

had made her selection, or the whole in the event of no selection being made. It appears to me that if no selection was made, by Mrs Macdonald during her life, a joint-liferent which the truster thus contemplated and directed became impossible. In my view, accordingly, no selection having been made by Mrs Macdonald during her life, the trustees, in terms of the settlement, are bound to allow Mrs Geddes as the survivor a liferent of the whole of the said articles, and for that purpose to hand them over to her. I therefore think that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I concur in the opinion of Lord Adam.

On the main question which his Lordship has discussed, I think it right to say that my opinion is rested on the special terms of Sergeant Bain's will. I think the power of selection given to his widow could not be exercised by will, because the selection is intended to be exercised before the estate is distributed, it being provided that after Mrs Bain has made her selection, the testator's remaining estate is to be shared in liferent between that lady and her daughter. In the general case, where an unqualified power of selection or appropriation is given to a liferenter, I should assume in construing it that it depended for its exercise upon the same principles as any power of disposal given to a third party, and that it might be exercised at any time during the life of the donee of the power. But in construing voluntary deeds general rules are liable to be controlled by the intention of the granters as expressed in the deeds. In this case I think Sergeant Bain has sufficiently manifested his intention that the power of selection conferred upon his widow should only be exercised within such reasonable time as is allowed for putting a testator's affairs in order, and that Mrs Bain's will is therefore not a valid exercise of the power.

LORD KINNEAR—I agree that the decision of this case does not depend upon any question as to the manner in which a power may be exercised, but upon the character of the right which the testator has bequeathed to his widow. I am of opinion with your Lordships that, on the construction of the disposition, the testator gives to his widow absolutely such articles as she may select, with a gift-over in the event of her not exercising the right of selection, to her and her daughter in joint liferent and to the survivor in liferent. Now, I think the gift-over took effect in consequence of the failure of Mrs Macdonald to exercise her right, and that it is too late now to disturb this arrangement, which we must assume to have been made advisedly during her lifetime. Her will is ineffectual to deprive the conditional legatees of the gifts which the testator has made to them, because the condition was purified when the articles in question were delivered to the joint liferenters in consequence of her having refrained from claiming them for her own absolute use.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—C. K. Mackenzie—Constable. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—A. Jameson—Cook. Agents—Fyfe, Ireland, & Dangerfield, S.S.C.

Saturday, June 20.

## SECOND DIVISION.

### PARISH COUNCIL OF KILMARNOCK v. OSSINGTON TRUSTEES.

*Local Government—Parish Council—Succession of Parish Council to Parochial Board—Local Government (Scotland) Act 1894 (57 and 58 Vict. cap. 58), secs. 21 and 22.*

The Local Government (Scotland) Act 1894 enacts, section 21, that "Every reference in any Act of Parliament, scheme, deed, or instrument, to a parochial board . . . shall be read and construed as referring to a parish council constituted under this Act;" and, section 22, that "A parish council shall come in place of a parochial board . . . and shall have and may exercise all the powers and duties . . . of a parochial board."

A truster by deed constituted a trust for the management of a coffee tavern. Among the trustees nominated by her was the "chairman of the parochial board of the parish and his successor in office for the time being, so long as such board shall exist."

Held that the chairman of the parish council was not entitled *ex officio* to act as a trustee under the deed.

The Right Honourable Charlotte Scott, Viscountess Ossington, relict of the Right Honourable John Evelyn Denison, Viscount Ossington, by deed of trust dated 8th April 1885, on the narrative that she had erected a building to be used as a coffee tavern, and provided the necessary funds for carrying it on, nominated certain trustees, including "the chairman of the Parochial Board of the parish of Kilmarnock, and his successor in office for the time being, so long as such office should exist," and conveyed to them the subjects in trust.

The Local Government (Scotland) 1894 (57 and 58 Vict. c. 58), enacts, sec. 21—"On and after the fifteenth day of May in the year One thousand eight hundred and ninety-five, all enactments regulating the constitution and election of parochial boards shall be repealed, and the parochial board of any parish shall continue to hold office only until the said day, and no longer; and on and after such day every reference in any Act of Parliament, scheme, deed, or instrument to a parochial board constituted under the law in force at the passing of this Act

shall be read and construed as referring to a parish council constituted under this Act." Section 22—"A parish council shall, subject to the provisions of this Act, come in place of a parochial board, and shall be deemed to be a continuance thereof; and a parish council shall have and may exercise all the powers and duties, and shall be subject to all the liabilities of a parochial board, and all the provisions, of any Act of Parliament in force at the passing of this Act relating to or dealing with the powers and duties of parochial boards, and the appointment, powers, and duties of their officers, in so far as not inconsistent with this Act shall subsist and have effect."

After the passing of this Act and the election of a Parish Council for the parish of Kilmarnock, the chairman of the Parochial Board, whose office then expired, ceased to act as a trustee, but the chairman of the Parish Council of Kilmarnock claimed to act in his place as a trustee *ex officio* under the deed of trust. The question having arisen as to his right to do so, the present case was presented to the Court.

The parties to the case were—(1) The Parish Council of Kilmarnock; and (2) The trustees under the deed of trust.

The first parties maintained that, as the successor in office of the chairman of the Parochial Board, the chairman of the Parish Council had come in place of the chairman of the Parochial Board, and was entitled to act as a trustee *ex officio* under the deed of trust.

The second parties maintained that the chairman of the Parish Council was not entitled to act as one of the trustees; that the trust-deed provided that the chairman of the Parochial Board of the parish of Kilmarnock for the time being was to be one of the trustees only so long as such board should exist; and that this board has ceased to exist under the express enactment of the "Local Government (Scotland) Act 1894," section 21. The second parties further maintained that although this Act provided that the Parish Council should come in place of the Parochial Board, and should be deemed to be a continuance thereof, the powers and duties transferred to the new body did not include those exercised by an individual officer of the board as *ex officio* trustee in an independent trust.

The question of law for the opinion of the Court was—"Whether the chairman of the said Parish Council of the Parish of Kilmarnock is entitled *ex officio* to act as a trustee under the said deed of trust."

Argued for the first parties—The word "deed" had been inserted in section 21 to meet the case of private trusts such as this. If the second parties' argument were sound, no private trust could be brought under the provisions of the Act, and the words "deed or instrument" would not receive effect. It was hypercritical to distinguish between "parochial board" and "chairman of parochial board." The trustees' object was that so long as there existed a body having charge of parochial affairs,

the chairman of that body should be a trustee. Under section 22 the parish council was to be a continuance of the parochial board, and under this section the chairman of the parish council was entitled to hold any office which had formerly been held by the chairman of the parochial board.

Argued for the second parties—A trustor's intention was entitled to receive effect unless it had been clearly overruled by the Legislature. The trustor here had provided that the chairman of the Parochial Board should be a trustee only "so long as such board should exist." There was no similar limitation in the nominations of the other *ex officio* trustees. The only possible explanation was, that as she died in 1889, she foresaw some such change as had taken place, and desired that if the parochial board ceased to exist as then constituted, the chairman of any differently elected body which succeeded it should not be a trustee. The trustor had taken the very precaution which was desiderated by the Lord Ordinary in *Incorporated Trades of Edinburgh v. Governors of Heriot's Hospital*, June 3, 1836, 14 S. 873. The intention of the Legislature to override the intention of the trustor was not clear. The statute provided (sec. 21) that "parochial board" should be read as "parish council," but not that "chairman of parochial board" should be read as "chairman of parish council." And so section 22 provided that the parish council might exercise all the powers and duties of the parochial board, but not that the chairman of the one should succeed to any position formerly held by the chairman of the other.

At advising—

LORD TRAYNER—By the trust-deed mentioned in this special case, Lady Ossington appointed certain persons to be trustees to carry out and fulfil the purposes of the trust. One of the persons so appointed is thus described in the trust-deed—"The chairman of the Parochial Board of the parish of Kilmarnock, and his successors for the time being, so long as such board shall exist." By virtue of the provisions of the Local Government (Scotland) Act 1894 the Parochial Board of the parish of Kilmarnock ceased to hold office on 15th May 1895, and its chairman, according to the statement in the case before us, has ceased to act as a trustee, his office having "then expired." The chairman of the Parish Council, which, under the provisions of the statute I have cited, came in place of the Parochial Board, claims right to act as a trustee under said trust "as the successor in office of the chairman of the said Parochial Board; and whether that claim is well founded is the question we are asked to determine.

I think there is no room to doubt that in ordinary parlance the Parochial Board of the parish of Kilmarnock, that is, the board which was formerly entrusted with the administration of the poor law, and that only, in the parish of Kilmarnock, has ceased to exist, and that consequently the person who was chairman of that board no longer holding such office is no longer a

trustee. But the first party to this case maintains that certain expressions in the 21st and 22nd sections of the statute I have cited have conferred upon him the office of chairman of the Parochial Board, and that he is entitled as such to the vacant trusteeship. We must therefore look at these sections, for upon their interpretation and effect depends the answer to the question before us.

Section 21 provides that on and after the 15th May 1895 "Every reference in any Act of Parliament, scheme, deed, or instrument to a parochial board . . . shall be read and construed as referring to a parish council constituted under this Act." This does not appear to me to support the claim of the first party, because the deed before us (Lady Ossington's trust-deed) is not in any sense a deed or instrument "to a parochial board." It conveys nothing to the Parochial Board; it authorises nothing to be done by the Parochial Board. Indeed, the reference in it to the Parochial Board at all is merely by way of description or demonstration to indicate the trustee appointed by this office which he holds. But the deed is to the individual, not to the board. Accordingly, the deed is not one of the kind referred to in the section. Section 22 again provides that "A parish council shall . . . come in place of a parochial board, and shall be deemed to be a continuance thereof." But to what effect and purpose this is to be deemed a continuance is made plain by the words which follow—"And a parish council shall have and may exercise all the powers and duties, and shall be subject to all the liabilities, of a parochial board." In short, the meaning and effect of this clause is shortly and accurately stated in the rubric—"Parish councils to take the place of parochial boards." All the duties incumbent on a parochial board are to be undertaken and performed by the parish council, and all the rights (of property or otherwise) and privileges of a parochial board are transferred to the parish council—in this sense, that the parish council in future should represent the parochial board in its rights and obligations. The one is to be deemed a continuance of the other, but only in this sense. As the trust in question was one with which the parochial board had no concern, so I think the parish council has nothing to do with it. And accordingly I am of opinion that the chairman of the parish council cannot claim *ex officio* to be a trustee. I think therefore that the question put to us should be answered in the negative.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court answered the question in the negative.

Counsel for the First Parties—Graham Stewart. Agents—Curren, Cowper, & Curren, W.S.

Counsel for the Second Parties—Wood. Agents—Melville & Lindesay, W.S.

Thursday, July 2.

FIRST DIVISION.

[Lord Low, Ordinary.

ABERDEEN HARBOUR COMMISSIONERS *v.* GRANITE CITY STEAMSHIP COMPANY.

*Statute—Repealing Statute—Construction of Saving Clause—Harbour Rates—Whether Exemption from Harbour Rates under Repealed Act within Saving Clause—Aberdeen Harbour Act 1879 (42 and 43 Vict. cap. 88), Schedule A—Aberdeen Harbour Act 1895 (58 and 59 Vict. cap. 136), secs. 2, 10, 76, 77, Schedule A.*

By Schedule A of the Aberdeen Harbour Act 1879 it is provided that any vessel included under class third which shall have made ten voyages in one year, from January to December inclusive, shall not be liable for harbour rates on any additional voyages of the description specified under class third made by it within such year.

By a subsequent Act in 1895 which came into operation on 1st October 1895, the former Acts were declared repealed from and after that date. The Act of 1895 did not contain any exemption similar to that in the Act of 1879.

By section 10 it was provided that "Notwithstanding the repeal of the recited Acts, and except only as is by this Act expressly provided, everything before the commencement of this Act done or suffered or confirmed by the recited Acts shall be as valid as if such Acts were not repealed, and the repeal thereof and this Act respectively shall accordingly be subject and without prejudice to anything so done or suffered or confirmed, and to all rights, liabilities, debts, claims, and demands, both present and future, which, if the recited Acts were not repealed . . . would be incident to or consequent on any and everything so done, suffered, and confirmed."

The owners of a vessel in class third, which had made ten voyages before 1st October 1895, claimed that they had by virtue of the Harbour Act of 1879 acquired a vested right of immunity from payment of all further rates till the end of 1895. *Held* (rev. Lord Low) that the pursuers had no vested right of immunity arising out of contract, and that accordingly their right not being consequent upon "anything done or suffered" the saving clause did not apply to it.

By section 100 of the Aberdeen Harbour Act 1868 (31 and 32 Vict. c. 138) the Harbour Commissioners were empowered to levy for every vessel coming into or going out of the harbour certain rates specified in the schedules annexed to the Act. By section 12 of the Aberdeen Harbour Act 1879 (42 and 43 Vict. c. 88) these schedules were re-