

in 1788, and were not bound to pay those imposed by subsequent legislation. Well, there are many decisions to the effect that a clause of this kind in a feu-charter, under which a superior undertakes to relieve of burdens, is limited to those subsisting at its date, and which alone therefore are in contemplation at the date of the feu. But the rule is to ascertain as satisfactorily as may be what the parties intended. Here we have the means of ascertaining that, for we have the usage of nearly 100 years under the principal tack, and a contract made between the present disputants when that tack was sixty-seven years old on the footing of the usage subsisting then, which was and has continued, that the lessee should pay all the landlord's burdens of the character imported by the clause, whether imposed in 1788 or by subsequent legislation. Since 1788 we have, I say, the contract of 1855, and alike, before and since that date, the lessees under the principal tack have paid all the landlord's burdens. This ascertains what the parties understood, and with reference to what they contracted in 1855, and they have acted on the contract then made. I am therefore for dealing with this contention as we are to do with Edmond's new contention. I think we should assolzie the defender Edmond in this action, so that with respect to the supposed newly discovered rights *hinc inde* the defending party will be assolzied from the claim made by the other.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I am of the same opinion. I think we must hold that the contracts should be construed as the parties themselves construed them for a long course of years.

The Court pronounced these interlocutors:—

In the *conjoined* actions—

“The Lords having heard counsel for the parties on the reclaiming-note of Charles Jopp and others, trustees for Andrew Jopp, against Lord Trayner's interlocutor of 20th July 1887, pronounced in the conjoined actions, Recal the said interlocutor except in so far as it conjoins the actions; and in the action at the instance of the said trustees against Francis Edmond, Ordain the defender to make payment to the pursuers of the sum of Six hundred and sixty-eight pounds sixteen shillings and one penny sterling, with interest at the rate of five pounds per centum per annum, as concluded for: Find the pursuers entitled to expenses, and remit to the Auditor to tax the same and to report, and decern: And in the action at the instance of Francis Edmond against the said trustees, in respect parties have arranged *inter se* for the settlement of the claims for assessments in connection with the repair of parish buildings mentioned in article 10 of the condescendence and answer thereto, Find it not necessary to dispose of the conclusions relating thereto, and *quoad ultra* assolzie the defenders from the conclusions of said action: Find them entitled to expenses: Remit to the Auditor to tax the same and to report, and decern.”

In the *second* action—

“The Lords having heard counsel for the

parties on the reclaiming-note for the defender against Lord Trayner's interlocutor of 20th July 1887, and the parties having arranged *inter se* for the settlement of the sum of £41, 17s. 9d. of income-tax sued for, and also of the question raised under the 14th article of the condescendence and answer thereto, Recal the interlocutor reclaimed against: Assolzie the defender from the conclusions of the summons: Find him entitled to expenses: Remit to the Auditor to tax the same and to report, and decern.”

Counsel for Jopp's Trustees—Sol.-Gen. Robertson—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Francis Edmond—Asher, Q.C.—Low. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, January 11.

## FIRST DIVISION.

### CLUGSTON v. THE GLASGOW ROYAL INFIRMARY AND OTHERS.

*Trust—Charitable Trust—Alteration of Purposes—Competition—Nobile Officium.*

A fund was raised by means of a bazaar, held in Glasgow under the auspices of the Royal Infirmary Dorcas Society, Glasgow, for the purpose of establishing a home for the reception of patients recovering from fever, in or near Glasgow. The local authority for the city subsequently built a fever hospital for the city fever patients, and the infirmary ceased to admit such patients. A petition was then presented by the holders of the fund to have a scheme settled for its administration. Answers were lodged for the Glasgow Royal Infirmary and the Dorcas Society in connection therewith, who asked that, the particular purpose for which the fund was raised having failed, the money should be applied to the erection of a nurses' home in connection with the Infirmary. Answers were also lodged for the Magistrates of Glasgow, as the local authority for the burgh, and the Dorcas Society in connection with certain fever hospitals in and near Glasgow. The object of this society was to supply fever convalescent patients with clothing, and also occasionally to assist them to go to the country to complete their recovery. They claimed that the fund should be made over for the benefit of the patients treated in these hospitals.

The Court *directed* the fund to be paid to the Magistrates of Glasgow, as the local authority, in trust for the Dorcas Society in connection with the said fever hospitals, in order that the annual income should be applied by the society exclusively for the benefit of the convalescent fever patients in the city fever hospitals.

This petition was presented by Miss Beatrice Clugston, David Davidson Balfour, James Campbell, David M'Gowan, honorary treasurer of the

Glasgow Royal Infirmary, and John Pirrie, treasurer of the Glasgow Convalescent Home, in the following circumstances, as stated in the petition—In December 1866 a bazaar was held in Glasgow under the auspices of the Royal Infirmary Dorcas Society, Glasgow, for the purpose of raising funds for the establishment of a home for the reception of patients recovering from fever, and a children's hospital, both in or near Glasgow, both of which charities were promoted by the petitioners, Miss Beatrice Clugston, Mr David Davidson Balfour, and Mr James Campbell. The funds realised at the said bazaar, which amounted to £4893, 0s. 3d., were appropriated in certain proportions, in pursuance of an arrangement among the parties interested—(1) Towards the establishment of a convalescent fever home, the bazaar having, as already mentioned, been held under the auspices of the Glasgow Royal Infirmary Dorcas Society (the Royal Infirmary being then the only institution for treating fever patients); and (2) in aid of a sick children's hospital. The former sum amounted to £1976, 4s. 6d., and the latter to £2916, 15s. 9d. The sum appropriated to the Sick Children's Hospital had been applied towards the erection of the Sick Children's Hospital in Garnethill, Glasgow. The sum set aside for the Convalescent Fever Home was inadequate to meet the expense of erecting or establishing such a fever home as was originally contemplated, and there was great difficulty in finding in the neighbourhood of Glasgow a site suitable for the purpose. The total sum under the charge of the petitioners at the date of presenting the petition was £3476, 9s. 6d.

The petitioners averred—"The conditions with regard to fever and other infectious diseases existing in 1866 differed from those which the petitioners found to exist on entering upon their duties, in respect (1) that the treatment of these complaints was not then fully assumed by the local authority, (2) their hospital accommodation was limited, and (3) it was situated in the centre of the town. The necessity for a fever home which existed at the date of the bazaar now, however, no longer exists, for since that date the local authority of Glasgow, under the powers and obligations conferred by The Public Health (Scotland) Act 1867, have wholly taken in hand the hospital treatment of infectious diseases. Their accommodation is ample, the Hospital being situated in the country, with several acres of pleasure ground attached. The convalescents are kept apart from acute cases, and are retained until fit for work. It is thus obvious that the functions which it was intended should be discharged by the fever home are now fully and efficiently discharged as statutory duties with which private benefactions like the fever fund cannot be mixed up. The petitioners therefore believe that in these circumstances it is not only inexpedient, but that it has become impracticable, for them to carry out the objects for which the fund was created, and it cannot be anticipated that anything will occur to alter the position of matters." The petitioners stated the various applications which had been made to them for the funds, and they prayed the Court "to authorise the petitioners to make payment to the directors for the time being of the Glasgow Royal Infirmary, and to the office-bearers for the

time of the Dorcas Society in connection with the Belvedere, Knightswood, and Govan Fever and Smallpox Hospitals, of one-half share each of the said sum of £3476, 9s. 6d., together with any further interest that may accrue thereon, the said sums to be paid on the receipt of the secretary and treasurer for the time being of the said Royal Infirmary and Dorcas Society respectively, under deduction always of the expenses hitherto incurred or to be incurred by the petitioners in connection with said Fund, including the expenses of and incident to the present application, the sum to be paid to the directors of the said Infirmary to be applied by them towards the erection of a home for nurses in connection with said Infirmary, and the sum to be paid to the said Dorcas Society to be applied by it to the purposes of that society; or otherwise, to settle a scheme for the administration of the said fund, with the interest that has accrued and may yet accrue thereon."

Answers were lodged for the Glasgow Royal Infirmary and the Dorcas Society in connection with the Royal Infirmary. They admitted the statement of facts contained in the petition, and further stated—"A society named the Dorcas Society in connection with the Royal Infirmary, which concurs in these answers, has been in existence for more than twenty years. The primary object of this society is to provide warm clothing and other necessaries for the convalescent poor who are about to leave the Infirmary. It was this society which in 1866 organised and held the bazaar mentioned in the petition. The funds raised at the different stalls, and apportioned to the Children's Hospital, have been duly paid or applied to that institution, which is now in operation. The remaining funds now in question were intended, as the respondents aver, for the benefit and increased efficiency of the Glasgow Royal Infirmary, the particular means then in view being the establishment of a Fever Convalescent Home in connection with that Infirmary, which then treated infectious fevers and other infectious diseases. . . . The local authority has since assessed the city, and erected at Belvedere, near Glasgow, accommodation for fever patients at the public expense, and maintained it at an expense out of the rates of some £35,000 per annum, with ample grounds for convalescents. . . . At the present time, and in the present state of the Infirmary funds, the particular means of maintaining its usefulness and efficiency most urgently required appears to its managers to be the provision of a suitable nurses' home in close proximity to the wards. Such a home has long been contemplated, and would have been built before now but for the want of funds." They accordingly moved the Court "to appoint the fund to be paid to the Glasgow Royal Infirmary, and pleaded that the money having been raised in connection with and for the benefit and further efficiency of the Glasgow Royal Infirmary by adding to its charitable arrangements a Fever Convalescent Home, and that particular purpose having through public legislation become no longer necessary, the money should now be applied to the next best means for promoting the further efficiency of the same Infirmary, viz., a nurses' home.

Answers were also lodged for the Magistrates and

Council of Glasgow, as local authority of the burgh under the Public Health (Scotland) Act 1867, and for the Dorcas Society in connection with the Belvedere, Knightswood, and Govan Fever and Smallpox Hospitals. These respondents stated—“The comparers the Magistrates of Glasgow having, under the powers and obligations conferred and imposed upon them by the Public Health (Scotland) Act 1867, undertaken the treatment of infectious fever cases, they in 1870 purchased the estate of Belvedere for the purpose of erecting thereon a fever hospital. The City of Glasgow Fever Hospital, Belvedere, was finally finished, with 390 beds, having cost altogether the sum of £76,176. . . . A difficulty arose almost at once in the hospital management with reference to the clothing of convalescents on dismissal. Prior to 1871 the Dorcas Society in connection with the Royal Infirmary of Glasgow was in the habit of supplying fever convalescent patients with warm clothing, but that society having intimated that they would be unable to render any more assistance to convalescent fever patients after the expiry of the month of December in that year, a meeting of parties interested was held in the Corporation Galleries, Glasgow, at which, in order to meet the want thus indicated, the Dorcas Society in connection with the Glasgow Fever Hospital, whereof the office-bearers are comparers, was established. The chief object of the members of the society is to provide warm clothing for the fever convalescents on leaving the hospitals. They also occasionally assist convalescents to go to the country for a short time to effectuate complete recovery. In 1877 the burghs of Partick, Hillhead, and Maryhill erected on the estate of Scotstoun “The Joint-Burghs Hospital, Knightswood,” and in 1883 “The Govan Combination Fever Hospital” was erected by the burghs of Govan, Govanhill, and Kinning Park, and Govan (Landward) Parish. As these institutions came into existence the Dorcas Society extended their operations so as to include the convalescent fever patients of these hospitals, and the name of the society was in 1886 changed to the Dorcas Society in connection with the Belvedere, Knightswood, and Govan Fever and Smallpox Hospitals.” Under these circumstances the comparers submitted that inasmuch as the funds were undoubtedly originally raised for the purpose of the Convalescent Fever Home, and inasmuch as the institutions above mentioned were the only institutions which answered that description, the fund should be made over for the benefit of the patients treated therein. The Magistrates of Glasgow, while they had no desire that the said funds should be applied in diminution of the rates, were of opinion that the same should be preserved and applied for the benefit of convalescent fever patients, and the comparers were willing that the fund should be either paid to the Corporation of Glasgow, to be held by them in trust for the comparers, the Dorcas Society, so long as the said society should continue to further the objects which it then set before it, or otherwise, if the Court should so think fit, that the fund should be paid directly to the office-bearers of the said society. But they submitted that in any view the whole fund should be paid to one or other of them, and not diverted, as it was proposed by the petitioners and by the comparers

the directors of the Royal Infirmary, to objects which had no connection with the particular purpose for which the fund was originally raised.

Argued for the petitioners—They proposed to devote the funds to objects as nearly as possible similar to the original intentions. The Court in the exercise of its *nobile officium* could deal with the question—*Clephane v. The Magistrates of Edinburgh*, February 26, 1869, 7 Macph. (H.L.) 7; *M'Andrew*, May 19, 1868, 5 S.L.R. 504; *Caird and Others*, February 25, 1874, 1 R. 529.

Argued for the Royal Infirmary and others—The Court as a court of equity would apply the fund to the next best object failing that for which it was collected. It had been so held in England in the case of subscriptions—*Attorney-General v. Stewart*, 14 L.R., Eq. 17—[LORD PRESIDENT—I do not think it likely that this Court will go so far in the exercise of its equitable jurisdiction as the Courts of England have under their doctrine]. The Dorcas Society of the Infirmary were originally intended to be the recipients of the fund—*Glasgow Royal Infirmary*, March 19, 1877, 14 R. 680; *Mitchell v. Burness*, June 19, 1878, 5 R. 954; *Bayne v. Black*, February 22, 1849, 6 Bell's App. 317; *Burnet's Trustees*, November 17, 1876, 4 R. 127; *Grant v. M'Queen*, May 13, 1877, 4 R. 734; *M'Dougall, Petitioner*, June 29, 1878, 5 R. 1014.

Argued for the Magistrates and Council of Glasgow and others—The petitioners did not ask for payment of the funds in order to relieve the rates, but for clothing patients whom they were not entitled to relieve out of the rates. The question was, what was the object of the charity they represented, and who were benefited by it? These were the convalescent fever patients of Glasgow. The funds were raised originally for such persons, and were not intended merely to increase the efficiency of the Infirmary.

At advising—

LORD PRESIDENT—The funds in question were raised by a society calling itself the Royal Infirmary Dorcas Society, Glasgow, and the purpose for which the funds were raised was to establish a home for the reception of patients recovering from fever in the Royal Infirmary, and also a children's hospital in or near Glasgow. The children's hospital has been provided for, and the only question is, what is to be done with the remainder of the fund raised for the convalescent fever patients? At the time the fund was raised the Royal Infirmary received fever patients, but since that time that institution has ceased to admit such patients altogether in consequence of the local authority having established an hospital for fever patients. That is a great improvement in the interests of public health, but it has created the present difficulty with regard to the funds in question, because it is clearly impossible to devote them to a home for convalescent patients of the Royal Infirmary, when no such patients exist. The question is, how are the funds to be disposed of in order that they may be applied to a purpose as near the original intention as possible, and to fulfil as nearly as possible the wishes of the charitable persons who raised the money? The case resolves itself into a competition. The Royal Infirmary claims the funds on the ground that

they were the originally intended recipients, or at least that the Dorcas Society in connection with that institution stood in that position. They say they have the best claim to it, and they propose to expend it in providing or towards providing a home for nurses. That certainly does not seem in point of description or substance to resemble the original intention of the subscribers. This proposal has nothing to do with fever or convalescent patients. But answers were lodged by the Magistrates and Council of Glasgow, as local authority of the burgh, and for the Dorcas Society in connection with the Belvedere, Knightswood, and Govan Fever Hospitals. They say that their society was established with the chief object of providing warm clothing for the fever convalescents on leaving the hospitals, and that they have employed their funds for that purpose. There is one fever hospital in Glasgow. The others are not within the city, but the fever hospital within the city comes in place of the Infirmary in treating fever patients, and the contention of these respondents is, that the fund will be most nearly expended in the way intended if it is used for helping convalescents of the fever hospitals in and near Glasgow.

I am of opinion that, as far as the fever hospital in Glasgow is concerned, this claim should be sustained. The very same persons will be benefited as were originally intended, or at least the money will be expended in the same direction. To this extent, I think, the proposals of the magistrates are reasonable, but I cannot propose that the suggested extension to the hospitals outside Glasgow should be sustained.

It is necessary to refer to the previous case of the *The Glasgow Royal Infirmary*, 14 R. 680. In that case a gentleman, Mr Mitchell, directed the residue of his estate to be divided among such charitable institutions as his trustees should judge most proper, and under this trust the trustees allotted the funds to a fever convalescent home when it should be erected. In its circumstances that case somewhat resembles the present. It is desirable, however, to show the points of distinction between them. In that case the money which had been allotted by the trustees had been paid over to the Infirmary. It was in its possession and subject to its use, and the only question was, what was the most proper purpose to which it could be devoted in the hands of the Infirmary. As in that case the testator's words were of a most wide scope, we thought at the time, and I see no reason to doubt the propriety of the course, that it should be devoted to the fever convalescent home when that should be erected. There was no competition in that case. We had before us an *ex parte* application. Here we have competing claimants, and the question comes to be, which will best use the fund in the line of the original intention? I have already said that the parties applying along with the magistrates are best entitled to it.

LORD MURE concurred.

LORD ADAM—I do not think the object of this charity has failed, because there are still patients recovering from fever in Glasgow. The original mode of applying the fund may have failed, but we should betake ourselves to the

mode next-of-kin to it. I think the funds should be applied to the relief of patients recovering from fever in the fever hospitals now existing in Glasgow.

The Court pronounced this interlocutor—

“The Lords having heard counsel and considered the cause, Refuse the claim for the respondents, the Glasgow Royal Infirmary and the Dorcas Society in connection therewith, as set forth in their answers: Grant warrant to and authorise the petitioners to transfer and make over to and in favour of the Magistrates and Council of the city and royal burgh of Glasgow, as local authority for said city under the Public Health (Scotland) Act 1867, the sum of £3476, 9s. 6d. mentioned in the petition, together with the interest which has accrued on the two deposit-receipts, and the half-year's dividend due at Martinmas last on the stock of the City of Glasgow, all mentioned in the petition, but under deduction always of the expenses incurred or to be incurred by the petitioners in connection with the fund under their charge, including the expenses of and incident to the present application, and also of the expenses incurred by both sets of respondents in connection with the present application: Direct the said fund, after deduction as aforesaid, to be held by the said Magistrates and Council, as local authority foresaid, in trust for the Dorcas Society in connection with the Belvedere, Knightswood, and Govan Fever and Smallpox Hospitals, in order that the annual interest or proceeds of the same may be applied by the said society exclusively for the benefit of the convalescent fever patients treated in the City of Glasgow Fever Hospital, Parliamentary Road, and the City of Glasgow Fever Hospital, Belvedere, or in any other hospital or hospitals which may be erected or acquired by, or become the property of the Magistrates and Council of Glasgow, as local authority foresaid, for the treatment of fever patients belonging to the city of Glasgow, and that by supplying patients, who are in need of the same, with clothing upon leaving the said hospital, or by enabling them to sojourn for a time in the country, or by in other ways rendering such assistance to said convalescent fever patients as may be considered suitable for promoting their restoration to health, and in the event of the said last mentioned Dorcas Society ceasing to exist or ceasing to carry on work of the description above directed, appoint the said Magistrates and Council, as local authority foresaid, to apply to the Court for further directions: Find all the parties entitled to their expenses as above mentioned out of the said fund: Allow accounts thereof to be lodged, and remit the same when lodged to the Auditor of Court to tax the same as between agent and client and to report, and decern.”

Counsel for the Petitioners—Ure. Agents—  
H. B. & F. J. Dewar, W.S.

Counsel for the Glasgow Royal Infirmary—R. V. Campbell. Agents—J. W. & J. Mackenzie, W.S.

Council for the Magistrates and Council of Glasgow—Jameson. Agents—Campbell & Smith, S.S.C.

Thursday, January 12.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.]

ROSS V. MARTIN.

*Property—Sale—Title—Possession.*

Two adjacent feus were given out, the eastmost in 1795 to William Caldwell, and the westmost in 1803 to William Kelly. They were separately possessed for more than forty years. In 1875 both feus were the property of the same person, who in 1880 sold by public roup to M the westmost feu, described as "All and hail that part or portion of land feued out to William Kelly . . . bounded on the east by the house and garden now or formerly belonging to William Caldwell." This description was the same as that in the original feu. There was a marginal note upon the articles of roup—"Three houses near Millgate occupied by M. Finn." In 1880 the eastmost, or Caldwell's feu, was sold by public roup to B. B's title was prior to that of M. The articles of roup contained the same description as the original feu, with this marginal note—"House and garden occupied by William Hannah." In 1885 B sold this feu to R. In 1887 R raised an action against M, the conclusions of which were for declarator that certain subjects in the defender's occupation, consisting of a house and garden, with joiner's shop, were included in his title, and for removing. It was proved that the subjects in question were comprised within Caldwell's feu, and were therefore within the pursuer's title, but that the defender had been in the occupation of these subjects from the date of his purchase, and that B, the pursuer's author, had asserted no right to them. The pursuer admitted that he knew at the date of his purchase that the defender was in possession and reputed owner of the house, garden, and joiner's shop. The defender maintained that B did not intend to buy the subjects in dispute, and that the titles should be construed in conformity with the true bargain between the seller and B, which, he alleged, was contained in the marginal note upon the articles of roup. *Held* that the pursuer, being a singular successor, was not affected by any personal exception which could be stated against B, and that the defender could not claim the ground in question as it was not within his title.

In the village of Blackburn, Linlithgowshire, there were two adjacent feus, the eastmost of which had been feued out to William Caldwell in 1795, and the westmost of which had been feued out to William Kelly in 1803.

These feus continued to be separately owned

and occupied for more than forty years, and in the year 1875 they were both bought by Thomas Robinson Johnstone.

In February 1880 Johnstone sold by public roup the eastmost or Caldwell's feu to Lawrence Balderston. In the articles and conditions of roup the description of the subjects was this—"All and hail that part or portion of land with the houses thereon in the village of Blackburn, bounded on the south by the Edinburgh and Glasgow road, on the west by the feu sometime ago granted to David Mitchell, on the north by the lands sometime belonging to the said William Honyman, and on the east by the feu now or formerly belonging to David Brownlee, lying in the parish of Livingstone and sheriffdom of Linlithgow." There was also this marginal note—"House and large garden occupied by William Hannah." The description in the disposition in favour of Balderston, which was dated 4th and recorded 11th February 1880, was the same as that in the articles of roup without the marginal note. The description was also the same as that in the original feu granted to Caldwell in 1795, except that in the original grant the western boundary was described as "the feu recently granted to David Mitchell." There was no trace of any grant to David Mitchell ever having been feudalised. By disposition, dated 27th and 30th May and recorded 5th June 1885, Balderston conveyed these subjects to John Ross.

In February 1880 Johnstone also sold the westmost or Kelly's feu by public roup to William Martin. In the articles of roup the description of the subjects was—"All and hail that part or portion of land feued out to William Kelly, merchant in Glasgow, by William Honyman, Esquire, of Gramsay, bounded on the east by the house and garden now or formerly belonging to William Caldwell, on the south by the Edinburgh and Glasgow road, and on the west and north by the lands sometime occupied by David Prentice, extending per measurement to twenty-two falls and nine ells of land, all lying within the barony of Blackburn, parish of Livingstone and sheriffdom of Linlithgow." There was also this marginal note—"Three houses near Millgate occupied by M. Finn and others." The description in the disposition to Martin, dated 26th and 28th February, and recorded 2nd March 1880, was the same as that in the articles of roup without the marginal note, but with this addition—"Together with the buildings and erections on the said part or portion of land, and all my right, title, and interest therein." This description without the addition and marginal note was the same as the description in the original feu granted to Kelly in 1803.

This was an action at the instance of James Ross against William Martin for declarator that a piece of ground extending to 11 poles 20 yards or thereby, delineated on a plan produced, was part of the piece of ground conveyed to the pursuer by the disposition in his favour from Lawrence Balderston, that it pertained heritably to the pursuer in virtue of his rights and titles, and that the defender had no right or interest therein. There was also a conclusion for removing.

The ground in question was occupied at the date of the action by a house marked C on the plan, and a garden, with a shed or building, used