

Thursday, July 2.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

### MACDONALD'S TRUSTEES v. BAIN'S TRUSTEES.

*Succession—Power of Selection—Whether Validly Exercised by Will.*

A trustor directed his trustees to hand over to his widow "such articles of jewellery, linen, silver plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use." He further directed them to allow her and her daughter "and the longest liver of them the free and uninterrupted life-rent right and use" of, *inter alia*, such articles of household furniture, plate, and pictures . . . which shall be found at the time of my death remaining after" his said widow "shall have made her selection as aforesaid, or the whole in case of no such selection being made." The widow made no selection of the articles at the testator's death or during her survivorship, but bequeathed various of them by her will.

*Held* that, under the terms of the disposition, the power of selection could only be validly exercised within a reasonable time after the testator's death, and was not validly exercised by a will.

Mr Edwin Sandys Bain of Easter Livelihoods, Stirlingshire, died on 30th December 1874, and was survived by his wife and daughter and by the family of a deceased daughter. By a trust-disposition and settlement dated 30th December 1874 he made the following provision:—"That my trustees shall hand over and deliver free of charge to the said Mary Ann Horsman or Bain such articles of jewellery, linen, silver plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use, and shall allow her and the said Charlotte Elizabeth Sandys Bain, the trustor's daughter, "and the longest liver of them, the free and uninterrupted life-rent use of my mansion-house of Easter Livelihoods . . . and also such articles of household furniture, plate, pictures, including those painted in oil hereinafter mentioned, and plenishing of every description, which shall be found at the time of my death remaining after the said Mary Ann Horsman or Bain shall have made her selection as aforesaid, or the whole in case of no such selection being made."

After the death of her husband Mrs Bain occupied Easter Livelihoods with her daughter Mrs Geddes, and continued to do so with short intervals till her death.

In 1875 Mrs Bain married Mr Macdonald, who died shortly afterwards.

In 1882 the mother and daughter executed a discharge in favour of Mr Bain's trustees, containing a formal acknowledgment of

delivery of the furniture, &c., in the mansion-house at Easter Livelihoods in the following terms:—"And further considering that we have been allowed the use of the mansion-house of Easter Livelihoods, gardens and grass parks and offices, and of the cottages at Calton of Saint Ninians, and of the whole articles of jewellery, linen, silver plate, books, and other household furniture which belonged to the said Edwin Sandys Bain deceased, from which I, the said Mary Ann Macdonald, have hitherto refrained from making any selection, and that the said trustees have now delivered to us the said articles of jewellery, linen, silver plate, books, and other household furniture, except the paintings in oil before mentioned, which are in said mansion-house, and an inventory of which has been authenticated by the said trustees."

Mrs Macdonald died in 1893, leaving a trust-disposition in which she bequeathed certain of the articles over which Mr Bain had left her a power of selection. An action was raised at the instance of Mrs Macdonald's trustees against Mr Bain's trustees and against Mrs Geddes for declarator, (1) that certain of the articles dealt with in Mrs Macdonald's will were her own property, and (2) that with regard to other articles admittedly belonging to the class over which she had a power of selection, she had "by her said trust-disposition and settlement made a valid and effectual selection."

The Lord Ordinary (KYLACHY) on 1st February 1896 found that the power of selection had not been validly exercised.

*Note.*—"This is an action raised by the trustees of the late Mrs Macdonald against the trustees of her first husband, the late Sergeant Bain, and the object of the action is to have it found that certain corporeal moveables purporting to be bequeathed by Mrs Macdonald's settlement were validly carried by her settlement, either (1) as being, some of them, her own property, or (2) as being property left by her husband over which she had under his settlement a power of selection, which power she duly exercised.

"The questions to be now decided are, I think, two—(1) Whether the power of selection conferred upon the widow could be exercised by will, and by simply disposing by will of particular articles; (2) Whether the power of selection extended to pictures, that is to say, to portraits and other pictures in oil belonging to Sergeant Bain. There is a third question, but it involves proof and cannot be now decided, viz., the question how far the articles disposed of by Mrs Macdonald's settlement were, apart altogether from her husband's settlement, her own separate property.

"As to the power of selection, that power is conferred by a direction to Sergeant Bain's trustees to hand over and deliver to his widow free of charge 'such articles of jewellery, linen, silver plate, books, and other household furniture belonging to me as she may choose to select for her own absolute use.' And that direction was followed by a further direction by which

the truster conferred upon his widow and daughter jointly a lifeferent of, *inter alia*, 'such articles of household furniture, plate, and pictures as should be left after the testator's widow made her selection, or the whole in case of no such selection being made.'

"At Sergeant Bain's death what happened was this—The widow made no selection either then or during her survivance, the whole articles remaining all along in possession of herself and her daughter; but on her death it appeared, as I have already explained, that she had bequeathed by will various of the articles in question to different relatives.

"Now, I am not prepared to say that a power of this kind requires to be exercised expressly, or that the absence from the will of a reference to the power is material one way or the other. But the difficulty which the pursuers have to meet is, I think, two-fold. In the first place, the power of selection being given for the widow's 'use,' albeit her 'absolute use,' is scarcely suggestive of a selection to take effect only at her death, and thus to operate, not in favour of the widow, but in favour of third parties. In the second place, the truster directs that any articles not selected should fall under the joint lifeferent, and the conclusion is obvious that if the selection by the widow might be postponed until her death and be made by will, any joint lifeferent of the unselected articles was an impossibility. It appears to me, therefore, that the difficulties in the pursuers' way are insuperable, and that I must find in terms of the defenders' contention that the power of selection conferred on Mrs Macdonald was not validly exercised.

"As to the pictures, if I am right in what I have said, the question is not material. But I am of opinion that Sergeant Bain did not intend that his widow should have any right of selection among his pictures. It may be that pictures will as a rule be carried by a bequest of household furniture. That is said to have been decided. But here I think any such presumption is overcome by the special and separate dispositions which Sergeant Bain made with respect to the pictures which he describes as his.

"As to further procedure, I think the parties desire that having made the findings which I have indicated, I shall continue the cause in order that they may consider as to whether, and in what form, the necessary proof should be taken. If the parties desire proof on the question as to Mrs Macdonald's property in certain of these articles, they may have it, but if they see their way to adjust that matter I shall continue the cause to enable them to do so."

The pursuers reclaimed, and argued—If no definite time limit were given within which the power of selection must be exercised, and there was nothing in the will inconsistent with delay, the power might be exercised at any time in the life of the donee. There was nothing in the present will inconsistent with that. She was en-

titled to take the whole of the articles for herself—*Arthur v. Mackinnon*, May 5, 1879, L.R., 11 Ch. Div. 385, and the fact that she had lived on with her daughter in the enjoyment of them without making any formal selection, did not show that she renounced her right to do so. The only person having an interest to make her exercise this right formally was the daughter, and she did not do so. The discharge granted in favour of the trustees showed that Mrs Macdonald regarded her right as still existing at that time. The words "absolute use" which the Lord Ordinary thought created an insuperable difficulty in the pursuers' contention, meant nothing more than "absolutely," *i.e.*, that Mrs Macdonald was entitled to deal with the articles selected as she chose, by will or otherwise.

Argued for respondents—The terms of the will indicated clearly that the power must be exercised within a reasonable time of the testator's death. There must be some overt act of selection to indicate which articles were to be handed over by the trustees to the widow "for her absolute use," and which were to be retained by her merely for her joint lifeferent. The alternative gift to her in joint lifeferent was quite inconsistent with the idea of her being able to exercise the power by will. The terms of the discharge only indicated that she had not exercised the power, and did not keep it alive. There was no analogy to a power of apportionment which might be validly exercised by a will.

At advising—

LORD ADAM—[*After narrating the terms of the trust-deed quoted above, his Lordship proceeded*].—What happened upon Sergeant Bain's death was this—Mrs Bain, afterwards Mrs Macdonald, and her daughter Mrs Geddes, had in any view a right to a lifeferent of these articles, and the trustees allowed them to have the use and possession of them up to the date of Mrs Macdonald's death.

Mrs Macdonald during her life never made any selection, but by her trust-disposition and settlement and codicil dated in 1892 she directed her trustees to deliver certain of these articles to the parties therein named; and the question is, whether, having regard to the terms of Sergeant Bain's settlement, this was a valid exercise of her power of selection. I agree with the Lord Ordinary that it was not, and for the same reasons. It appears to me that the intention of the truster was that the selection should be made within a reasonable time after his death—at any rate during his widow's life. It will be observed that he directs his trustees to hand over to Mrs Macdonald herself (and not to any assignees or legatees) such articles as she might select for her own absolute use, which appears to me to imply a selection to be made during her life. He then directs his trustees to allow her and her daughter Mrs Geddes a joint-lifeferent, and a lifeferent to the survivor of the mansion-house of Livelands, and of such articles of household furniture, plate, &c., as should remain after Mrs Macdonald

had made her selection, or the whole in the event of no selection being made. It appears to me that if no selection was made by Mrs Macdonald during her life, a joint-liferent which the truster thus contemplated and directed became impossible. In my view, accordingly, no selection having been made by Mrs Macdonald during her life, the trustees, in terms of the settlement, are bound to allow Mrs Geddes as the survivor a liferent of the whole of the said articles, and for that purpose to hand them over to her. I therefore think that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I concur in the opinion of Lord Adam.

On the main question which his Lordship has discussed, I think it right to say that my opinion is rested on the special terms of Sergeant Bain's will. I think the power of selection given to his widow could not be exercised by will, because the selection is intended to be exercised before the estate is distributed, it being provided that after Mrs Bain has made her selection, the testator's remaining estate is to be shared in liferent between that lady and her daughter. In the general case, where an unqualified power of selection or appropriation is given to a liferenter, I should assume in construing it that it depended for its exercise upon the same principles as any power of disposal given to a third party, and that it might be exercised at any time during the life of the donee of the power. But in construing voluntary deeds general rules are liable to be controlled by the intention of the granters as expressed in the deeds. In this case I think Sergeant Bain has sufficiently manifested his intention that the power of selection conferred upon his widow should only be exercised within such reasonable time as is allowed for putting a testator's affairs in order, and that Mrs Bain's will is therefore not a valid exercise of the power.

LORD KINNEAR—I agree that the decision of this case does not depend upon any question as to the manner in which a power may be exercised, but upon the character of the right which the testator has bequeathed to his widow. I am of opinion with your Lordships that, on the construction of the disposition, the testator gives to his widow absolutely such articles as she may select, with a gift-over in the event of her not exercising the right of selection, to her and her daughter in joint liferent and to the survivor in liferent. Now, I think the gift-over took effect in consequence of the failure of Mrs Macdonald to exercise her right, and that it is too late now to disturb this arrangement, which we must assume to have been made advisedly during her lifetime. Her will is ineffectual to deprive the conditional legatees of the gifts which the testator has made to them, because the condition was purified when the articles in question were delivered to the joint liferenters in consequence of her having refrained from claiming them for her own absolute use.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—C. K. Mackenzie—Constable. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—A. Jameson—Cook. Agents—Fyfe, Ireland, & Dangerfield, S.S.C.

Saturday, June 20.

## SECOND DIVISION.

### PARISH COUNCIL OF KILMARNOCK v. OSSINGTON TRUSTEES.

*Local Government—Parish Council—Succession of Parish Council to Parochial Board—Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), secs. 21 and 22.*

The Local Government (Scotland) Act 1894 enacts, section 21, that "Every reference in any Act of Parliament, scheme, deed, or instrument, to a parochial board . . . shall be read and construed as referring to a parish council constituted under this Act;" and, section 22, that "A parish council shall come in place of a parochial board . . . and shall have and may exercise all the powers and duties . . . of a parochial board."

A truster by deed constituted a trust for the management of a coffee tavern. Among the trustees nominated by her was the "chairman of the parochial board of the parish and his successor in office for the time being, so long as such board shall exist."

*Held* that the chairman of the parish council was not entitled *ex officio* to act as a trustee under the deed.

The Right Honourable Charlotte Scott, Viscountess Ossington, relict of the Right Honourable John Evelyn Denison, Viscount Ossington, by deed of trust dated 8th April 1885, on the narrative that she had erected a building to be used as a coffee tavern, and provided the necessary funds for carrying it on, nominated certain trustees, including "the chairman of the Parochial Board of the parish of Kilmarnock, and his successor in office for the time being, so long as such office should exist," and conveyed to them the subjects in trust.

The Local Government (Scotland) 1894 (57 and 58 Vict. c. 58), enacts, sec. 21—"On and after the fifteenth day of May in the year One thousand eight hundred and ninety-five, all enactments regulating the constitution and election of parochial boards shall be repealed, and the parochial board of any parish shall continue to hold office only until the said day, and no longer; and on and after such day every reference in any Act of Parliament, scheme, deed, or instrument to a parochial board constituted under the law in force at the passing of this Act