which ought to be come to is that the appointment took effect *simpliciter*.

LORD SELBORNE—My Lords, I read this deed exactly as if the words had stood thus—"We do hereby allot and apportion the sum of £25,000 secured over the estates of Loch Garry and Kinloch-Rannoch as the share of and in my, Adriana M'Donald's, property, of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate, and it is our will and desire that the said sum of £25,000 shall be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the said entailed estates; and also that the trustees under our marriage contract, or the survivors of them, shall, immediately on the death of the survivor of us, renounce and discharge the heritable bond for the same sum of £25,000 and disburden the said lands and estates of Loch Garry and Kinloch-Rannoch of the same.

So reading the deed, there is, first, an appointment (in the events which have happened) to the eldest son, as fiar, of the whole £25,000. All that follows is but a superadded wish, desire, or condition, having in view the settlement or the release to the owners of the entailed estates of the sum so appointed, which ulterior purpose might be accomplished, and could only be accomplished, through the medium of the estate and interest vested in the eldest son by virtue of this appointment. That wish, desire, or condition not being authorised by the power, must necessarily fail unless the appointee (whether bound to elect or not, by reason of other benefits given to him independently of the power), should elect to give effect thereto; but the appointment itself is not therefore vitiated. The authorities of which *Carver* v. *Bowles* is an example, have determined (on principles which if sound in England must be equally so in Scotland), that an ulterior purpose of this kind, which is *ultra vires* only, and not also a fraud on the power, that it may have operated as a motive to the appointment in the mind of the appointee will, nevertheless, not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used, according to their proper construction, which must itself be independent of any peculiar doctrines of law applicable to powers, are sufficient to execute the power, and to vest the property in the appointee.

The context of this deed satisfies me not only that, on sound principles of construction this was its real effect, but that the appointors intended to do the very thing which in law they did; and that they well understood that it was necessary that the deed should so operate in order to make it possible that their ulterior wishes should be capable of accomplishment. The declaration and appointment which they made was expressed to be "in consideration of the said deed of entail," (*i.e.* the entail of the Loch Garry and Kinloch-Rannoch estates), as well as "of the powers possessed by us under the said contract of marriage," and after disposing of the £25,000 in the way which has raised this controversy they proceeded to appoint the rest of Lady M'Donald's settled property equally among their "younger children exclusive of the heir" to the extent of £10,000 each, directing that if there were any excess above that amount such excess should all fall to the "eldest son or heir of entail as above mentioned." Here also they superadded the expression of an ulterior wish, to be effectuated through that appointment by the words which followed "with a view to its being laid out in the purchase of lands and entailed with the other estates, upon him and the heirs called in the aforesaid deed of entail through the whole course of succession." And afterwards in two places they referred to the £25,000 as being by this deed "settled on the heir of entail," words which are nearly in those places applicable to the eldest son, as well as to any other heir of entail who, (in different events from those which happened), might have succeeded on the deaths of the appointors to the entailed estates. A comparison of all the passages in which the appointee of the £25,000 is thus spoken of in the singular number, seems to me to make it quite clear that one individual person (to be ascertained with reference to the state of the title to and possession of the entailed estate immediately after the death of the survivor of the appointors), and one person only, was intended to take the 25,000 by way of appointment.

That being so, I agree with your Lordships that the opinion of the minority of the learned Judges in the Court of Session was correct; and that this appeal ought to be allowed.

Interlocutors reversed, and cause remitted with a declaration.

Counsel for the Appellant—Collyer, Martin, Q.C. and Cotton, Q.C. Agents—Loch & Maclaurin, Westminster, and A. P. Purves, W.S.

Counsel for the Respondents—Pearson, Q.C., and Kay, Q.C. Agents—Grahames & Wardlaw, Westminster, and Dewar & Deas, W.S.

Thursday, June 24.

ALEXANDER BREMNER (INSPECTOR OF POOR FOR RATHVEN) *v.* LUNACY BOARD FOR ELGINSHIRE.

(Before Lord Chancellor Cairns, Lords Hatherley, O'Hagan, and Selborne.)

(*Ante*, vol. xi. p. 692; I. R. 1155, 10th July 1875).

Pauper—Parochial Board—Liability—Reference to Arbitration—Homologation.

In a question between two parochial boards as to liability for support of a pauper lunatic, the inspectors for either parish referred the matter to an un-incorporated Society of Inspectors of the Poor—*Held* that this reference, although to a society composed of fluctuating members, was a perfectly valid one, and that the parties having entered into the reference and acted upon the award made were bound by it.

This was an appeal from a judgment of the Second Division of the Court of Session as to the settlement of a pauper named Charlotte Grant. She was born in the West Indies, came to this country at the age of twenty, and went from place to place in Aberdeenshire and Morayshire, sometimes earning her living by service, and sometimes by charity. She was not married, and had acquired no industrial settlement, but in 1858 she went to Rathven and had an illegitimate child. She remained there in a state of destitution, supported

by the parish, till February next. She then passed into the parish of Urquhart, where she remained a few days and received some support, and then she proceeded to Elgin, where she became chargeable on the parish. After some time, during which she was supported by Elgin parish, and after correspondence between the two parishes of Elgin and Rathven relative to their liability for her support, she became insane, and was in 1860 removed to Elgin District Lunatic Asylum, where she has been since. The Lunacy Board raised an action against the two parishes, contending that one or the other was liable for her maintenance. It further appeared that in 1858 the parishes of Rathven and Elgin agreed to refer this question as to liability to the decision of the Society of Inspectors of Poor for Scotland, and after some procedure that Society gave its decision in favour of Elgin. Acting on this decision, Rathven repaid the parish of Elgin £85, and continued to support the pauper in the asylum till 1864, when Rathven repudiated further liability. This step was founded on the view that the submission was not binding and was informal, and that the inspectors had no power so to bind the parish. On the other hand, Elgin contended that whether the decision was right or wrong, inasmuch as Rathven had acted on it and homologated it for two years it was too late to reopen the question. The Lord Ordinary (SHAND) found in favour of Rathven, holding the reference to be not binding, and contrary to the law of the case. This decision was reversed by the Second Division, one of the Judges (LORD BENHOLME) dissenting. Rathven now appealed against that decision.

Argued for the appellant—It is the law of Scotland that a reference to a society is incompetent, and all the Judges have assumed that point. [LORD CHANCELLOR—It is a common thing in England to refer to the Attorney-General or Solicitor-General for the time being. How does the mention of the name affect the matter?] In Scotland it is deemed incompetent to refer a matter to the Lord Advocate as such. That has been assumed in many cases, and it is said to be so because there must be a *delectus personæ*. [The LORD CHANCELLOR and LORD SELBORNE requested counsel to read the authorities that were relied upon as to this, and said they did not establish the general proposition; at all events they did not show that after such a reference had been acted on one party could withdraw from the reference.] Appellant's counsel relied on the general rule as being assumed by all the Judges, and further contended that there had been no homologation, for a nullity could not be set up in that way. The award was a nullity, as it was a reference to a society, which was held in Scotland to be no reference at all. This is a peculiarity in the law of Scotland, and is always acted upon.

Counsel for the respondents were not called upon.

In delivering judgment—

LORD CHANCELLOR—My Lords, in this appeal, subject to an observation as to the form of the interlocutor, I cannot entertain any doubt as to the true merits of the question at issue. It has not been suggested at the bar of your Lordships' House that it is not competent for two Parochial Boards to refer to arbitration any question as to which of them may be bound to maintain a pauper when a dispute arises between them. Here a dispute did arise, and a reference to arbitration was resolved upon in order to avoid expense. The minutes of the Parochial Board of the parish of Rathven show that the Board intended to refer the case to arbitration, and afterwards directed their inspector to carry out this intention. Ultimately the parties agreed to refer the matter to the Society of Inspectors, a body eminently qualified to consider and decide such a question. It has been argued to your Lordships that a reference cannot by the law of Scotland be made to a society consisting of fluctuating members. There has been, however, no authority produced to support any such proposition, and there is nothing in the law of England to sustain it. The reference in this case, when made, was conducted quite regularly, by written statements sent by each Parochial Board through its officers, for except through these officers there is no way in which a Board could act. It would lead to gross injustice if, after such a reference, and when the award has been made, one parish could turn round and repudiate it. In the present case the parties acted upon the award, and the appellant made payments under it. When the Board first intimated their intention to withdraw from it they did not put forward any want of authority to enter into the reference, or any irregularity during the reference, but they simply said that a case had since been decided by the Court of Session the other way. In short, what the Board said only came to this, that if they had in the first instance put their materials properly together they might have got a different decision. This is no ground, however, for opening up the dispute after it has been terminated. As regards the morality of the proceeding, there never was a clearer case of an endeavour by an after-thought to raise objections when it has become too late to do so. The appellant has obviously suggested to his Board the mode resorted to for upsetting the award of the society. There is, however, no ground for this course. My Lords, the only difficulty in your Lordships' order will be that the Court of Session have put their decision on the ground of homologation, and by a peculiar form have evaded recognising the validity of the award. It will be more consistent with the facts and the law that the interlocutor should be varied, and be based on the ground that the matter had been referred to arbitration, and that the award has been against the appellant. With that variation, my Lords, I should move that the interlocutor appealed against be affirmed, and, as the variation is merely one of form, it should make no difference as to costs, which will have to be paid by the appellant.

LORD HATHERLEY—My Lords, I am of the same opinion. I should be sorry to hold that a reference cannot be made according to the law of Scotland to a body whose members fluctuate, and such references are often made in England, of which one instance is the Benchers of the Inns of Court. There is no authority to show that the reference in the present case was not valid and the award binding.

LORDS O'HAGAN and SELBORNE also concurred.

On the question being put, the House affirmed the interlocutor appealed against, with a variation.

Counsel for Appellant—Cotton, Q.C., and W. A. Brown. Agents—Philip, Laing & Monro, W.S.

Counsel for Respondents—Pearson, Q.C., and Lancaster. Agents—H. & A. Inglis, W.S.

COURT OF SESSION.

Tuesday, March 16.

OUTER HOUSE.

[Lord Curriehill.

RHIND AND OTHERS *v.* DAVID SHIACH AND OTHERS.

Petition for Sequestration and Appointment of Judicial Factor—Competency—Executor—20 *and* 21 *Vict. c.* 56, *sec.* 4.

Held that a petition to sequestrate the estate of a person deceased, and to appoint a judicial factor thereon, was competently brought before the Junior Lord Ordinary, although the appointment of a judicial factor would have the effect of suspending the functions of the executor nominate.

The circumstances of this case are set forth in the following note of the Lord Ordinary:—

"*Note.*—The petitioners are beneficiaries materially interested in the executry estate of the deceased John Rhind, who died on 28th August 1873, in his eighty-ninth year, leaving a last will and testament, dated 20th February 1862, by which he nominated certain persons to be his executors, of whom David Shiach, one of the respondents, is now the sole acceptor. The prayer of the petition is 'to sequestrate the estate of the said deceased John Rhind, if necessary, and to appoint a judicial factor thereon with the usual powers.' In support of the prayer of the petition it is alleged, *inter alia*, (1) that the said David Shiach fraudulently procured the execution by the deceased of three codicils to his said testament, discharging him (the said David Shiach) of all debts due by him to the deceased, and conferring upon him and certain of the other respondents benefits over and above the legacies left to them by the original testament; and (2) that the debts really due by the said David Shiach to the deceased, and now owing by him to the executry estate, amount to about two hundred and fifty pound—nearly half the value of the whole executry estate—and that as he disputes the existence of any debts except to the extent of about £8, his personal interests are opposed to those of the beneficiaries. The allegations regarding the said codicils are, shortly, to the effect that at the time of the alleged execution thereof the deceased could neither read nor write through blindness and bodily infirmity; that his memory was quite gone; that the codicils were not read over to him; that the said David Shiach led the deceased's hand at the subscription; that the deceased never knew the contents of the said codicils, and did not understand what was their effect; that the deceased was not at the date of said codicils of a sound disposing mind, and from mental weakness and blindness, caused by physical weakness and old age, was incapacitated from giving directions in regard to his affairs or the disposal of his property after his death, or of executing any deeds with that view; and that the said pretended deeds were not the deeds of the deceased. There are alternative statements of facility on the part of the decased, and of fraud and circumvention and undue influence on the part of the said David Shiach, as having led to the execution of the said codicils; and there are other similar allegations, for which reference is made to the petition.

"The petitioners raised in the Court of Session a summons of reduction of said codicils, in which all the foregoing allegations were set forth as the reasons of reduction, and in which they called as defenders the said David Shiach, and the parties who would have taken benefit by these codicils, viz.—the respondents Jane Shiach and Helen Jane Shiach or M'Cann. Appearance was duly entered in that summons for all the defenders, but they failed to satisfy the production, and decree of certification, *contra non producta* was pronounced on 14th November 1874, with expenses against the said David Shiach, which expenses were afterwards taxed and duly paid by him.

"In these circumstances, the petitioners maintain that the administration of the executry estate is not safe in the hands of David Shiach, and that the estate should be placed under judicial management, in order that the state of accounts between David Shiach and the deceased may be investigated and ascertained, and that the estate may be properly invested. The petition, however, does not pray for the removal of the said David Shiach from the office of executor.

"Answers have been lodged for David Shiach and certain of the other beneficiaries, who are also materially interested in the executry estate, in which it is pleaded that the petition is incompetent, on the ground, as explained by the respondents' counsel at the debate, that such a petition is competent only in the Inner House, and cannot competently be presented to, or entertained by, the Junior Lord Ordinary—(1) Because it is virtually an application for the removal of David Shiach from his office of executor; and (2) because it prays for sequestration of the executry estate.

"If the petition had expressly prayed for the removal of the executor, it seems to be settled by the case of *Mitchell*, 20 July 1874, 2 Macph. 1378, that it ought to have been presented directly to the Inner House, and not to the Junior Lord Ordinary. But it does not pray for the removal of the executor, but merely for the sequestration of the executry estate and the appointment of a judicial factor, which would not necessarily involve the removal of the executor, though it would cause a temporary suspension of his functions pending the sequestration. It becomes necessary to inquire whether and how far such a petition is, according to the sound construction of the Act 20 and 21 Vict. cap. 96, regulating the distribution of business in the Court of Session, one of those petitions which must be brought, in the first instance, before the Junior Lord Ordinary, and disposed of by him in the Outer House."

The Lord Ordinary here notices the provisions of section 4 of the Act, and reviews the decisions bearing on the points. He then proceeds:—

"I am of opinion that such petitions are truly petitions for judicial factors within the meaning of the Act, and that the respondents' plea of incompetency should be repelled.

"Upon the merits of the application, I am of