tions can have no right to interdict parishioners from occupying any particular seat in the church.

I am of opinion that the defenders are right in this contention. The pursuers cannot take over the trust which was committed to the corporations as such, and they do not profess to carry out any trust, but claim to act as proprietors by purchase of the seats. I see no ground for holding that they have any right to do so. They cannot carry out their excellent object in this way if parishioners object to their taking upon themselves to allocate seats. I hold that the pursuers have no right to ask for the interdict which is sought in the prayer of their petition, and that we ought to recal the interlocutors of the Sheriff and Sheriff-Substitute, and refuse the interdict.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD LEE was absent at the hearing, and consequently gave no opinion.

The Court pronounced the following interlocutor:—

"Find in fact (1) that on 14th December 1807, at a meeting of the heritors of the landward parish of Brechin, certain seats in the church of that parish were allocated to the Incorporation of Glovers, the Incorporation of Weavers, the Incorporation of Shoemakers, and the Incorporation of Tailors, all of the burgh of Brechin; (2) that the said seats were allocated for the use of the members of the said incorporations respectively; (3) that said corporations have ceased to exist as real trade organisations, and consist only of a few individuals who do not represent any portion of the community or parishioners of Brechin; (4) that these individuals have sold or otherwise sought to alienate the same to persons now represented by the petitioners: Find in law that the pursuers did not by the purchase of said seats acquire any legal right to allocate the same as they might choose, or to exclude any parishioners from occupying any seat in said parish church, and have no title to demand interdict against any parishioner occupying such seat: Therefore sustain the appeal: Recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Refuse the prayer of the petition: Find the defenders entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuers—Low—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Gloag—Law. Agents—J. & J. Galletly, S.S.C.

Thursday, July 18.

OUTER HOUSE.

[Lord Kinnear.

MACDONALD *v.* WARREN.

Agent and Client—Fraud.

G, a law-agent, who was insolvent, having obtained a sum of money from his client W to invest in loan upon a particular heritable security appropriated it to his own uses. After the money had been spent he was instructed by another client M to obtain a loan upon a property belonging to her. He induced M, upon the representation that it would facilitate the obtaining of the loan, to execute a disposition of the property in his favour. This disposition was never recorded. Some days prior to the date of this disposition G executed a bond and disposition in security over the property in favour of W in security of a part of the money which had been entrusted to him by W for investment. No intimation of this bond was made to M, and no money paid to her in respect of the loan. The law-agent shortly thereafter died insolvent. M then became aware of the existence of the bond, and raised an action against W for its reduction, and for declarator that she had an undoubted title to the property unburdened by the bond. *Held* (1) that the disposition by M to G not having been recorded, W had no real right to the lands under the bond and disposition in security; (2) that W had no personal right to enforce completion of her right under the bond, there being no contract between her and M; (3) that no right accrued to W by virtue of the disposition (which enabled G to execute the bond) having been granted by M to G, as the granting of the bond was not a fraud upon W, but was an attempt to benefit W at the expense of M.

Rose v. *Spaven*, June 15, 1880, 7 R. 925, *distinguished.*

In January 1886 James Young Guthrie, S.S.C., Edinburgh, was entrusted by Mrs Warren, Edinburgh, with the duty of procuring an investment for a sum of money. On 12th January he transmitted to her a proposal for a loan of £1800 over certain subjects at Morningside Drive and Comiston Road, Edinburgh, and received from her on 21st January a sum of £1550 to account of the proposed loan. Mr Guthrie, who had been insolvent for several years before this money was put into his hands, appropriated the money to his own purposes. He paid the money into his account with the Clydesdale Bank, which was then considerably overdrawn, with the result that a sum of £912, 0s. 6d. was placed to his credit. This credit balance was reduced by 23rd March 1886 to £88, 2s. 7d. From that time till 10th May 1887, when he died, the account fluctuated. It was generally overdrawn, and was so at the date of his death. From the time

he received the £1550 till his death he never had a sufficient balance to repay Mrs Warren or to procure investment of her money.

For several months after the money was remitted Mr Guthrie corresponded with Mr Fleming, solicitor, Grantown, Mrs Warren's brother, who acted for her as if the proposed loan were in process of being completed, and in June 1886 he remitted the interest as if the loan had been already made. On the 8th July 1886, however, he wrote to Mr Fleming that he preferred to substitute for the Morningside security three others of greater value. One of these was stated to be property in Portland Place, Troon, belonging to Mrs Macdonald, a client of his own, on which he proposed to place £600. He alleged that he had arranged with Mrs Macdonald that as he was to lend her £200 as a loan postponed to Mrs Warren's loan of £600 Mrs Macdonald was to give him an absolute disposition of the property, and he was thereafter to execute a bond for £600 in favour of Mrs Warren. A bond for £600 over this property was executed by him in favour of Mrs Warren on 4th November and recorded on 12th November 1886.

Mrs Macdonald, the owner of this property, was a client of Mr Guthrie's, and in the spring of 1886 had instructed him to endeavour to effect a loan upon it. In July 1886 Mr Guthrie suggested to Mrs Macdonald that she should execute a disposition of the subjects to him upon his giving a back-letter as he would be better able to obtain the money in his own name. In consequence of these representations Mrs Macdonald executed a disposition in his favour on 15th November 1886, and sent it to him on or about 17th November 1886. This disposition was never recorded. No back-letter was ever sent. No intimation was ever given to Mrs Macdonald of what had been done with her property, and no money was ever received by her from Mr Guthrie. After Mr Guthrie's death she learned that the bond and disposition of her property above referred to had been executed by Mr Guthrie in favour of Mrs Warren.

Mr Guthrie's estates were sequestrated after his death, and his trustee renounced all interest in the property.

Thereafter Mrs Macdonald, and her husband Alexander Macdonald, as her administrator-in-law and as an individual, brought this action against Mrs Warren, concluding for reduction of the bond and disposition in security, and for declarator that Mrs Macdonald had a good and undoubted title to the subjects unencumbered by the bond and disposition in security.

The Lord Ordinary (KINNEAR) on 18th July 1889 pronounced the followed interlocutor:—"Having considered the proof and whole cause, Finds and declares, reduces, and decerns in terms of the conclusions of the summons: Finds the pursuer entitled to expenses, &c.

"*Opinion.*—It appears that in January 1886 the late James Young Guthrie, S.S.C., was entrusted with money belonging to the defender for investment. On the 12th of January he transmitted to her agent in Grantown, Mr Fleming, a proposal for a loan of £1800 over certain subjects in Morningside; and on the 21st Mr Fleming, who had previously intimated that Mrs Warren would lend the money if Mr Guthrie were satisfied with the security, remitted £1550 to Guthrie on account of the proposed loan. The proposal had been made to Guthrie by Mr Cook, the proprietor of the subjects. It is not suggested that there would have been any difficulty in procuring the additional £250 which was required to make up the loan of £1800, and there appears to have been no reason why the transaction should not have been completed immediately on receipt of the £1550 remitted by Mr Fleming. Accordingly it appears that for several months from the end of January Guthrie was being pressed by both parties to carry out the loan; that both complained of a delay which they thought unaccountable, and that he answered the complaints of both by false excuses. There seems to be no reason to doubt that the real cause of the delay was simply that he had appropriated his client's money to his own purposes, and was quite unable to replace it except by committing a new fraud.

"He had been insolvent for some years before the defender's money was put into his hands. When he received the £1550 remitted by Mr Fleming he paid the money to his own account with the Clydesdale Bank, which at that date had been overdrawn to a considerable amount. The effect of the payment was to place a sum of £912, 0s. 6d. to his credit. By the 23rd of March the credit had been reduced to £88, 2s. 7d. From that date until his death the balance fluctuated. But the account was generally overdrawn, it was overdrawn at the date of his death, and from the time the sum of £1550 was paid in until he died he never had a sufficient balance at his credit to repay the defender or to procure the investment for which he was entrusted with her money. The proposed transaction with Mr Cook was brought to an end, so far as the latter was concerned, in March, when he procured a loan elsewhere after intimating that he would hold Mr Guthrie liable for the delay. It then became Mr Guthrie's duty to inform the defenders that the transaction could not be carried out. But he not only failed to do so, but in April and again in June he wrote to Mr Fleming in such terms as to suggest that nothing was required for the completion of the loan except the revisal and execution of the writs, and in June he remitted the interest as if the loan had been already made. It is not till the 8th of July that the correspondence contains any intimation that the loan over the subjects at Morningside is not to be completed. On that day he writes to Mr Fleming that, as he says he had explained verbally to Mrs Warren, he preferred to 'substitute for the Morningside security three others of greater value,' and one of these three was the security in question over the pursuer's property. The statements in this letter as to the pursuer's property are false. The purpose for which

she had granted a conveyance in favour of Guthrie had failed, and Guthrie had no authority to make use of the conveyance for any other purpose, but held it as a mere custodier for the pursuer. If he had used it to borrow money on the faith of his apparent right in the pursuer's property the question might have been different. But the defender's money had been put into his hands before the conveyance was granted, in reliance upon his honesty, and upon his promise to invest it in a different security. In these circumstances it appears to me that the pursuer is entitled to set aside the bond granted by Guthrie to the defender in so far as it bears to affect her property.

"The principle by which the case must be decided is laid down by Lord Cairns in the case of *Cundy* v. *Lindsay*, 3 App. Ca. 459, where he says that when it is necessary 'to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall,' the Court in discharging that duty 'can do no more than apply rigorously the settled and well known rules of law. Now, upon the settled and well known rules of law with regard to heritable property the defender's bond is invalid and inept to affect the pursuer's land. For although the bond itself has been recorded in the Register of Sasines the disposition in favour of Guthrie, the granter of the bond, was not recorded, and since Mr Guthrie was not himself infeft in the lands his precept was ineffectual to infeft the defender. At present therefore the defender has no real right in the lands, and she can of course have no personal right under her bond, except against the granter and persons whom he was entitled to bind. But it is certain that he had no authority to bind the pursuer. It is said that the defender's right may still be made real; and it is true that, if it were good as a personal right against the pursuer, there would be no formal difficulty in completing the title by following the procedure prescribed for that purpose in the Titles Act of 1865. But it is obvious that the defender cannot complete her right in this way unless the pursuer is under obligation to make the right effectual. And the pursuer is under no such obligation. There is no contract between the parties.

"It is said that the pursuer must bear the loss, because she put into Mr Guthrie's hands the instrument which enabled him to perpetrate the fraud. But the conveyance to Guthrie was not used as an instrument for obtaining money from the defender. Her money was already lost, and the fraud which was practised by the execution of the bond in her favour was a fraud upon the pursuer. The defender therefore gave no value for the bond, and cannot retain the advantage which her agent attempted to procure for her by a fraud. In this respect the case differs from that of *Rose* v. *Spavens*, June 15, 1880, 7 R. 925, on which the defender's counsel relied. In that case the pursuer had executed a bond and disposition in security, which he placed in the hands of his agent for the purpose of raising money. The agent, to conceal a fraud which he had practised upon a second client, induced a third to discharge a bond over certain property, and to accept the pursuer's bond in its place. The discharge was given in exchange for the bond; there was no question that the bond was in itself valid and effectual, and the agent had authority from his client to borrow money and give the bond in return. In the present case the agent had no authority to execute the bond under reduction; the defender's money was not given in exchange for the bond, and the bond as it stands is ineffectual.

"There may be some apparent difficulty from the form of the action, because it is said that if the bond were ineffectual a reduction would not have been required. But the reduction may be useful to clear the record although it is unnecessary to disencumber the land. If the summons had concluded for declarator that the bond is invalid and ineffectual the defender would have had no answer. But the form of action the pursuer has chosen is nevertheless quite competent and apposite."

Counsel for the Pursuer—D.-F. Balfour Q.C.—Strachan—Craigie. Agent — James Russell, S.S.C.

Counsel for the Defender—Gloag—W. Campbell. Agent—P. Morison, S.S.C.

Saturday, November 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

PATON *v.* MACPHERSON AND OTHERS.

Sale—Sale to Highest Offerer—Conditions—Contract—Title to Sue—Relevancy.

The trustee on a sequestrated estate offered for sale a share of a policy of insurance which had vested in him, and on which a premium was payable, on these conditions—"2. The premium due to be paid by the purchaser; 3, the highest offerer to be the purchaser." The higher offerer of two competitors obtained an assignation of the share of the policy, which was duly intimated, but he refused to pay the premium due, averring that by the terms of an arrangement prior to the sale the premium was to be paid by the trustee himself.

The second offerer brought an action of reduction of the offer, and acceptance and assignation and intimation thereof, against the purchaser, on the ground that the pursuer was truly the higher offerer, and in terms of the conditions of sale he was purchaser of the share.

Held that even if from any dispute the contract between the defender and the trustee came to an end, that circumstance would not of itself rear up any contract between the trustee and