

decessor as a road which was disused, the pursuer cannot do otherwise than admit that, when the title describes the lands as being bounded by the road, it was the road shown on that sketch, and now in question, that was referred to. I think it is established by evidence that this road continued to be used up to the present time from the Haddington end at least as far as the bridge communicating with Roodlands, the defenders' property, by the proprietors of that ground, which is on the south side of the hedge. Attempts to stop this use have not been submitted to by these proprietors, and have not been persisted in. We have also, as regards this road, of which the western extremity was in some doubt, the important fact that for a considerable time it was under the Statute Labour Trustees, although they did not do much for it. Further, it has all along been most undoubtedly a road for foot-passengers in actual use as far at least as Alderston. Accordingly, while the historical part of the evidence comes to this, that this road was used as a common highway from Haddington to Longniddry, that accords with the description in the title which designates this road as a common way. I agree with the Lord Ordinary that *ex facie* of the title, which is a bounding title, the pursuer cannot, by the mere proving of facts as to use, extend his lands so as to take in more land than his boundary permits. The pursuer says the road must be held to be within his lands, because he has repaired the hedge and kept the ditch clear. I do not think there is anything in that, because it was a great convenience to him that the hedge should be kept in good repair, and it was by the ditch that his own lands were drained, and unless he had kept it clear damage would have resulted to his own property. I cannot hold that there is any evidence of possession beyond the northern edge of the road, even if such evidence would have been competent in face of his title. I agree with the Lord Ordinary that the pursuer has failed to prove his case.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—Dundas—C. N. Johnston. Agents—Waddell & M'Intosh, W.S.

Counsel for the Defenders—The Solicitor General, Q.C.—J. H. Millar. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, February 27.

SECOND DIVISION.
JOHNSTONE'S TRUSTEES v.
JOHNSTONE.

Husband and Wife—Donation—Revocation—Donation of Heritage subject to Bond—Implied Partial Revocation by Bonding Subject of Gift—Feu-Duties and Compositions.

A husband purchased heritable property, taking the title to himself and his wife equally between them, and to their respective heirs and assignees whomsoever. When the property was bought it was subject to a bond which was taken over in part-payment of the price. Subsequently a second bond in security of a loan to the husband was granted over the property by himself and his wife with joint consent and assent. The husband died, leaving a trust-disposition and settlement by which he directed his trustees in the first place to pay all his debts. The property was sold after his death with consent of his widow. *Held* that she was only entitled to half of the price, under deduction of one-half of each of the bonds and the expense of discharging the same, on the ground (1) as to the first bond, that it was a burden on the gift when it was made, and (2) as to the second bond, that the husband by burdening the subject of the gift had by implication revoked it *pro tanto*.

In connection with the property, liability had been incurred during the husband's lifetime (1) for a law-agent's account, (2) for compositions, (3) for a minute confirming the title, (4) for taxes, feu-duties and incidental expenses. *Held* that these were debts of the husband, and not chargeable against the widow's share of the price.

John Johnstone, tenant of the Bourgeois Hotel, Fleshmarket Close, Edinburgh, died on 17th October 1894, leaving a trust-disposition and settlement dated 28th December 1892, and relative codicil dated 22nd September 1894, by which he conveyed his whole estate and effects, heritable and moveable, to trustees, for the purposes therein mentioned. The first trust purpose was payment, *inter alia*, of all his just and lawful debts. By the second trust purpose he directed as follows—"They" (the trustees) "shall, so soon after my death as they think right, realise, and shall hold, apply, pay, and convey the whole rest and remainder of my means and estate, and interest and produce thereof, as follows, viz.—One-third thereof to my wife Mrs Ann Wright or Johnstone if she survives me, payable to her so soon after my death as my said trustees and executors think right." If his wife survived him, the remaining two-thirds, and if she predeceased him the whole, was to go to such of his children, David William Johnstone and Jessie Margaret Johnstone, as should sur-

vive, jointly *per stirpes* with the issue of the predeceasing child or children. He gave his trustees power to sell and power to carry on his business.

In June 1887 the testator bought a house in Haddington Place. On this property at the date of its purchase by him there was a bond for £100, and it was agreed that it was to be taken over in part-payment of the price. The subjects were disposed "to and in favour of the said John Johnstone and Anne Wright or Johnstone, his spouse, equally between them, and to their respective heirs and assignees whomsoever, heritably and irredeemably." The testator and his wife bound themselves to repay the sum of £100 in the bond, and agreed that the personal obligation should transmit against them in terms of the Conveyancing (Scotland) Act 1874, section 47.

Subsequently the testator desired to borrow a further sum of £130, and this was effected by a bond on the property in Haddington Place dated 29th July 1891. The acknowledgment of receipt and the personal obligation in the bond were by Mr Johnstone alone, and the disposition in security by him and Mrs Johnstone with joint consent and assent.

In connection with the property the following liabilities were incurred during the testator's lifetime, viz.—(1) a law-agent's account in connection with an ineffectual attempt to sell the property in 1891-2; (2) compositions upon several past transmissions of the property the right of relief for which was valueless, and on the transmission to the testator and his wife; (3) the expense of a minute confirming the title, which had been irritated in respect (a) of an omission to refer fully to burdens, &c., in a deed of gift from the Crown in March 1886, and (b) of failure timeously to pay the compositions; (4) taxes, feu-duty, and incidental expenses.

The testator was survived by his widow and the two children above mentioned.

The trustees, with consent of the widow, sold the Haddington Place subjects for £390. They also realised the whole of the deceased's other estate, including his business and business premises, but excepting the household furniture, which was left for the use of the widow and children.

In these circumstances disputes arose between the trustees and the widow as to her rights.

Mrs Johnstone maintained that the bonds for £100 and £130 on the property in Haddington Place were debts due by the trustee at the date of his death and payable out of the residue, and that she was entitled to receive one-half of the price without deduction in respect of these bonds, interest, and expenses of discharging them. The trustees maintained that the bonds, with interest and expenses, formed a charge against the whole price, and, to the extent of one-half, the amount of them should be deducted from the widow's share.

The widow and the trustees also differed as to whether one-half of the law-agent's account, compositions, expense of minute,

and feu-duty, taxes, and incidental expenses above referred to, were to the extent of one half payable out of her share of the price or were wholly payable out of residue.

The present special case was therefore presented to the Court. The parties to the case were (1) the trustees, (2) the widow, (3) the children.

The opinion of the Court was desired upon the following questions:—"2. (a) Are the first parties, in accounting to the second party for her share of the proceeds of the said subjects in Haddington Place, entitled to debit her with one-half of *all or any* of the following items, viz.—(1) the bond for £100, interest, and expenses of discharging the same; (2) the bond for £130, interest, and expenses of discharging the same; (3) the amount of Millar, Robson, & Co.'s said business account; (4) the compositions, amounting to £52, 10s.; (5) the expense of the minute confirming the title; and (6) the feu-duty, taxes, and incidental expenses connected with the said property, down to the date of truster's death? or, (b) Is the second party entitled to receive payment of one-half of the price of the said subjects, without any or what deductions?"

Argued for the first and third parties—The first alternative of the second question should be answered in the affirmative. The gift to the wife was subject to the burdens on the property at the date of the gift. This disposed of the question as to the bond for £100. As to the second bond, the gift was a donation by a husband to his wife, and as such was liable to be revoked. By burdening the subjects with this bond the husband had by implication revoked the gift *pro tanto*—Stair, i, 4, 18; Ersk. i. 6, 31; Fraser's Husband and Wife, vol. ii. p. 954. The other items were liabilities incurred in connection with the property, and they were chargeable on the wife's share, the gift to her being *cum onere*.

Argued for the second party—On the second question, the husband was the real debtor, and his representations were bound to relieve the widow. The first purpose of his settlement was payment of debts. The husband never intended his gift to be subject to the burden of the bond which was on the property at the date when he bought it. With regard to the second bond, this was a question of intention, and intention could not be presumed merely from the bond being placed on the subjects, and there was no other evidence of such intention; indeed, the direction to pay debts was evidence to the contrary. The wife was simply granting a security for her husband's debt. In such case a wife was entitled to relief out of her husband's estate—*Erskine v. Williams*, November 15, 1844, 7 D. 110. With regard to the other items, (3) was an ordinary debt due by the husband, and (4), (5), and (6) should have been paid by him during his lifetime, when he was in the full beneficial enjoyment of the property and dealt with it as his own.

LORD JUSTICE-CLERK—The second question as regards the first two items relates

to two bonds, the first for £100, and the second for £130, placed on the property in Haddington Place, which the widow maintains should be paid otherwise than by deduction from her half share of the value of these subjects. Now, what came to her was a gift from her husband, and not only was she bound to take that gift subject to the burdens which were on it when she got it, but her husband was quite entitled to take back again what he had given in whole or in part. I have therefore no doubt that the widow is not entitled to decree as regards the first and second items under question 2. As to the other items under that question, I think she is well entitled to obtain what she asks.

LORD YOUNG—I entirely agree that the widow must take the subject which was gifted to her subject to the burdens which were upon it at the date of his death. He was entitled to put any burdens he pleased on the property during his life. This disposes of the second bond, and the first bond is in a stronger position even than the second. The husband gave his wife a gift with the burdens which were on it, but I do not think it was intended that her share should suffer deduction in respect of all expenses connected with the property. I am therefore of opinion that she is entitled to receive payment of one-half of the price of the property, less one-half of the two bonds for £100 and £130 respectively.

LORD TRAYNER—I agree. About the first bond I think there can be little question. It was a burden on the property when the husband made the donation. As regards the second bond there is perhaps more room for argument, but I think no room for doubt. The husband, in the exercise of the power which he unquestionably had over what was virtually his own property, burdened it with a further sum of £130. The wife must take the gift subject to the burdens put upon it by him during his life. With regard to the other items, they were personal debts of the husband, and I do not think they can be made chargeable against the wife.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

“Answer the second question by declaring that the second party is entitled to her share of the proceeds of the subjects in Haddington Place subject to one-half of the principal sums due under the bonds for £100 and £130 and the expenses of discharging the same: Find and declare accordingly, and decern.”

Counsel for the First and Third Parties—**Craigie**—**W. Harvey**. Agent—**John Elder**, S.S.C.

Counsel for the Second Party—**A. S. D. Thomson**—**Abel**. Agents—**W. & J. L. Officer**, W.S.

Thursday, February 27.

SECOND DIVISION.

[Lord Moncreiff, Ordinary.]

SCHOOL BOARD OF CABRACH v. MACDONALD.

School—School Board—Declinature by Person Nominated to Fill Vacancy—Right of Board to Nominate after Elapse of Eight Weeks—Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), sec. 13—Education (Scotland) Act 1878 (41 and 42 Vict. c. 78), sec. 15.

A person nominated to fill a vacancy on a school board, in terms of the Education (Scotland) Act 1872, section 13, and the Education (Scotland) Act 1878, section 15, is entitled to decline office, and if he does so he is never at any time a member of the board and does not require to resign.

The elapse of the period of eight weeks without a nomination by a school board to fill a vacancy, after which the Education Department is entitled, in terms of the Education (Scotland) Act 1878, section 15, to nominate a person to supply such vacancy, does not deprive the school board of their right of nomination if exercised before the Department exercise theirs. A person so nominated, after the elapse of eight weeks, by a school board, is legally a member of the board, and in any view it is not open to a schoolmaster contesting the validity of his dismissal to object to the legality of such a nomination, when the objection has not been taken by the Education Department.

By letter dated 30th April 1894 Mr W. M. Skinner, a member of the School Board of Cabrach, resigned office. On 19th July 1894 the Board proceeded, in terms of the Education (Scotland) Act 1878, section 15, and the Education (Scotland) Act 1872, section 13, to nominate the Rev. G. G. MacMillan, minister of Cabrach, to fill the vacancy. On 6th August he wrote to the clerk a letter in the following terms:—“Dear Sir—I am in receipt of yours of 1st August, and in reply beg to state that I shall on no consideration accept office in the Cabrach School Board. . . .” The Board thereupon, assuming that in view of this letter, which they regarded as a declinature, their nomination of Mr MacMillan had been of no effect, proceeded on 16th August to nominate William Beattie to fill the vacancy. He accepted office on 20th August. On 29th August Mr Gordon, a member of the Board, gave notice that at the meeting of the Board to be held on 27th September he would move that the defender, who was schoolmaster at Upper Cabrach Public School, be dismissed from his office. The defender was a certificated schoolmaster, and in accordance with the Public Schools (Scotland) Teachers Act 1882, section 3, notice of this motion was sent to the four original members of the Board, to Mr