

"I retain the opinion embodied in my interlocutor and note. I do not think the deed of 1726 incapable of construction by extrinsic evidence. But I conceive that the trust thereby constituted in the kirk-session of Kinglassie, 'for the use and behoof of the poor of the said parish,' is *prima facie*, and presumptively, a trust for the legal poor; and that the *onus* lies on the kirk-session to establish that the trust was truly intended for a discretionary distribution by the session, apart from the heritors, amongst persons within the parish in a state of poverty, whether possessing a legal claim of relief or not. I am of opinion that the evidence, rightly construed, not only fails to make this out, but directly makes out the reverse. The original intervention of the heritors in the purchase of the property,—the share which they took from time to time in its administration,—the mode in which they were ultimately united with the session in granting the leases,—and the application of the rents to the relief of the legal poor, by no special appropriation of the session, but indiscriminately with the other parochial funds, and especially with the assessment which the heritors voluntarily laid on themselves (which, although perhaps inaccurately termed the legal assessment, stood in exactly the same position of being raised to meet the legal demand),—are circumstances which I think unanswerably confirm the inference presumptively deducible from the terms of the disposition, that this property 'belonged to the heritors and kirk-session of the parish of Kinglassie,' in the true construction and meaning of the Poor-Law Amendment Act."

At advising—

LORD COWAN—The consulted Judges are all agreed in holding that the interlocutor of the Lord Ordinary is well founded. I concur in that opinion, on the grounds more particularly set forth in the opinions of Lord Curriehill and Lord Deas.

To reach this result, it never has appeared to me necessary to challenge the authority of the decision by the First Division of the Court in the case of *Hardie v. Kirk-Session of Linlithgow*. That case was decided upon the result of the inquiry, allowed by Lord Rutherford, Ordinary, "into the administration of the property there in question," "by whom administered, and under what control," and "for what objects." Such investigation was held to be necessary from the terms of the title, by which the subjects had been in 1707 disposed to the then Eleemosynary for the poor of the parish, "for the use and behoof of the kirk-session of Linlithgow and the poor of the said parish." The terms of this title were not such as *de plano* to vest the property in the parochial board of the parish, under the 52d section of the Poor Law Statute 1845—the provision in its terms being limited to property held, directly or through trustees or commissioners," "by the heritors and kirk-session of any parish," "for the use or benefit of the poor of such parish." But while this was true, there was nevertheless room for holding that under the title the estate had been managed and distributed throughout for the use and behoof of the legal poor of the parish. The allegations of the parochial board to that effect, with the counter allegations on the part of the kirk-session, behoved, in consequence, to be investigated for the just decision of the cause. The result was to satisfy the Court that the kirk-session had held and administered the fund for the general poor, including the casual or occasional poor, and not for those poor only who were entitled to legal relief. The

principle on which the Court proceeded in disposing of that case appears to me quite sound, whatever may be thought of the view taken by the Court of the result of the investigation into the respective allegations of the parties.

The same principle must, in my opinion, be applied in this case. The terms of the title are not such as to bring the property *de plano* within the express terms of the statutory provision, transferring the management of the poor's funds of the parish to the parochial board. But the terms of the title are such as to justify investigation into the history, management, and application of the subjects by the kirk-session who are the holders of it "for the use and behoof of the poor of the parish." Had there been nothing to reflect light on the origin and history of this property and its management, the statutory terms of themselves might not have carried it to the parochial board, on the principle stated by the Lord President in the case of *Linlithgow*. But adopting that view as applicable to the present case, the result of the elaborate investigation which has been gone into appears to me inevitably to lead to a different conclusion.

On these grounds, I am of opinion that the decision of this case in conformity with the opinions of the consulted Judges not only does not conflict with the principle on which the Court decided the case of *Linlithgow*, but will be in perfect conformity with that principle and with the sound construction of the statutory provision, when its application is sought to be enforced in such circumstances as the present case presents.

LORD BERNHOLME—I concur in the opinion of Lord Ordmidele.

LORD NEAVES concurred.

LORD JUSTICE-CLERK concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to; but without expenses to either party.

Agents for Pursuers—J. & H. G. Gibson, W.S.  
Agent for Defenders—John Thomson, S.S.C.

Friday, June 14.

## SECOND DIVISION.

JOHNSTON v. PETTIGREW.

*Bankrupt—Trustee—Heritable Securities—Bond and Disposition—Assignment—8 and 9 Vict., c. 31—Recording Titles to Land Act 1858—Registration.* A party acquired two bonds and dispositions in security in corroboration of a disposition of lands to him. He took infetment on the disposition, but the instrument of sasine made no reference to the bonds, and they were not recorded under the Act 8 and 9 Vict., c. 31. He afterwards made a disposition of the lands and of the bonds, and that deed was registered under the Titles to Land Act. This registration was set aside by a previous judgment of the Court as an invalid title to the lands. Held, in a question with the trustee of the party who disposed the lands and the bonds together, that the right of the disponee to the bonds was merely personal, and could not compete with the trustee's completed title under the Act of 1858.

This case arose upon objection by Matthew Pettigrew, manufacturer in Glasgow, to a scheme of

ranking made up by William Johnston, accountant in Glasgow, trustee on the sequestrated estate of John Struthers, spinner and twister, Great Dovehill, Glasgow. The only question related to a right of preference claimed by the objector, in respect of two bonds and dispositions in security acquired by Struthers, the bankrupt, in 1856, in corroboration of the disposition to him of the lands of Craighole or Craighoil, near Kilmun. Struthers took infestment on the disposition of the lands; but the instrument of sasine made no reference to the assignation of the bonds, and the assignation to them was not recorded in terms of the 8th and 9th Vict., c. 31. Struthers conveyed the lands and bonds in 1859 to the objector by a disposition and assignation *ex facie* absolute, but alleged to have been in reality in security of advances made by Pettigrew. That deed was registered under the Titles to Land Act 1858; but the registration was reduced as a title to the lands by a judgment of this Division, June 16, 1865. It was now maintained by Mr Pettigrew that, although the registration gave no title to the lands, it was a good registration of the bonds under the Act of 1845. The trustee made up a separate title to the bonds by a notarial instrument under the Titles to Land Act 1858. He maintained that the bankrupt's right to the heritable securities having remained merely personal, there had been no valid transference of the real right to Mr Pettigrew by the recording of the assignation in terms of the 8 and 9 Vict., c. 31, § 1, that Act enabling such transmission to be effected only by a creditor infest; and that transmissions of inchoate rights to heritable securities (now completed by notarial instrument under the Act of 1858) were not within the operation of the Act of 1845. He also pleaded that the bonds had been extinguished *confusione* when they came into the person of the proprietor of the lands, but this plea was not disposed of. The Lord Ordinary gave effect to the contention of the trustee, repelling the objections taken to the scheme of ranking and division, and approving of the same.

The objector reclaimed.

A. R. CLARK and LANCASTER for him.

GIFFORD and GUTHRIE in answer.

At advising—

**LORD JUSTICE-CLERK**—In this case William Johnston, trustee on the sequestrated estate of John Struthers, presents a petition to the Court for approval of a scheme of ranking, under which he claims payment to himself, for behoof of the general creditors of the bankrupt, of the price of an estate which belonged to the bankrupt called Craigcoll, which had been brought to sale after deducting certain burdens, and, among others, the sum secured by a valid bond and disposition in security in favour of the trustees of the marriage-contract of parties of the name of Richards. The proposal is objected to by Matthew Pettigrew, who alleges that he is in right of two securities which, he says, form real burdens on the estate. By a former judgment of the Court, it was found that his claim to the property of the estate, founded on the same deed which assigned to him these securities, was bad, by reason of defective registration. The title to the property was sought to be completed by registration under the Titles to Lands Act, the provisions of which, as to the mandate authorising registration, were neglected. The same objection does not attach to the registration of heritable securities where no mandate to register is required; and he says that the assignations to these securities

contained in his disposition being actually on the register of sasines, the right in his person is completed.

In reply to the objector, the trustee maintained that Struthers, the bankrupt, had no completed right in his person to these securities; that he was not infest in them according to the old form, or registered assignee under the form required by the Act of the 8 and 9 Vict., and consequently held a title merely personal; that Struthers' personal title, from his failure to register the securities or to infest, left it free to the trustee to complete a real right to the securities, which he had done by expediting a notarial instrument, as directed by the Titles to Lands Act.

The question resolves, as it occurs to me, wholly into the matter raised under the statute of 8 and 9 Vict., as to the power under the provisions of that Act of the holder of a right to heritable securities, merely personal, to convey them to another, so that registration by that other party may complete a real right in him. It was argued that the trustee, by completing his own title, completed the bankrupt's right, and so must be held to have validated the right in Struthers, and so made the right of his assignee, the objector, complete by accretion. But it is impossible to listen to that plea, because the trustee did not make up his title to these bonds through a completion of the bankrupt's title to them. We have an instrument of sasine in the trustee's favour expedite upon the precept contained in Fleming's disposition to Struthers for infestment in the heritable securities, to which unexecuted precept he acquired right as trustee, and a notarial instrument in his own favour. There is no such registration of the assignation in Struthers' person involved in the completion of the trustee's title as to give the least ground for the plea of accretion.

It is plain that Struthers, the bankrupt, had no more than a personal title. His title to Craigcoll was complete by expediting infestment on the disposition in his favour by his author, Mr Fleming, the trustee upon the bankrupt estate of William Russel, in whose person the right to the property and the two securities in question, as corroborative of the right of property, was vested. An infestment or a precept of sasine on the disposition in favour of Struthers could not possibly have the effect of making real the personal right conveyed by assignation of the bond.

If the holder of a personal right to heritable securities can effectually assign under the provisions of that Act, the obligator, Mr Pettigrew, will prevail; if the transmission can be effected only by one who is vested in the real right, the contention of Mr Pettigrew must fail.

The Act of the 8 and 9 Vict. was among the first of a series of statutes affecting conveyancing which have affected very considerable and beneficial changes. It proceeds to provide—[quotes section 1]. The provision applies to the case of heritable securities constituted by infestment. The right, which may be transferred in the short statutory method, is the right of the creditor therein—that is, the right of the creditor in the heritable security so constituted may be transferred; and, the assignation being registered, the heritable security shall be transferred precisely as if sasine had followed upon an assignation. The creditor is defined to be, in the 12th clause, "the party in whose favour the heritable security is granted, or who is in the right thereof," and the transference is of the right as vested in the creditor. Its completion by regis-

tration completes the right in the assignee which was previously in the granter of the assignation. The right of the party who gives the assignation is transferred to the registered assignee just as if he had expedie sasine. There is nothing as to a transfer which does not proceed from a party in the real right to the security; and, as the necessary effect of registering the assignation is to put the assignee in the position of a party whose right has been completed by sasine, so it must be that the party who transfers has a real right in him previous to the transfer, which, being communicated and followed by registration, gives a real right to the assignee. The transmission of inchoate rights to be made complete not, in the person of the assignee but of some party who may have a title from the assignee uninfert, is not within the statute.

The possibility of transmitting a right to securities in the old form, so that, after a series of transmissions of the original precept, an infertment, taken at last, would complete the right, cannot affect the construction of this Act. It may be that a larger remedy might have been desirable; and that a holder of a merely personal right should have had the power of communicating such a right as would have placed the last holder registering in the position of the first of a series of intermediate holders, *different and more complete than that* of the immediate granter. I cannot find any such thing in the statute. The statute contemplates a transfer from a party vested in the real right to a party who becomes, by registration of the conveyance, a party holding the same quality of right which the granter of the conveyance had.

Reference was made to the schedules. Schedule No. 1 presupposes infertment in the granter, "all as specified in the bond and disposition in security, and instrument of sasine thereon." Note (a) requires a statement of all the intermediate holders after the first. The assignees, if the statute is of the import stated, must mean registered assignees.

In Schedule No. 3 the case is given of an instrument in favour of an heir of a creditor who is assumed to die infert in the security, and as to whom it is said that he acquired right by general or special service. It is plain that some peculiar meaning or effect is attached to the words "general service." They can hardly be said to justify the inference that a personal right must be contemplated, as a general service is the appropriate mode of service in reference to such rights. In the case supposed the ancestor is infert; and, where infert, special service is necessary. The words must there, I think, be either disregarded or read as Mr Guthrie suggested—as applicable to the case where a general service is used, not as taking up a right, but to fix and ascertain who is in a particular relation. I think that we must adhere to the Lord Ordinary's interlocutor.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

Agent for Objector—John Ross, S.S.C.

Agent for Respondent—D. J. Macbrair, S.S.C.

Saturday, June 15.

## FIRST DIVISION.

M'ALLISTER v. DUTHIE.

*Retention—Interim Decree—Charge—Suspension.*  
Suspension of charge on interim decree in an

action for payment of money, on the ground that the complainer had a right of retention in respect of having subsequently in the action obtained a judgment against the charger for a sum of expenses, which judgment was under review, refused.

Duthie sued M'Allister for £96, the balance remaining due of a larger debt. M'Allister admitted a balance of £52. The Lord Ordinary (MURE) decerned against M'Allister *ad interim* for the admitted balance, and this judgment became final. The Lord Ordinary then, after a proof, found M'Allister liable to Duthie in a farther sum, but gave him expenses, subject to modification. Duthie reclaimed. Duthie then charged M'Allister on the decree for £52. M'Allister suspended, and pleaded a right of retention over the sum charged for to the extent of the expenses to which he was found entitled by decree of the Lord Ordinary. He offered to consign the amount.

The Lord Ordinary (MURE) refused the note of suspension, and added this note to his interlocutor:—"The Lord Ordinary is not aware of any principle or authority applicable to the law of retention which can entitle a debtor to suspension of a final decree for payment of a debt, in respect of a claim arising out of a mere finding for expenses of process which has been reclaimed against, and which expenses, even if ascertained, would be subject in the first instance to the hypothec of the complainer's agent, and liable to be carried off by him to meet his account incurred on behalf of the complainer."

M'Allister reclaimed.

SCOTT for him.

FRASER and SKELTON, for respondent, were not called on.

The Court adhered.

The LORD PRESIDENT said—I cannot imagine any doubt in this case. When the Court award an interim decree in an action for payment of money, the footing on which it goes out is, that the sum decerned for ought to have been paid, leaving the disputed balance to be the subject of after deliberation. There may be cases in which very nice questions may arise as to whether interim decree, even in the case of an admitted balance, should be given. But whenever interim decree is given, there is an end of all such considerations. It is then a settled matter that the defender is bound instantly to pay the sum decerned for. All that is very elementary and hardly worth stating, but for the strenuous contention of the complainer. But he says that the pursuer having failed to enforce the interim decree until a further interlocutor in this cause was pronounced, he has lost his right to enforce it; and the ground on which he puts that is, that he has now got an interlocutor, in which he is found entitled to expenses, subject to modification. That is under review, and he says he may come to get a decree for the sum against the respondent. That gives him, he says, a right to retain the sum decerned for long before, and which it was his duty to pay immediately on the decree. All I can say is, that that appears to be founded on a total misapprehension of the doctrine of retention. There is no foundation for retention in such a prospective and possible claim of debt.

LORD CURRIE HILL concurred.

LORD DEAS—There are some circumstances where, when parties litigate, the Court may equitably interfere to stop a party from enforcing even a legal right while the proceedings are going on. But it