

vessel called the Montrose, and sometimes called the Lord Aberdour, of Newcastle-on-Tyne, the property of the pursuers, while lying in the harbour of Leith, and caused her to be dismantled, and detained in the said harbour of Leith—to the loss, injury, and damage of the pursuers?"

2. "Whether, on or about the 18th day of July 1865, the defender wrongously exacted and received from the pursuers the sums of money specified in the schedule hereto annexed, in order to have the said arrestment loosed and discharged? and whether the defender is resting and owing to the pursuers the said sums, or any part thereof, with interest at the rate of five per centum per annum from said 18th July 1865 till paid?"

Damages laid at £300.

SCHEDULE.

1. Amount of account sued for in the summons raised at the instance of the said James Dykes against the said John Batey and Francis Batey (which was signed on or about the 15th July 1865), and in reference to which account the arrestment mentioned in the foregoing issues was used, which amount was advanced or paid under protest by the pursuers to the defender on or about 18th July 1865 . . . . . £31 10 0

2. Amount of account of expenses incurred to Mr A. D. Murphy, S.S.C., Leith, law agent for the said James Dykes, in reference to the said summons and arrestment, also paid under protest by the pursuers to the defender on or about said 18th July 1865 . . . . . 9 8 8

£40 18 8

The case chiefly turned on the question whether the account in respect of which the action was raised and the arrestments were used was one for which Messrs Batey, the owners, were responsible. The account was due to the defender for coal supplied for and used in the vessel, and for the hire of the defender's steam-tug Pet; but the pursuers maintained that the account was incurred solely on the credit and responsibility of a Mr Gibb, who had chartered the vessel.

The jury to-day returned a unanimous verdict for the pursuer on both issues, and assessed the damages at £50.

Tuesday, March 27.

FIRST DIVISION.

EXTENDED SITTINGS.

HENDERSON AND OTHERS v. NORRIE.

*Trust—Denuding.* Circumstances in which held (alt. Lord Jerviswoode, diss. Lord Curriehill) having regard to the nature of the trust, that a trustee was bound to denude.

Counsel for Pursuers—Mr Patton and Mr Gloag. Agents—Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender—Mr Clark and Mr Marshall. Agents—Messrs Maconochie & Hare, W.S.

This action is sued by Mr Clayhills Henderson of Invergowrie, Mr Christopher Kerr, town clerk of Dundee, and Mr David Halley, merchant in Dundee, against Mr Charles Norrie, merchant in Dundee. The object of the action is to have Mr Norrie ordained to resign his office as a trustee, or otherwise to concur with the pursuer, Mr Kerr, who was the only other surviving trustee, in granting a deed of denudation of the trust.

The trust was of a very peculiar nature, as will be seen from the opinions of the Judges at advising. The Lord Ordinary (Jerviswoode) held that the defender was not bound to resign or denude, but to-day the Court, Lord Curriehill dissenting, recalled the Lord Ordinary's interlocutor, and held that he was bound to denude.

The LORD PRESIDENT said—This is a case of very considerable nicety and peculiarity. On the one hand it involves questions as to the principles and conditions on which a trustee may be required to denude an estate held in trust, and, on the other hand, it involves questions as to the interests of the parties substantially entitled to a trust-estate. It appears that in the year 1839 a feu-contract was entered into betwixt Mr David Hunter, jun., and the present defender and others, by which they acquired certain property therein described; and, according to the feu-contract, the right was given to them as trustees, but the clause is very peculiarly expressed. It is "to and in favour of the said Charles Norrie, David Halley, Christopher Kerr, and John Kerr, and himself, the said David Hunter, jun., and the survivors or survivor of them, and the heirs of the last survivor, as trustees or trustee for behoof of the said Charles Norrie, David Halley, Christopher Kerr, John Kerr, and David Hunter, jun., and that in proportions following, viz.:—One-third part or share thereof *pro indiviso* for behoof of the said Charles Norrie and David Halley equally between them and their heirs and assignees; another third part or share thereof *pro indiviso* to the said Christopher Kerr and John Kerr equally between them, and their heirs and assignees; and the remaining third part or share thereof *pro indiviso* to the said David Hunter, jun., and his heirs and assignees, and to the disponees and assignees of the said trustees or trustee, heritably and irredeemably." That mode of expression *pro indiviso* is very curious; but as I read the deed, it means that the whole property is to be held by all in trust, and that a third share *pro indiviso* is the interest of each of the specified parties. There is no division of the property at all. The parties are trustees for themselves as *pro indiviso* proprietors. Then the obligations undertaken by them to Mr Hunter are thus expressed:—"For which causes and on the other part the said Charles Norrie, David Halley, Christopher Kerr, John Kerr, and himself, the said David Hunter, jun., as trustees or trustee foresaid, and also as individuals, bind and oblige themselves, their heirs and successors, conjunctly and severally, to pay to the said David Hunter, jun., and his heirs and successors, and to his or their factors, the sum of £335, 14s. 9d. in name of feu-duty yearly," &c. That was the nature of the right as originally granted, and of the interests of the parties in it. It appears that sub-feus have been granted by these trustees, and that there have been several changes in the interests of the parties. Mr Norrie has conveyed his interest to Mr Kerr, and some of the trustees have died. Mr Kerr and Mr Norrie are the only trustees surviving. Some feus were granted before Mr Norrie made over his interests, and in some of these the trustees, including Mr Norrie, bound themselves in absolute warrandice to the feuars, both as trustees and as individuals. Mr Norrie himself is a feuar from the trustees in virtue of two feu-rights granted to him, and it appears that some disagreement has arisen betwixt him and the parties now interested in the estate. The question now raised is whether Mr Norrie is bound to resign or to denude in favour of the beneficiaries. He says he has no objection to put an end to the trust, but he insists on being relieved of the obligations he has undertaken in regard to the feu-duty payable to the superior, and in regard to the warrandice granted to the sub-feuars. He says he is entitled to have a discharge from the over superiors of his personal obligation for payment of the feu-duty, and that is a thing which seems cannot be got, because the persons now in right of the feu-duty are a committee of the General Assembly of the Church of Scotland, who very properly say that they will not interfere. The result is that Mr Norrie cannot get what he asks; and if he is right, that the trust must subsist in him and Mr Kerr till the death of one of them, and then in the survivor of them till his death, when it will pass to the heir of the survivor. It

looks in that view of it very like an interminable trust, without any right to put an end to it; because if Mr Norrie is the survivor, his heir may say that the trust must subsist until he is freed of all his ancestor's obligations. The beneficiaries, on the other hand, say they are willing to grant Mr Norrie a general discharge of his actings as trustee, and a personal obligation to relieve him of the feu-duty. I don't know whether this personal obligation is of much value. If Mr Norrie were called upon to pay the feu-duty, he would have a claim of relief at any rate against the beneficiaries personally, and also against the subjects. The question is what we are to do. There is no application here for the removal of Mr Norrie on account of his fractious conduct in refusing to assume new trustees or to resign. I must say that the deed before us is to me a novel sort of one. I don't recollect ever having seen one like it. But the view I am disposed to take of it is that it was a feu-contract for the purpose of giving these parties a *pro indiviso* right, and that there was engrafted on it a trust for the sole purpose of removing difficulties about the form of the title. The trust was an adjunct of the right for the convenience of the title. In that view, what we have to look to is the separate utility of the trust, and the obligations undertaken as trustees, for themselves, and in reality in reference to their own patrimonial interests. The obligation undertaken to the superior is in that view just the same as if there had been no trust at all. Then, in regard to the obligation of wardance, I think it was extinguished when Mr Norrie parted with all his interest in the estate, and treated his obligation in the conveyance as one of the nature which I have described. Farther, I think, Mr Norrie runs no practical risk by denuding. The estate is large enough to secure him, and he has his right of relief against it. The other surviving trustee and all the beneficiaries are here concurring in an end being put to the trust, and I think it is not reasonable in the circumstances that the defender should insist on keeping it up. I therefore differ from the Lord Ordinary, and hold that on receiving the discharge offered by the pursuers the defender is bound to denude.

Lord CURRIEHILL.—I never in my experience saw a transaction of the kind expressed in this deed, and perhaps the parties to it did not contemplate the complications it might involve them in. I have formed an opinion in conformity with that of the Lord Ordinary. The transaction seems to have been a species of feuing adventure by five gentlemen, who transacted with each other in different characters. In the first place, they were a board of trustees for managing the feu; in the second place, they were beneficiaries in certain proportions; and, in the third place, they were obligants in an undertaking which, as I view it, was of the nature of a cautionary obligation. One of them, Mr Hunter, had a fourth character, that of over-superior, and it may be said also of them all that they were also mid-superiors. As trustees they are the vassals of Mr Hunter. The trust is created by the feu-contract itself, and the terms of it are very peculiar. The first peculiarity is that there is no period of denuding set forth in it; but I think it is plainly indicated that the trust was intended to be permanent, because when one died his right was to accresce to the survivors, and ultimately the whole was destined to the last survivor's heir. This trust-right so vested was burdened with the payment of the feu-duty in the usual manner by a clause of *reddendo*. The feu-duty is therefore a trust-debt. The trustees have very ample powers conferred on them by the deed—to uplift the rents and feu-duties and to manage the revenues out of which they are to pay the feu-duty and their other obligations, and it is only the surplus that they are to divide among the beneficiaries. Then as beneficiaries the rights of the parties are very different. The share of each was not on death to accresce to the survivors, but it was to descend

to his own proper heirs or assignees. It is plain, therefore, that it was intended that the trust-right and the beneficial right should become vested in different persons. The third character in which the parties transacted is one of great importance in this question. There is superinduced a personal obligation for payment of feu-duty of a very unusual kind. This is an obligation of which the trustees could not rid themselves by disposing the feu or by renouncing the office of trustee, even if that were competent. The superior did not trust to the security of the subjects, but he got a personal obligation from each trustee binding on his heirs. They chose to transact with him on that footing. All the trustees and their heirs are liable to the end of time, *singuli in solidum*, for an annual feu-duty of £335. They cannot rid themselves of that. Although they should all sell their beneficial interest, still they and their heirs would remain liable to the superior. One attribute of this obligation is that the trust-estate is the principal obligant. It was a condition of the right. That being the case, if the position of the trustees was that of cautioners, they have a right of relief against the estate. Each trustee has a lien over the trust-estate for his relief. That doctrine is very clearly stated by Professor Bell (2 Comm., p. 123), and is supported by the cases cited by him and those mentioned by the Lord Ordinary in his note—*Elliot's Trustees* (6 S. 1058), and *Edmond v. Dingwall's Trustees* (23 D. 21). This right of relief is commensurate in point of endurance and extent with the obligation itself. There is a separate right of relief; each has a proportionate relief against his co-trustees. In regard to the trust-estate, Mr Norrie is entitled to a total relief; and in regard to all but his own share he has a claim of relief against the others. The application of these principles is very important in this case. All the trustees are dead but two. Some of the beneficiaries are dead, and others have transferred their shares. The defender is called upon to resign or denude. There is no obligation on him to do so in the trust-deed. How then does it arise? It is said to arise because all the beneficiaries require that he should do so, as he has now no interest in the estate. If this could be made out I think the action would be well founded; but I am of opinion that the defender has an interest in the estate as cautioner for it. He is liable to be distressed annually for payment of the feu-duty. But at present he has a lien over the estate, and I cannot see how, without violating the principles of law as to cautionary obligations, the defender can be called on to denude. It is said he will have his right of relief left, but he would have no active right. He would require to prosecute in order to make it effectual. This might involve expense, and besides he might first be distressed. At present, however, he may uplift the revenues and apply them to their proper use before the beneficiaries get a farthing. The pursuers say they are willing to grant a discharge to the defender. That is so far well; but although they are now men of credit, their fortunes are subject to the vicissitudes of all human fortunes, and their heirs may not be in the same position. I think the defender is not bound to accept this discharge in lieu of the real security he has; but I think the pursuers might have proposed to grant him an heritable bond of relief in security, which I think would not embarrass them. Under such a bond Mr Norrie never could enter into possession unless he was compelled to pay the feu-duty, and this could never happen if the pursuers paid it themselves. The burden on the pursuers would thus not be increased, while the security of the defender would be made clear. If such a bond had been tendered I think the defender could not have resisted this action; but I understand it is declined. In regard to the matter of warrandice I think the defender has no right to any relief at all, for this reason that this obligation can never come into operation unless the trust-estate be evicted. But if it should turn out that the trustees have no right,

then there is no subject over which there can be a lien.

Lord DEAS concurred with the Lord President. There were two alternative conclusions in the summons. The trust has now come to a dead-lock, and the defender refused to concur in anything whatever. He showed from the correspondence that the defender had been asked either to assume new trustees, or to resign, or to concur with Mr Kerr, his co-trustee in denuding, but he would do nothing. The whole trust was a speculation with a view to profit, and was never intended to be permanent. The object of the parties was, after feuing out the ground, to put the profits of the speculation into their pockets, but the defender refused to allow this object to be carried out. He would do nothing at all. It seemed that there was some dispute betwixt himself and the trust as to the two feus held by him, which he considered of much more importance than the general interests of the trust, and in consequence of the defender's conduct opportunities for feuing are being lost. His Lordship was therefore clear that if the defender was not to be compelled under the second conclusion to denude, he ought to be compelled under the first to resign. He says the trust is a permanent one, and that he is entitled to obstruct it to the end of time, at least as long as he lives. The question is—Was it the intention of the parties that the trust was to last for ever, and devolve ultimately on the heirs of the survivor? If Mr Norrie should be the survivor this would turn out to have been a most unlucky thing for the other parties, unless his heir proved a more manageable person than he was. If it be true that Mr Norrie has a lien over the estate, he is entitled to keep it, and is not bound to take either personal or heritable security as a *surrogatum* for it. He is not even bound to accept the heritable bond suggested by Lord Curriehill. But if he got such a bond, he might be getting more than he has at present; for if Mr Kerr should chance to be the survivor, Mr Norrie and his heirs would be out of the trust, and yet these heirs would remain liable under his obligations. After Mr Norrie's death Mr Kerr, the survivor, would be entitled to sell the property, but if the heritable bond suggested was granted, his heirs would have a permanent security, which they would not have unless he survived Mr Kerr. The question just came to this—Is the trust permanent, or are the beneficiaries entitled to a deed of denudation, which will, of course, throw upon them a personal obligation to pay the feu-duty? His Lordship thought they were entitled to such a deed, consistently with all the objects and intentions of the trust. The deed was no doubt peculiar, but its terms were explainable by the fact, that though not intended to be permanent it was expected to last a considerable time, and the form of trust adopted was a very good one for the purpose, if the parties had just been sure that the trustees would be reasonable and pliable. Although there had been no trust, if the parties had entered into a feu-contract as *pro indiviso* feuars, the obligations on Mr Norrie would just have been the same as they are. It might be a question on which his Lordship would be sorry to give an opinion in this incidental way, whether where a title is taken by means of a feu-contract, the vassal and his heirs were liable to the end of time for the feu-duty, although there had been other vassals accepted by and entered with the superior. It might be the law that he was, but there was no decision to that effect. If, however, it is not, what is Mr Norrie's liability? He did not see that any great risk was incurred by Mr Norrie denuding, but if there was, he and the others had taken it on themselves for their own personal benefit, and it must remain.

Lord ARDMILLAN concurred with the majority, remarking that he thought there was no peril to be apprehended from denuding. He thought this peril was a kind of ghost which the defender had conjured up in his own mind amid a cloud of feudal

subtleties to scare away the reasonable demands of the pursuers.

Wednesday, March 28.

GREIG v. HERIOT'S HOSPITAL (*ante*, p. 27).

*Poor—Assessment—Exemption.* Held (aff. Lord Jarviswoode) that the Governors of Heriot's Hospital are assessable for the poor in respect of the lands and heritages occupied by them for the purposes of the Hospital.

Counsel for Pursuer—The Lord Advocate and Mr Gifford. Agents—Messrs Webster & Sprott, S.S.C.

Counsel for Defender—Mr Patton and Mr Millar, Agents—Messrs MacRitchie, Bayley, & Henderson, W.S.

The question raised in this action is whether the lands and heritages situated in the City Parish of Edinburgh, and belonging to and occupied by the defenders, "the feofees of trust and governors of George Heriot his Hospital," incorporated by Act of Parliament, are assessable for the support of the poor. The inspector of the City Parish raised this action for the purpose of having it declared that they were, and the Lord Ordinary (Jarviswoode) decreed and declared as concluded for. His Lordship referred to the cases of Adamson v. the Clyde Trustees (22 D. 606, and 3 Macp. H. L. 100); Gardner v. Leith Dock Commissioners (2 Macp. 1234, and since affirmed by the House of Lords); University of Edinburgh v. Greig (3 Macp. 1151); Forbes v. Gibson (13 D. 341); and Bakers' Society of Paisley (15 S. 200). The defenders reclaimed, and the Court unanimously adhered.

The LORD PRESIDENT said—I think this is scarcely an open question. The argument in favour of exemption has been most forcibly and ingeniously put to us; but I think the principles which regulated the decisions of the House of Lords in the Mersey Docks case and in the cases from this country, as well as the principle of the recent decision of the Second Division in the case of the University of Edinburgh, finding that it was exempt, are conclusive in this case. I am not moved by the argument that there are here no owners. The trustees are in the beneficial occupation of the subjects, not the boys. The mere fact that the boys pay nothing is immaterial. It is said there is exemption because the institution is an educational and charitable one. But if this were a good argument it would lead to the exemption of the whole revenues of the Hospital, which is not contended for. Is the institution, then, a Crown or national one? I don't think it is in any sense. The fact of an Act of Parliament having been passed in regard to it for the purpose of extending, in consequence of exceptional circumstances, the benefits of the charity to objects other than those contemplated by its founder, does not make it a national institution if it was not so before. It is quite a usual thing to obtain an Act of Parliament to innovate upon the objects of a charitable trust such as this. It is not materially different from an estate bill introduced into Parliament for the purpose of getting the better of some difficulty which the law cannot remove without its intervention. This is not in itself a national institution. George Heriot left his means not only for a local purpose, but also for a limited purpose. No doubt it was said the institution was a national ornament, which was explained to mean not that the building but that the foundation was so—as a man may be said to be an ornament to his country without any reference to his physical appearance. I don't think this will do either. The nation contributed nothing to it, had no voice in its management, and has done nothing in regard to it except passing the Act of Parliament. It is said the institution has been hitherto exempt. That means that it has not hitherto been taxed. But it is to be remembered that before the passing of the Poor Law Act