

ference with natural and moral law. It was therefore not valid or binding, and she was entitled to return to and reside with her parents without incurring forfeiture of the provision—*Fraser v. Rose*, July 18, 1849, 11 D. 1466; *Wilkinson v. Wilkinson*, 1871, L.R., 12 Eq. 604.

Argued for third party—If this was held to be a conditional bequest, then the condition was valid and binding. It was a provision conferred by one who had no natural obligation to provide for the second party, and therefore the condition attached to it was valid even if in the case of a provision made by a parent for a child such a condition would be void—*Stair*, i. 3, 7; *Erskine*, iii. 3, 85, Lord Ivory's Note, 211; *Reid v. Coates*, March, 5, 1813, F. C.; *Bell's Illustrations*, ii. 407. The present case was different from *Fraser v. Rose*, because (1) the latter case was one of father and daughter, and the father was under a natural obligation to provide for the daughter, (2) the daughter was of full age, and (3) she had been living with her mother. In the present case the child had for most of her life resided apart from her parents, and it might be quite reasonable to suppose that the truster inserted this condition in order to prevent his legacy being employed not in maintaining the girl but her whole family at the expense of the girl. 2. This was not a conditional bequest at all. It was a gift subject to a limitation for a specified time. In such a case if the limitation was struck out the whole gift was rendered invalid; it was impossible to give effect to the gift without importing the limitation into it—*Trafford v. Maconochie*, 1888, L.R., 39 Ch. D. 116.

LORD JUSTICE-CLERK—I think that this case may be decided upon the principle that if a sum is bequeathed to a child upon the condition that the child shall not reside with its own parents, against whose character no allegation can be made, that condition shall not receive effect, and that the failure to fulfil the condition does not deprive the legatee of the right to payment of the legacy, such a condition imposed by another relative being *contra bonos mores*, and therefore to be held null.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the First Parties—A. J. M. Morison. Agent—Alex. Morison, S.S.C.

Counsel for the Second Party—W. Campbell. Agent—Charles George, S.S.C.

Counsel for the Third Party—Kincaid Mackenzie. Agent—Alex. Morison, S.S.C.

Friday, June 10.

## FIRST DIVISION.

### FORBES AND OTHERS (FORBES' TRUSTEES) v. MACLEOD.

*Bankruptcy—Vesting of Heritable Bond in Trustee—Security Title—Tantum et tale*—*Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), sec. 102.*

The principle of the decision in the case of the *Heritable Reversionary Company v. Millar*, August 9, 1892, 19 R. (H.L.) 43, is applicable to security-titles as well as to trusts.

The law-agent of a trust advanced a sum of money to enable the trustees to take over a bond and disposition in security from the creditor in the bond. The assignation to the bond was taken in name of the law-agent, who granted a back-letter to the trustees acknowledging that the bond was in reality held by him in security for all sums due to him by the trustees, and undertaking upon payment of said sums to reconvey to them the bond and the subjects therein disposed. At the date of the law-agent's subsequent sequestration his accounts showed a balance in favour of the trustees after debiting them with the sum so advanced.

In a question between the trustees and the trustee on the law-agent's sequestrated estate, who maintained that he was entitled to retain the bond for behoof of the bankrupt's creditors, held that the trustees were entitled to have the bond assigned and the subjects conveyed to them, the bankrupt's right in the bond having been merely a right in security, and having been *de facto* redeemed.

Peter Forbes, the creditor in a bond and disposition in security for £2000, assigned the same, in consideration of that sum, to Miss Wingate on the footing that he should relieve her of any loss which she might sustain. Shortly after the assignation the debtor in the bond paid to Miss Wingate £500 on account of the principal sum, and the bond and disposition in security was discharged to that extent.

Mr Forbes died in 1890, leaving a trust-disposition and settlement whereby he disposed his whole estates to trustees for certain purposes. Samuel Macadam Carrick, Mr Forbes' partner in business, acted as law-agent and factor to the trustees.

In 1892 the debtor in the bond suspended payment, and a first and final dividend of 1s. 8d. in the £ on the amount of the bond and interest was received by Mr Carrick. In 1894 the personal obligation in the bond being now valueless, Miss Wingate called upon Forbes' trustees to repay her the sum of £1500 due to her under the bond and disposition in security.

At a meeting of Forbes' trustees, held on 25th April 1894, it was arranged that

Mr Carrick should take over the bond on their behalf. This was accordingly done, Mr Carrick advancing the sum required, viz., £1475, 1s. 6d., after allowing for the balance in the trustees' hands. Miss Wingate thereafter, upon payment to her of £1500, assigned the bond to Mr Carrick to that extent, and the assignation was recorded on 16th May 1894.

On 17th May 1894 Mr Carrick granted to Forbes' trustees a holograph back-letter, in which, after referring to the assignation of the bond by Miss Wingate to him, he proceeded—"I hereby acknowledge that said assignation, though *ex facie* absolute, is in reality held by me, with the said bond and disposition in security, and principal sums, interest, and penalties therein contained, and lands and others thereby conveyed in security merely for all sums due or hereafter to become due, to me or my firm of Forbes & Carrick, writers, Glasgow, by the trust-estate of the said Peter Forbes; and I undertake, on receiving payment of all sums due to me or my said firm as aforesaid, to reconvey said bond and disposition in security and others to the extent foresaid to you: Declaring that in the event of the said trust-estate failing after three months written notice by registered letter addressed to the trustees for the time being, to make payment of the amount due at the time to me or my said firm, I shall be entitled to deal with said bond and disposition in security and others as absolute proprietor thereof, I being always bound to account to said trust-estate for any reversion that may remain after payment of principal, interest, and expenses due to me or my said firm; and in the event of my at any time hereafter obtaining a conveyance to the heritable subjects conveyed by said bond and disposition in security, this back-letter shall in like manner be held to be applicable in all respects to the conveyance which may be so obtained as if the same had already been granted."

In 1895 Mr Carrick obtained from the person heritably vested in the subjects contained in the bond and disposition in security a conveyance in his favour of his reversionary interest.

In 1896 Mr Carrick disappeared. His estates were thereupon sequestered, and Mr John Mackintosh Macleod, C.A., Glasgow, was appointed trustee thereon conform to act and warrant of confirmation in his favour, dated 18th May 1897. The account between Mr Carrick and Forbes' trustees disclosed that while on 15th May 1894 there had been a considerable balance against the trustees (including the sum of £1475, 1s. 6d. advanced by Mr Carrick in order to enable the bond to be taken up), that balance had been wiped out by credit entries during the latter part of 1895, so that on 31st December 1895 there was, and there afterwards continued to be, a balance due by Mr Carrick to the trustees.

At the date of his sequestration Mr Carrick was still vested in the bond and disposition in security. His estates held out no prospect of yielding more than a few shillings in the £ to his creditors.

In these circumstances a special case was presented by Forbes' trustees, first parties, and the trustee on Mr Carrick's sequestered estates, second party, to determine the rights of parties in the bond and disposition in security.

The following questions of law were submitted to the Court:—"1. Is the second party bound to reassign to the first parties, at their expense, the said bond and disposition in security to the extent of the balance remaining due (£1500), and interest due thereon? 2. Is the second party bound to dispense to the first parties, at their expense, the subjects conveyed by the said bond and disposition in security? or 3. Is the second party entitled to retain the said bond and disposition in security and subjects thereby conveyed for behoof of the creditors of the said Samuel Macadam Carrick, allowing the first parties, in respect of their claim for a re-conveyance, a ranking only for the value of the subjects as at the date of sequestration."

Argued for the first parties—Carrick had no beneficial interest in the bond and disposition in security, though no doubt the formal title stood in him. He was a bare trustee, and the bond could not accordingly be held to be included in the "property" which by the act and warrant of confirmation were vested in his trustee in bankruptcy under sec. 102 of the Bankruptcy Act of 1856—*Heritable Reversionary Company v. Millar*, August 9, 1892, 19 R. (H.L.) 43, *per* Lord Herschell, 44. The decision in *Millar* was, indeed, absolutely decisive of the present case. Even assuming that the bond became vested in the trustee in bankruptcy, he could only take it subject to the qualifications under which the bankrupt had held it. The creditors in the sequestration were in no better position than adjudgers. They could only take their debtor's right *tantum et tale* as it was in his person—*Thomson v. Douglas, Heron, & Company*, 1784, M. 10,229, Hailes' Decisions, 1002, *per* L.J.-C. Braxfield. The back-letter here put it beyond question that the beneficial right in the bond was in Forbes' trustees and not in the bankrupt.

Argued for the second party—*Millar's* case founded on by the first parties did not apply. Carrick was *ex facie* owner of the right; he had paid money for the bond; and though no doubt a certain personal qualification attached to his proprietary right, that qualification was only a *pactum de retrovendendo*, and could not affect the right of the bankrupt's creditors—*Wylie v. Duncan*, 1803, M. 10,269; 3 Ross' L.C. 134. An *ex facie* absolute donee, though his right be qualified by a back-letter, had a true *jus domini*, and was not correctly included in the category of trustees—*Bell's Prin.* sec. 912; *National Bank v. Union Bank*, December 18, 1885, 13 R. 380, *per* Lord Fraser, 398, *per* L.P. Inglis, 413; *rev.* December 10, 1886, 14 R. (H.L.) 1. If Mr Carrick had conveyed this bond to a third party within sixty days of bankruptcy, the sale could have been reduced—*Moncreiff (Tod and Hill's Trustee) v. Union Bank*, December 16, 1851, 14 D. 200.

At advising—

LORD M'LAREN—This case raises an important question of principle, but when the facts are clearly apprehended it does not present any real difficulty.

Referring to the case itself for the history of the transactions under which the right to certain heritable subjects in Glasgow came to be vested in the first parties (Forbes' trustees), I may begin by observing that the subjects were burdened with a bond for £1500 for which Forbes' trustees were liable to Miss Margaret Wingate, the heritable creditor. To enable the heritable creditor to be paid off, the agent of the trustees, Mr Carrick, advanced the sum of £1475, 1s. 6d. This sum, together with £24, 18s. 6d., from the trust funds, was paid at Whitsunday 1894 to Miss Wingate, who in exchange assigned the bond for £1500 to Mr Carrick as a security for the repayment of Mr Carrick's advance to the trustees.

The estates of Mr Carrick were eventually sequestered, the confirmation by the Sheriff of Lanarkshire being dated 18th May 1897. The trustee in the sequestration is the second party to the case. From the account between Mr Carrick and Forbes' trustees it appears that Mr Carrick's advance had been extinguished by credit entries representing trust moneys received by Mr Carrick, and at the date of the sequestration there was a balance due by him to Forbes' trustees.

The first parties claim a reconveyance of the heritable bond and subjects disposed in security. The trustee in the sequestration claims to retain the bond on condition of allowing a ranking to the first parties in respect of their claim for a reconveyance of the security subjects.

My opinion is that the right of Mr Carrick in its inception was a redeemable right, that it was in fact redeemed by payments to account, and that the sequestration of Mr Carrick did not alter the character of the right. I should have come to this conclusion on the terms of the bond itself, which I assume to be in the ordinary form, because dispositions in security are always declared to be irredeemable only in the event of a sale under the powers of the bond. We see that after getting the assignation to the bond Mr Carrick granted a letter to Forbes' trustees acknowledging that he held the title in security only, and undertaking on payment of all sums due to him to reconvey the bond with the security subjects. I do not think that this letter was necessary to protect the right of Forbes' trustees; it merely expresses the legal result of the qualified title on which Mr Carrick was holding. But when it is once ascertained that Mr Carrick's title was a qualified title at the date of the sequestration, we have a measure of the right of the trustee, because creditors can only take such right as the debtor himself possessed, or in other words, they take his estate *tantum et tale*, as it stood in his person, being bound by all its conditions and qualifications.

This principle, I may observe, is very liberally applied in favour of the true owner against the creditors of a trustee or other person having a qualified title, because even where the title is *ex facie* unqualified and enters the records as such, the creditors of the *ex facie* absolute proprietor can take no higher right than he himself possessed. This was the point decided by the House of Lords in the case of the *Heritable Reversionary Company v. Miller*, 19 R. (H.L.) 43, and the principle of that decision obviously governs security titles as well as trusts. When Carrick was paid his debt, he ceased to have any pecuniary interest in the subjects, his title being then merely nominal. It follows, in my opinion, that the second party is bound to retransfer the subjects unconditionally.

I think that the first and second questions should be answered in the affirmative, and the third question in the negative.

LORD ADAM and the LORD PRESIDENT concurred.

LORD KINNEAR was absent.

The Court answered the first and second questions in the affirmative, and the third question in the negative.

Counsel for the First Parties—Johnston, Q.C.—M'Clure. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Second Party—Dundas, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Wednesday, June 1.

## SECOND DIVISION.

[Sheriff of Argyllshire.

### CAMPBELTOWN SHIPBUILDING COMPANY v. ROBERTSON.

*Fishings—Waste or Uncultivated Land beyond High-Water Mark—Statute 11 Geo. III. cap. 31, sec. 11.*

Where a firm of shipbuilders fenced a portion of waste ground belonging to them above high-water mark in order to use it as an extension of their shipbuilding yard and for storing material—*held* that the ground so fenced ceased to be "waste or uncultivated land," and that persons employed in the fisheries had no right to use it in terms of section 11 of 11 Geo. III. c. 31.

By section 11 of 11 Geo. III. cap. 31, intitled "an Act for the Encouragement of the White Herring Fishery," it is enacted that all persons employed in the said fisheries "shall have and exercise the free use of all ports, harbours, shores, and forelands in Great Britain or the islands belonging to the Crown of Great Britain, below the highest high-water mark and for the space of 100 yards on any waste or uncultivated land beyond such mark within the land, for landing their nets,