Agents for Pursuer—Mackenzie & Kermack, W.S.

Agents for Defender—Hamilton & Kinnear, W.S.

OUTER HOUSE.

(Before Lord Kinloch.)

ADAMSON *v.* KNOX AND BEATTIE.

Poor—Settlement—Summons—Relevancy. A relieving parish sued the parish of a pauper's birth, and a parish in which the birth parish alleged that a residential settlement had been acquired. The pursuer did not himself allege that there was any settlement in the alleged parish of residence. Objection to the relevancy of the summons on that ground repelled (per Lord Kinloch and acquiesced in).

The inspector of the City Parish of Glasgow sued the inspectors of the parishes of St Ninian's and of Barony for relief of the support of certain paupers. He alleged in his summons that the husband and father of the paupers was born in St Ninian's, but he made no averment of a settlement of any kind in Barony. The condescendence, however, contained the following statement :—

"Cond. 5. It is admitted by St Ninian's that the deceased James Davie was born in that parish, but it is maintained that at the time of his death he was in possession of a residential settlement in Barony, which that parish denies. According as this fact shall be determined in the present process, either St Ninian's or Barony will be bound to repay the pursuer's advances, and relieve the City parish of Glasgow of the future support of the pauper. In no point of view has the pauper a settlement in the said City Parish. The pursuer does not think it necessary to give the details of the residence of the said James Davie prior to his death, as these will fall to be set forth by the defenders in their defences."

In these circumstances Barony stated the following plea-in-law:—

"The pursuer's action, as against this defender, is irrelevant, in respect the summons contains no averment to warrant its conclusions against him."

The Lord Ordinary (Kinloch) repelled the plea, observing in his note :—

"The present action is raised by the City Parish of Glasgow against the parishes of St Ninian's and Barony, for the purpose of fixing on one or other of them the support of a widow pauper and her children. It is clear that the City Parish is itself not chargeable. No ground of chargeability against that parish is suggested from any quarter. The settlement is admittedly that of the pauper's deceased husband. Admittedly he was born in St Ninian's; and if no other settlement appears, St Ninian's is his parish of settlement. But it is alleged by St Ninian's that anterior to his death he had acquired a residential settlement in Barony. The parish of St Ninian's offers to establish the fact. The question therefore lies between St Ninian's as the admitted birth settlement, and Barony as the alleged settlement by residence.

"The Lord Ordinary has no doubt that the question has been competently raised by the City Parish calling the two others into the field in order to dispute their liability. This is the convenient form which has been adopted in modern practice for now a good many years.

"But the Barony Parish pleads as a preliminary defence that the action has been irrelevantly directed against it, inasmuch as no positive statement has been made by the pursuer that the residential settlement was within that parish. What is averred by the pursuer is that it is 'alleged' that the residential settlement is within Barony; and accordingly St Ninian's not only avers this, but offers to prove it. It appears to the Lord Ordinary that this is enough. If the pursuer had committed himself to a positive statement that the residential settlement was in Barony, it might have been said with more justice that this was a reason for calling Barony and no other. What the pursuer does, and in the Lord Ordinary's view does properly, is to call the birth parish (admittedly liable if no other is), and also to call the other parish as that against which the birth parish avers a residential settlement. The matter will then be properly controverted between these two parishes."

Counsel for Pursuer—Mr Thomson. Agent—William Burness, S.S.C.

Counsel for St Ninian's—Mr Lamond. Agents—J. & J. Turnbull, W.S.

Counsel for Barony—Mr Burnet. Agent—John Thomson, S.S.C.

(Before Lord Ormidale.)

M.P.—ROBERTSON'S TRUSTEES *v.* M'LEAN AND OTHERS.

Heritable and Moveable—Legitim. A person died, having feued a piece of building ground on which he was in the course of erecting buildings which were not completed at the time of his death. Held (per Lord Ormidale and acquiesced in) that the cost of the whole buildings, when completed, formed heritable estate, out of which *legitim* was not payable.

This is an action of multiplepoinding raised by the trustees under the settlement of the late John Robertson, plumber in Glasgow. The testator died on 20th January 1864, a widower, survived by an only daughter, Mrs M'Lean, who refused her testamentary provisions and claimed legitim. The estate consisted of moveable goods, amounting to £2427, 10s. 7d., but the trustees contended that of this amount the sum of £1335 was to be considered heritable, and that legitim was not payable out of it. Some time prior to his death, the testator, intending to retire from business, had entered into missives of feu of a piece of building ground at Bridge of Allan. He had got plans and estimates of a proposed villa prepared. These had been submitted to the superior, and approved by him. He had instructed a builder to make out specifications of the whole work to be done in constructing the house, and these had been prepared, and contracts entered into to the extent of £934. At the date of the testator's death, the building was roofed in and nearly ready for the plasterer. These facts appeared from the evidence of certain witnesses examined upon commission, and the parties in addition made the following joint-minute of admissions :—

"1. There was a verbal set of the under flat of the house in question, conform to plan thereof, to Dr Gordon, Bridge of Allan, for the year from Whitsunday 1864 to Whitsunday 1865, at the rent of £48 sterling per annum.

"2. As the house was not erected at the time of the lease being entered into, the accompanying tracing was delivered to Dr Gordon, to show the size and arrangement of the house he had leased.

"3. The mason and joiner work were being proceeded with at the time of Mr Robertson's

death, and the value of the work done in these departments at that time, and of material on the ground, was—

Mason-work . . .	£470	0	0
Joiner-work . . .	165	0	0
In all	£635	0	0

And the plasterer had material on the ground, although he had done no work on the building, of the value of £10.

"4. In addition to the above, the joiner had work finished and in preparation at his workshop for the building of the value of . £60 0 0
And the plasterer had work in the same position of the value of . 2 0 0
And the latter had ordered lime for the building of the value of . 10 0 0
In all £72 0 0

"5. The amounts of the contracts actually made by Mr Robertson for the mason, joiner, and plaster work of the house in question were—

For mason-work (including £70 for extras) . . .	£570	0	0
For joiner-work . . .	318	0	0
For plaster-work . .	46	0	0
Making in all	£934	0	0

"6. The house, if finished by Mr Robertson, according to his plans and specifications and contracts made, would have cost him £1335 sterling."

The trustees did not complete the building left unfinished by the testator. They entered into an arrangement with a builder under which, for a sum of £40 paid to him by them, he took over the house and whole contracts, and freed the estate of all claims connected therewith, and he obtained a title from the superior with consent of the trustees in his own name. In the feu-disposition so obtained the obligation imposed upon the vassal was to erect and maintain a house upon the subjects of the value of not less than £300. The trust-deed contained a power but not a direction to sell.

R. V. CAMPBELL, for the trustees, argued that the sum of £1335, or at least the sum of £934, was to be regarded as heritable. He referred to the following authorities :—More's Notes, 142 ; Stair, 2, 1, 1 ; 3, 8, 47 ; Ersk., 2, 2, 14 ; Agnew, M. 8210 ; Arbuthnot, M. 5225 ; Ker, M. 5533 ; Robertson, M. 5489 ; M'Nicol *v.* M'Nicol, 16th June 1814, F.C. ; Elliot *v.* Minto, 2 S. 180, 1 W. & S. 678 ; Yates' Trustees, 24th May 1832, 10 S. 565, Collie *v.* Pirie's Trustees, 22d January 1851, 13 D. 506 ; Robson *v.* M'Nish, 2d December 1861, 23 D., 429 ; Syme *v.* Harvey, 14th December 1861, 24 D. 202 ; Cooper *v.* Jarman, 2 L. R. Eq., M. R. 98.

BANNATYNE (GIFFORD with him) for Mrs M'LEAN, argued—

1. That the sum of £40 paid by the trustees to be relieved of the building was alone to be regarded as heritable ; or otherwise,

2. That the sum of £635, representing the value of the work actually executed at the date of the testator's death, was alone heritable ; or,

3. That the sum of £934, the amount for which the deceased had entered into contracts, was alone heritable.

Reference was made to Erskine, 2, 2, 14 ; Bell's Com. II., 713 ; Johnston, M. 5443.

The Lord Ordinary pronounced the following interlocutor, in which parties have acquiesced :—

"*Edinburgh, 29th January* 1867. — The Lord Ordinary having heard counsel for the parties on the proof and whole cause, and having considered the arguments, together with the proof and other proceedings, Finds, as matter of fact, that some time before the death of the late John Robertson on 20th January 1864, he had acquired in feu a piece of ground at the Bridge of Allan, with the view and for the purpose of erecting a house thereon ; that accordingly he had got prepared a plan and relative specifications of the house he so intended to erect, which plan was approved of by the superior of the feu ; that Mr Robertson had also obtained estimates for certain portions of the work necessary to be done towards the erection of the said house, and had entered into contracts with tradesmen for the mason, joiner, and plaster work thereof, to the extent of £934 ; that he had also instructed a builder to go on with the work ; and accordingly said house was at the time of Mr Robertson's death in the course of erection and nearly completed : Finds also, as matter of fact, that Mr Robertson had in anticipation, and on the footing of said house being completed before the term of Whitsunday 1864, let the under flat thereof to a Dr Gordon, at the yearly rent of £48, and had delivered to Dr Gordon a tracing of the plan of said house as it was to be completed, which tracing is No. 36 of process : Finds also, as matter of fact, that said house if finished by Mr Robertson, according to the foresaid plan, specifications, and contracts would have cost him £1335 sterling : Finds, as matter of law, that in these circumstances said sum of £1335 must be dealt with as heritable estate left by the late Mr Robertson, and is not to form part of the fund out of which legitim is due to the claimant, Mrs Isabella Robertson or M'Lean ; and to that effect and extent sustains the pleas of Mr Robertson's trustees, and repels those of Mrs Isabella Robertson or M'Lean and husband : *Quoad ultra*, and with a view to the application of this interlocutor, and the determination of the remaining points in the case, including the expenses of process, appoints the case to be enrolled that parties may be further heard. "R. MACFARLANE."

"*Note.*—The proof will, it is believed, be found fully to support the findings of fact in the above interlocutor ; and if so, it appears to the Lord Ordinary that the £1335 which it would have cost Mr Robertson to complete the house in question, must be held, on the one hand, to be a debt of, or deduction from, his executry or personal estate, while the house in question or cost when completed being £1335, must be dealt with as heritable estate—it being so in its own nature to the extent to which the house was actually built, and as regards the remainder, it being so in law, *ex destinatione* of Mr Robertson.

"It was contended, however, on the part of Mrs M'Lean, a daughter of Mr Robertson, who claims her legitim, that £40 only, the sum which his trustees after his death paid in order to get his estate relieved from all obligations connected with the house in question, ought alone to be dealt with as heritable estate, in ascertaining the fund out of which her legitim is exigible. But, in point of fact, Mr Robertson's trustees not only paid the £40 in order to get quit of the obligations referred to, but in addition, gave up and made over the house and feu themselves ; and, at any rate, it is clear that no act of Mr Robertson's trustees could change or affect the nature of his estate, as it stood at the time of his death, and was left by himself.

"It was also contended alternatively on the part of Mrs M'Lean, that no more could be deducted from the fund out of which her legitim was exigible than the value of the house, so far as it had been completed and actually existed at the time of Mr Robertson's death, which was admitted to be £635, or at the utmost no more than £934, being the amount for which Mr Robertson was under actual contracts with tradesmen at the time of his death. And in support of this contention, the Lord Ordinary was referred to Erskine, 2, 2, 14, and the case of Johnston *v.* Dobie and Others, 25th February 1783, Mor. 5443.

"Now, while it is quite true that Mr Erskine states in the passage referred to that 'One's collecting of timber, stones, slates, or other materials for raising any fabric or edifice, is not sufficient to make them heritable *destinatione*, till they be united to the surface of the ground by actual building,' it appears to have been decided in the case of Johnston *v.* Dobie, cited by Mrs M'Lean herself, that the actual union or fixing of materials in a building is not indispensable, and that acts short of that unequivocally indicative of the *animus* of the proprietor are sufficient to make a subject in itself moveable heritable *destinatione*. The argument of both the contending parties in that case, as clearly appears from the report, which is very instructive on such questions as the present, proceeded upon the assumption of this principle being indisputable, and so accordingly, while 'some of the Judges seemed to be of opinion that even the simple collecting of materials for building might often sufficiently denote the *animus destinandi* of the proprietor, so as to render them heritable, others appeared to admit no other rule but the then actual state of the subjects; but the opinion of the majority was, that in cases like the present, where the will of the proprietor so strongly marked is actually carrying into execution by overt acts, such *animus* should have full effect.' And accordingly the Court found that the articles of unfixed work destined for the house fell to the heir, and not to the executors.

"The principle of this judgment, the Lord Ordinary thinks, supports the interlocutor he has pronounced. Mere intention, not expressed and declared in clear and unequivocal terms, or manifested by unmistakeable acts and conduct, may not be enough, but in the present case the *animus destinandi* of the late Mr Robertson has not only been unequivocally manifested, but to a large extent actually carried into effect. Not only so, but as the Lord Ordinary views the proof—taking, of course, as part of it, the mutual admissions of the parties—Mr Robertson had entered into engagements, on the assumption that the house in question would be completed, of such a nature and in such a way as precluded him from retracting or receding from them. It is impossible, indeed, on any reasonable view of the evidence, to suppose that Mr Robertson would have stopped short of the full completion of the house. His whole acts and conduct bearing on the matter plainly and decidedly indicate a fixed resolution to the contrary—a resolution which he had to a large extent carried into effect.

"These are the grounds upon which the Lord Ordinary has arrived at the conclusion embodied in his interlocutor, and that conclusion he thinks is in accordance with established principles, as illustrated by the authorities already referred to, as well as many others, of which he considers it sufficient to mention Bell's Principles, S. 1490; and Elliot *v.* Minto, 1 W. and S. 678.

"That in the most favourable view that could be adopted for Mrs M'Lean, the sum of £934, being the amount of the actual contracts binding on Mr Robertson at the time of his death, in reference to specific portions of work in connection with the house in question, falls to be deducted from the fund otherwise available for legitim, was scarcely disputed, and is supported by precedents directly in point—Robson *v.* Denny, 2d February 1861, 23 D. 429; and Cooper *v.* Jarman, 4th December 1866, Weekly Notes, vol. i. p. 378.

"It is presumed from what fell from the parties at the debate, that, on the footing of the Lord Ordinary's interlocutor, they will have no difficulty in agreeing as to the full and final disposal of the litigation. "R. M."

Agents for Trustees—Maitland & Lyon, W.S.

Agents for Mrs M'Lean—Hamilton & Kinnear, W.S.

Friday, March 8.

John Millar, Esq., advocate, this day presented her Majesty's commission in his favour as Solicitor-General of Scotland; and the usual oaths having been administered to him, he was invited by the Court to take a seat within the bar.

SECOND DIVISION.

RICHMOND *v.* LITTLE.

Teinds—Commonty—Decree of Valuation. Circumstances in which held that it was not proved that the teinds of a portion of divided commonties were included in a decree of sub-valuation.

This is a question in the locality of Orwell between Mr Richmond, one of the heritors, the minister of Orwell, and the common agent in the locality. The question is, whether the portion now belonging to Mr Richmond of the divided commonties of Cuthill Muir and Berry Muir are to be held as having been included in a sub-valuation obtained in 1630. The subjects described in Mr Richmond's title are "the lands of Collinstain or Collinston, and Stenton, with houses, biggings, yards, parts, pendicles, and pertinents of the same whatsoever, lying within the barony of Cuthill-Gourdie and sheriffdom of Perth." The commonties were divided and allocated in 1774. The Lord Ordinary (Barcaple) held that Mr Richmond had failed to show that the valuation included the teinds of his portion of the commonties. There being no mention of the commonties in the titles and no information in regard to them at all prior to the division in 1774, it was only presumptively that it could be held that they existed as commonties in 1630, and that the right of commonty then attached to Collinston and Stenton. But assuming that that was to be presumed, the Lord Ordinary was of opinion that on a sound construction of the decree of valuation it could not be held to include the teinds in question.

The pursuer (objector) reclaimed.

COOK and DUNCAN for him.

CLARK and ASHER for defender.

At advising,

Lord COWAN—I concur in the views taken of this case by the Lord Ordinary.

It is a principle well established that an heritor asserting that the teinds of his lands have been valued has imposed on him the burden of making out the fact on grounds satisfactory to the Court. This principle is specially applicable to a question