty.

"I do not think it safe in this question to rely on English decisions, since it is not, I suppose, doubtful that our Courts might sustain bequests which the English Courts would reject as incapable from uncertainty of execution by the Court. That is not a criterion of the validity of a testament which our Courts apply.

"I am aware of only one case in our Courts in which a trust-deed has been held void from uncertainty. In *Low's Trustees v. Macdonald*, June 21, 1873, 11 Macph. 744, bequests of £1000 to charities in Glasgow and £1000 to charities in Aberdeen were held void from uncertainty, but in that case there was no appointment of trustees. If there had been, the judgment would, I rather suppose, have been different—*Hill v. Burns*, 1826, 2 W. & S. 80; *Miller v. Black's Trustees*, July 14, 1837, 2 S. & M'L. 866; *Kelland v. Douglas*, November 28, 1863, 2 Macph. 150, were cases of trusts for charities to be selected by trustees. These were sustained. In *Crichton v. Jameson*, 1828, 3 W. & S. 329, a bequest to such of a testator's friends or relatives as might be pointed out by his widow or trustees was held good. In *M'Laren v. Henderson's Trustees*, February 24, 1880, 7 R. 601, a trust for the advancement of the science of phrenology was sustained. In *Robbie's Judicial Factor*, 1895, 20 R. 358, a trust for undefined charitable purposes was held to fail, but that was because the trustee directed to carry it out had died. In *Cobb v. Cobb's Trustees*, March 9, 1894, 21 R. 638, a trust-deed for objects which may have gone beyond charitable objects was sustained generally. I think that a provision in a trust-deed will not fail if the truster points out as the recipients of the bequest a class of objects, and if he appoints trustees to carry out the trust, and if they accept. In these later cases it seems to have been assumed that a trust-deed which points no object, but leaves the disposal of the estate absolutely to the discretion of trustees, will be ineffectual. From the report of *Hill v. Burns* it appears that Lord Balgray was of opinion that such a bequest would be good; and in *Crichton v. Grierson* the Lord Chancellor carefully reserves his opinion on the question.

"The point appears, however, to have been decided in *Sutherland v. Sutherland's Trustees*, July 6, 1892, 20 R. 925. But the report is unsatisfactory. In that case the clause in reference to the residue of the estate was—"I leave and bequeath sums to be disposed of by my said trustees in such

manner as they may think proper, subject to such instructions and directions as I may hereafter make.' He left no instructions. It was decided that the will was ineffectual either to give the trustees a proprietary right in the residue or to impose on them a trust in regard to it. No reasons were given for the judgment, these having been apparently expressed in the course of the argument, but unfortunately they have not been reported. It is, however, a case in point, and the only case in our books definitely, so far as I know, deciding the question."

Counsel for the Trustees — W. Gray.
Counsel for the Heirs *in mobilibus* — Brown. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, October 24, 1895.

OUTER HOUSE.

[Lord Moncreiff.

PARISH COUNCIL OF RUTHERGLEN v. PARISH COUNCIL OF GLEN- BUCKET AND DALZIEL.

*Poor—Settlement—Imbecile—Forisfamilia-
tion.*

Held, after a proof, that permanent congenital imbecility in a girl of thirteen years of age, short of idiocy, when taken in conjunction with the fact that the girl had been certified as of unsound mind, and had been placed, with the approval of the General Board of Lunacy, as a pauper inmate in an institute for imbeciles, was sufficient to evidence her incapacity to acquire a settlement in her own right. *Cassels v. Somerville and Scott*, June 24, 1885, 12 R. 1155, and *Nixon v. Rowand*, December 20, 1887, 15 R. 191, *distinguished*.

This was an action at the instance of Allan Scott Edmiston, inspector of poor for the parish of Rutherglen, on behalf of the Parochial Board of that parish, against the inspectors of poor of the parishes of Glenbucket and Dalziel, concluding for declarator, that Joan Ralston, an inmate of the Institute for Imbeciles at Larbert, had properly become chargeable to the parish of Rutherglen on 29th September 1894, and still was so chargeable; also for declarator that she was chargeable either to the parish of Glenbucket as the parish of her mother's settlement, or to the parish of Dalziel as the parish of her own and her father's birth settlement, and further, for reimbursement from one or other of these parishes of past outlays, and relief from future advances.

The parish of Glenbucket maintained that Joan Ralston was not sufficiently imbecile to be incapable of acquiring a settlement for herself, that she had been forisfamiliated, and that consequently she was chargeable to the parish of her birth. The

parish of Dalziel, on the other hand, maintained that she was an imbecile and incapable of acquiring a settlement for herself, that she had never been forisfamiliated, and that being a dependent of her mother, who was also a pauper, she was chargeable against the same parish as her mother.

The pauper's mother was admittedly chargeable to the parish of Glenbucket, the parish of her birth, as after the death of her first husband, Joan Ralston's father, she married a second husband who had no settlement in Scotland, and who had deserted her.

After a proof, the result of which sufficiently appears from his Lordship's opinion, the Lord Ordinary (MONCREIFF) on 24th October 1895 issued the following interlocutor:—"The Lord Ordinary having considered the cause, finds and declares in terms of the first and second declaratory conclusions of the summons; further, in respect the said Joan Ralston has a subsisting parochial settlement in said parish of Glenbucket, declares against the Parish Council of Glenbucket in terms of the first petitionary conclusion of the summons, assolizes the Parish Council of Dalziel from the conclusions of the summons, and decerns: Finds the Parish Council of Glenbucket liable in expenses to the Parish Council of Dalziel, and also to the pursuers, the Parish Council of Rutherglen," &c.

Opinion.—"It is admitted by the defenders that liability for the support of the girl Joan Ralston lies on one or other of them. The Parish of Glenbucket is the birth parish of the girl's mother, while the girl herself and her father were both born in the parish of Dalziel. Her father Joseph Ralston died on 23rd April 1881. Her mother, who survived him, in 1885 married a man of the name of Palmer, who deserted her in 1891. In October 1893 Joan Ralston's mother obtained parochial relief from the parish of Rutherglen for herself and her children, and she has continued chargeable as a pauper ever since. When she thus became chargeable she had four children dependent upon her, one of whom was Joan Ralston, who was then over 12 years of age, having been born on 4th July 1881. In September 1894 Joan Ralston was, on the application of the Inspector of Poor for the parish of Rutherglen, sanctioned by the General Board of Lunacy, received as an inmate of Larbert Institution for the training of imbecile children, and there she has remained ever since. The present action has been brought for the purpose of recovering, from one or other of the defenders, advances made for her maintenance in the institution.

"When Joan Ralston's mother became a pauper in 1893 her settlement was in Glenbucket, the parish of her own birth, because on her second marriage she lost her settlement in Dalziel which she had derived from her first husband, while her second husband had no settlement in Scotland, and had deserted her. She being the pauper, the parish of her settlement was bound to relieve those at least of the children living with and dependent upon her who were in