

was carefully guarded so as not to be applicable to such a case as this, where the destination-over, which suspends vesting, is not to the survivors of the class or to the issue of predeceasers, but is in favour of third parties.

"I agree with the reporter in thinking that there may be a claim of debt here, as for aliment, against the estate left by the father, in the case of such of the children as are not able to support themselves. But it is for the trustees, and tutors and curators, to work that out on their own responsibility, with the consent, if they can obtain it, of the other contingent fiars.

"I am constrained to refuse the petition."

Counsel for the Petitioners—A. S. D. Thomson. Agent — Andrew Newlands, S.S.C.

Tuesday, June 2.

FIRST DIVISION.

WHITTLE, PETITIONER.

*Trust—Trustee—Bankruptcy of Trustee—Removal.*

One of two testamentary trustees who had been sequestrated, and who was indebted to the trust-estate, removed on the petition of the other trustees and the beneficiaries.

This was a petition at the instance of Mr Robert Whittle, one of two trustees under the trust-disposition of the late Mr John Whittle, Barnhill, Dumfries, with consent and concurrence of the beneficiaries under the trust, craving the Court to remove the other trustee, Mr Joseph Carruthers, solicitor, Moffat, from the management of the trust. Under the trust-disposition the trustees were directed to hold the residue of the truster's estate in liferent for his widow, the fee being left equally among the children.

The petitioner averred that the respondent had been lately in financial difficulties, that on April 21st, 1896, his estates had been sequestrated, and that a claim had been lodged in the sequestration by the petitioner on behalf of the trust estate for the sum of £117, in respect of transactions between the respondent and the late John Whittle.

The respondent lodged answers in which he averred that the claim against him on behalf of the trust-estate was greatly overstated, and that he had counter claims which would more than meet it. He averred further that he had acted for years as the law-agent of the truster, and that the latter had never wished to recal his appointment.

Argued for petitioner—The effect of the sequestration of a trustee clearly was to render him ineligible for the office, more especially in a case like this, where the trust-estate had a claim against him, and also where the trust was a continuing one—*M'Dowall v. M'Dowall*, 1789, M. 7453;

*Towart*, May 14th, 1823, 2 S. 305; *Smith*, May 15th, 1832, 10 S. 531; *Macpherson v. A B*, December 19th, 1840, 3 D. 315. In the last case the trustee was removed even though he offered to find caution.

Argued for respondent—No charge was made against him personally. The debt had existed before the appointment was made, and his sequestration had placed the respondent in a more favourable position with regard to holding this office, since it was the trustee in the sequestration who was interested in resisting the claim, and not himself. In any case the Court should not remove him, but if they thought a change of management necessary, should appoint a judicial factor.

LORD PRESIDENT—I think there is enough to render necessary the removal of this trustee.

It is quite clear that his position as a sequestrated bankrupt, alleged to be indebted to the trust-estate, makes him a very unsuitable person to act as one of two trustees managing that estate. I think it is to be regretted that the respondent did not solve the difficulty by retiring. As, however, he declines to do so, it appears to me that our clear course is to remove him. No more censure of him is implied by our doing so than is involved in his having rendered this course necessary by not himself taking the proper step of retiring from the trust. It is out of the question that a person in the respondent's position should be allowed, in order to save his dignity, to insist upon the appointment of a judicial factor, that is, to mulct the estate in the expenses of judicial management in place of the present gratuitous administration.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court granted the petition.

Counsel for Petitioner—Younger. Agents—Steele & Johnston, W.S.

Counsel for Respondent—Cullen. Agent—Alex. Wyllie, S.S.C.

Tuesday, June 9.

FIRST DIVISION.

THE GOVERNORS OF BELL'S TRUST, PETITIONERS.

*Trust—Scheme for Administration of Educational Trust—Amendment of Scheme—Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), sec. 7—Extension of Area of Benefits of Trust.*

The Educational Endowments (Scotland) Act 1882, sec. 7, enacts that, "subject to the provisions of this Act, it shall be the duty of the Commissioners, in re-organising as aforesaid educational endowments, to have special regard to

making provision for secondary or higher or technical education in public schools or otherwise, in those localities to which the endowments severally belong, or in such manner as to secure to the inhabitants of those localities the benefit of such endowments."

Circumstances which held not to justify the extension of the benefits of a trust for educational purposes to an area different from that to which they were destined by the testator.

*Trust—Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59). sec. 20—Petition for Alteration of Scheme of Administration—Consent of Scotch Education Department.*

The Educational Endowments (Scotland) Act 1882, sec. 20, provides for the alteration of schemes of administration of educational endowments by the Court of Session upon application made with the consent of the Scotch Education Department by the governing body.

The governors of an educational trust presented a petition, bearing to be with consent of the Scotch Education Department, for alteration of the scheme of administration. The consent of the said Department had not in fact been given when the petition was presented, though it was subsequently granted *pendente processu*. Held that although the procedure of the petitioners had been gravely irregular, the consent so given might be taken as validating the petition *ab initio*.

The Governors of Bell's Trust, Old Aberdeen, presented a petition for amendment of the scheme of administration of the trust approved of in 1890. The petition bore to be presented "with the consent and concurrence of the Scotch Education Department."

By the said scheme it was directed, *inter alia*, that "the governors shall continue to maintain the Bell School in the parish of Old Machar, and shall provide accommodation for not less than 284 children."

By the Aberdeen Corporation Act 1891, sec. 7, the greater part of the parish of Old Machar, including Old Aberdeen, was added to the royal burgh of Aberdeen; and in terms of the Education (Scotland) Act 1878 (41 and 42 Vict. cap. 78), section 30, the same portion of Old Machar has been annexed by order of the Scotch Education Department to the said burgh for the purposes of the Education Acts. The School Board of Aberdeen have accordingly extended their administration to the said district.

The amended scheme which the Court was asked to sanction provided for the governors ceasing to maintain the Bell School and applying the whole endowment of £2563 to establishing bursaries in connection with the Grammar School of Aberdeen for boys, and the High School of Aberdeen for girls, the said bursaries to be awarded by competitive examination among pupils attending public schools in the unannexed portion of Old Machar, and

also within the extended boundaries of the burgh of Aberdeen.

The circumstances in which the application was made are fully set forth in the following report by Mr B. P. Lee, advocate, to whom the petition and process were remitted by the Court:—"The petition, which bears to be with the consent and concurrence of the Scotch Education Department, was boxed on 26th September 1895, and on 16th October 1895 your Lordships ordered advertisement, and intimation to the Lord Advocate and the School Boards of Aberdeen and Old Machar. On the following day—October 17th—this intimation was duly made. At this time the petitioners were acting without the consent of the Education Department, which consent is, by section 20 of the Educational Endowments (Scotland) Act 1882, essential to any application for alteration of the Commissioners' schemes. The petitioners, however, on 16th January 1896, in a note to my Lord President (No. 13 of process), state that 'since the date of the interlocutor appointing intimation and service, the agent of the petitioners has been in communication with the Scotch Education Department, who have finally consented to the application. My Lords desire that the whole correspondence with the Department be laid before the Court, and it is herewith produced accordingly, that it may be remitted to the reporter along with the rest of the process.'

"The correspondence produced is of considerable length, and divides itself naturally into two parts—before and after the petition was presented. The latter part deals entirely with the irregularity of presuming on the consent of the Department and proceeding without it. The Education Department at first requested that the petition should be withdrawn, but finally, in a letter dated 30th December 1895, Mr Craik wrote, 'I am directed to state that after communicating with their counsel, my Lords have, although with much hesitation, come to the conclusion that they may allow the petition to proceed, on the distinct understanding that all the correspondence on the matter be submitted to the Court.'

"The earlier part of the correspondence with the Education Department deals with the merits of the alterations which the petitioners propose, and concludes on 23rd September 1895 with a letter in which the Department inquires 'whether there would be any objection, on the part of any of the various parties interested, to the Old Machar bursaries being confined to Old Aberdeen, instead of being thrown open to all the (new) Aberdeen Schools.' Throughout the whole correspondence there is no indication that the Education Department in any way concurs in the petition, but of course its concurrence is in no way necessary, and has only been claimed on the face of the petition through inadvertence.

"The various events which have led up to the present application are correctly stated in the petition. They are briefly the amalgamation of the cities of Aberdeen

and Old Aberdeen, followed by the annexation of the amalgamated portion of Old Machar parish to the burgh of Aberdeen for the purposes of the Education Acts; the necessity for further school accommodation in the district now partially supplied by Bell's School, and the consequent determination of the School Board to build and maintain a new school; the desirability of carrying on in one school the work presently done by Bell's School and the existing Public School; and finally, the inadequacy of the funds of this endowment for the proper maintenance of the school, and especially for putting the buildings into such a condition as to meet the requirements of the Scotch Education Department.

"In these circumstances, as the petitioners state, 'the School Board of Aberdeen have agreed, in the event of your Lordships granting the prayer of the present application, to take over the management of the Endowment School, and to bear the whole expense of such management as and from the date of your Lordships granting the said prayer.'

"Your Lordships are asked to sanction a scheme under which the Governors shall cease to maintain their school, and shall devote the whole endowment, amounting to £2563, to the establishment of bursaries in connection with the secondary schools of Aberdeen, the Grammar School for Boys, and the High School for Girls.

"So far I think that the circumstances fully justify the application, but the petitioners propose that these bursaries when founded shall not be restricted to children from the parish of Old Machar, to which the endowment belongs, but shall be open to competition alike to scholars from Old Machar and from the extended royal burgh and city of Aberdeen. In support of this extension of area the petitioners state on page 6 that the founder Dr Bell also endowed another school in the city of Aberdeen, which was in 1881 transferred to the School Board of Aberdeen, the endowment being consolidated with others into a fund to be applied by the Town Council of Aberdeen for the promotion of education at the primary and secondary schools under the charge of the Aberdeen School Board. This change was made by Provisional Order under the Endowed Institutions (Scotland) Act 1878, and by section 20 of the Educational Endowments (Scotland) Act 1882 the governing body constituted by such Provisional Order may apply to the Court for alteration. The recent annexation of the great part of Old Machar, for the purposes of the Education Acts, to the burgh of Aberdeen, has, the petitioners say, given to Old Machar a participation in the benefits of Dr Bell's Aberdeen Endowment.

"Were the future of the endowment to be determined on the footing that Dr Bell's two endowments were in reality one for the benefit of the city of Aberdeen and the parish of Old Machar, the present proposal would be open to the criticism that while a part of Old Machar is still without the

sphere of the Aberdeen School Board and therefore receives no advantage from Dr Bell's Aberdeen endowment, it is not proposed to give that part any preference to the benefits of the Old Machar fund. But any attempt in this process to compensate the city of Aberdeen for the benefits which its extension has conferred upon its neighbours, seems to be precluded by the legal position of the endowment now alone before the Court. The scheme which your Lordships are asked to alter has full operation and effect in the same manner as if it had been enacted in the Educational Endowments (Scotland) Act of 1882, section 32, and can only be altered in terms of the section of that Act under which this petition is presented, section 20, 'provided that such alteration shall not be contrary to anything contained in' the Act. Now, section 7 provides that 'subject to the provisions of this Act it shall be the duty of the Commissioners in reorganising as aforesaid educational endowments, to have special regard to making provision for secondary or higher or technical education in public schools or otherwise in those localities to which the endowments severally belong, or in such manner as to secure to the inhabitants of those localities the benefit of such endowments. . . . Provided that nothing in this Act contained shall be taken to compel the Commissioners to restrict any bursary, exhibition, scholarship, or other educational benefit, attached to or tenable at any educational institution, to the children of persons resident in the locality where that institution exists.' There is nothing to suggest that the locality benefited by an endowment may be either extended or restricted by schemes framed under the Act,—the provision in this section apparently referring only to the case of bursaries already attached to a particular school, and allowing in such cases attendance instead of residence to remain the necessary qualification.

"In these circumstances I consider that the more limited alteration suggested by the Education Department is the proper one, and that there is no warrant either in the statute or in former cases before your Lordships for the much more serious alteration proposed by the petitioners."

Argued for the petitioners—(1) It was only fair that the whole of Aberdeen should share in the benefit of this endowment, as it would henceforth bear the whole responsibility. The present endowment conferred no exclusive benefit on the inhabitants of Old Machar; the Bell School was open to all children. At all events, the portion of Old Machar not annexed was so small as not to be entitled to special treatment. (2) The Scotch Education Department had now given its consent to the application.

At advising—

LORD PRESIDENT—Our attention has necessarily been called by the reporter to what is not only a grave difficulty in the way of granting the prayer of this petition, but also a reprehensible irregularity on the part of the petitioners. When this petition

was presented, the petitioners had not obtained the consent of the Scotch Education Department to its presentation; and yet the petition purported to be presented with the consent of that Department, while, as if to emphasise the consent, the wholly inappropriate words "and concurrence" were added. No expectation of obtaining that consent could warrant the petitioners in making this statement. The consent of the Department is a pre-requisite to any such petition being presented, and we have occasion to know that the consent of the Scotch Education Department is not a formal but a discriminating and highly intelligent act.

It is with some difficulty that I have come to the conclusion that, now that the Department have *pendente processu* consented to the petition going on, we may treat this as entitling us to consider the application as if its origin had been more legitimate.

On the merits, I am entirely satisfied with the recommendations of the reporter. Agreeing with him, I consider that we should not be warranted in extending to New Aberdeen benefits which, according to the directions of the testator, were destined to a different area. The recent changes in the administration boundaries of Aberdeen, and the circumstance that the same testator had made another bequest which, owing to those changes, might now be held to compensate for such an extension, do not furnish any valid reason for the step which the petitioners ask us to take.

I am therefore for remitting to Mr Lee to adjust the scheme in accordance with his report.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court remitted to the reporter to adjust the scheme in accordance with his report.

Counsel for Petitioners—Abel. Agents—Auld & Macdonald, W.S.

Saturday, February 8.

## OUTER HOUSE.

[Lord Kyllachy.]

### FRASER v. MALLOCH.

*Process—Dominus Litis—Expenses.*

*Held* that to establish the character of *dominus litis*, and thus burden one who was not a party to a suit with liability for expenses, it must be shown that the party on whom it is attempted to impose liability was in reality the principal, disclosed or undisclosed, in the suit, and that the actual litigant was merely his agent.

This was an action at the instance of J. M. Fraser, manufacturer in Govan, against John Macgregor Malloch, writer in Glasgow, concluding for payment of £451, 5s. 7d., being the taxed expenses found due to

the pursuer in a previous action at the instance of Messrs Donald & M'Culloch, cloth manufacturers, Govan, against him. The facts are fully set forth in the opinion of the Lord Ordinary.

The pursuer pleaded—"The defender being the true *dominus litis* in the action above mentioned, the pursuer is entitled to decree as concluded for."

The defender pleaded—" (3) The defender not having been the *dominus litis* of the action referred to, should be assoilzied with expenses."

On 8th February 1896 the Lord Ordinary (KYLACHY) assoilzied the defender from the conclusions of the action.

*Opinion.*—"The defender in this case is sued for payment of the expenses awarded to the pursuer in a recent action in which he (the pursuer) was defender and was successful in his defence. The ground of the demand is, that the defender was, as is alleged, the true *dominus litis* in the action, and is, as such, responsible for the expenses. It is not said that he was a party to the action. So far as appears he was simply the Glasgow agent of the pursuers. But it is said that he had such an interest in the result of the suit, and had such control over its course as to be the true *dominus litis*. There has been a long proof, but I do not think that the real facts of the case are seriously disputed. In 1891 Messrs Donald & M'Culloch (the pursuers of the action referred to) bought from Mr Fraser (the present pursuer) a factory in Govan with plant and machinery and certain business assets. The price as ultimately paid was about £3500. Messrs Donald & M'Culloch, who had been employed in the factory, had little capital—only about £250—but they obtained a loan on the property for £2000, and the balance was lent them by the present defender Malloch, who was their banker and law-agent in the transaction. The factory was not successful, and in 1892 Messrs Donald & M'Culloch raised an action of reduction against Mr Fraser on the ground of alleged fraudulent misrepresentation. By that time they were indebted to the defender Mr Malloch to the extent of about £1300, and there was another creditor for £400 more. Mr Malloch's firm, who were writers in Glasgow, conducted through their Edinburgh correspondent the litigation, and during its progress he continued to finance the factory business. The action was in the end unsuccessful, with the result that the factory was closed and Donald & M'Culloch were sequestrated. Being unable to recover his expenses, Mr Fraser has now brought the present action, in which as I have said he sues Mr Malloch for these expenses.

"The question which must first be determined is, what in law is requisite to attach to a person not a party to a suit the character of *dominus litis*.

"The term *dominus litis* is of course borrowed from the civil law, but with respect to the particular facts with which we have here to deal, it cannot be said that much assistance is to be derived from the definitions and doctrines of that law. The