

Dec. 22, 1848, 11 D. 270; *Duncanson v. Jefferis' Trustees*, Mar. 4, 1881, 8 R. 563; *M'Bain v. Wallace & Co.*, Jan. 7, 1881, 8 R. 360, *aff. ib.* July 27, 1881, H. of L. 106; *M'Laren's Bell's Com.*, i., 272.

At advising—

**LORD JUSTICE-CLERK**—We have had the advantage of an able argument in this case, and it involves questions of some interest. I have now come to be of opinion in favour of the judgment under appeal. The facts of the case are very simple. The proprietor of this machinery was tenant under his sisters of the factory in which the machinery was placed. Being in want of money he applied to his sisters to purchase the machinery in their factory. This, they say, they agreed to do, and both seller and purchasers concur in stating that the price was paid to the seller, and the property in the machinery was transferred to the purchasers. That is their statement. Some months afterwards a formal lease of the factory and the machinery in it, per inventory, was executed by the sisters in favour of their brother, and he continued to possess the factory and machinery. About six months after the date of this lease the brother became bankrupt; and the question now raised is, whether the machinery is the property of the sisters, who are said to have purchased it, or whether it has passed to the trustee in his sequestration? I am of opinion that that question has been settled already by authority, and it almost seems as if the trustee thinks so too, because he states as the ground of his claim that in point of fact no such sale or lease as is spoken to by the bankrupt and his sisters ever took place or existed. I think that it is sufficiently proved that there was a contract of sale, and that there followed on it the payment of the price. There is not a scrap of evidence to raise the suspicion that there was no sale, and no one to contradict the persons who state that a sale took place. In addition to this evidence, moreover, we have the real evidence of the lease which was executed.

With regard to the authorities on this branch of the law, the Sheriff-Substitute seems doubtful whether some expressions of mine in the case of *Tullis* are sound law. That case was decided without reference to the Mercantile Law Amendment Act, and Lord Neaves entirely concurred in the opinion I then expressed. In the more recent case on this branch of the law (*M'Bain v. Wallace*, in the House of Lords) I find Lord Blackburn saying—“A simple creditor who issues process and poinds the goods might at common law poind them as against that person who sold the goods, if that person retained the *jus in re*, though he had lost the *jus ad rem*; notwithstanding the statute he may poind them as a creditor where the possession of the vendor (to borrow the phrase used by Lord Justice-Clerk Inglis in the case of *Sim v. Grant*) has been allowed by the purchaser to be such as is quite inconsistent with his having the *jus ad rem* by virtue of his personal contract of sale.” That is precisely what I said in the case of *Tullis*. *Tullis* gave effect to the principle of Bell, that where possession is continued on a separate contract, and on a distinct and separate title, the doctrine of reputed ownership is not available at all. I find nothing to distinguish this case from that of *Tullis* except the want of

any public notification of change of possession, but this is not necessary so long as the transaction is honest, and as to that I entirely concur with the Sheriff-Principal. This being so, the Mercantile Law Amendment Act ceases to be of importance. On this point I shall only read Lord Watson's definition in the case of *Wallace*. Referring to the difference between the laws of England and Scotland on the subject he says—“In Scotland it undoubtedly had not that effect, and in order to place a purchaser in Scotland in the same position as a purchaser in England in questions with creditors of a bankrupt or the assignee or trustee in sequestration of a bankrupt, the Legislature did not enact that in Scotland the completion of a personal contract should pass the property, or have the effect of delivery, but it did enact, by the 1st section of the statute of 1856, that as in a question with the creditors of the seller, or with the trustee in a sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt had he remained solvent.” Therefore, if this case had disclosed a case of sale only—simply *retenta possessione*—the Mercantile Law Amendment Act would have applied, but it is not so.

**LORDS YOUNG and CRAIGHILL** concurred.

**LORD RUTHERFURD CLARK**—I am also of the same opinion. It is necessary that the pursuers should prove a contract of sale. It has been proved here, and that the price was paid. With that qualification, if it be a qualification, I concur.

The Court dismissed the appeal.

Counsel for Respondents (Pursuers)—Pearson—Dickson. Agent—Alexander Wardrop, L.A.

Counsel for Appellant (Defender)—Mackintosh—Hay. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, March 17.

## SECOND DIVISION.

[Lord Lee, Ordinary.]

**YELLOWLEES v. ALEXANDER, et e contra.**

(Before Lords Young, Craighill, and Rutherford Clark.)

*Property—Recompense—Bona fide Possession—Meliorations—Relevancy.*

A person to whom heritable subjects had been conveyed in trust for a body of creditors, of whom he was the chief, having died, his sons, who were his trustees in his private trust property, though without any title, and estate, entered on the management of the sold it to a person who possessed it for many years and expended certain money in repairs and improvements upon it. The sale was made under a minute of agreement by which the sellers undertook to make up as good a title as possible to the subjects, and the buyer undertook to raise no question as to their title. After thirty years the sellers

got a judicial factor appointed on the trust-estate of their father, and he demanded from the buyer an accounting for the rent for the period during which he had held the subjects. The buyer, on the other hand, demanded to be recompensed for his meliorations on the subjects, and refused to pay any rent. *Held* that though the sellers had no title, the subjects having been sold by those who were the principal creditors, and no objection having been taken by anyone, and the possession which followed having been *bona fide* and in terms of the agreement with those who were in a position to get a judicial factor appointed and a title given through him to the buyer, the buyer was entitled to recompense for meliorations, and was not bound to pay rent for the period during which he had possessed.

In 1841 John Haldane and Walter Scott Haldane, proprietors respectively of four-seventh and three-seventh shares of certain heritable subjects in Selkirk, conveyed the subjects in trust to Robert Haldane, writer in Galashiels. The trusts were in the case of both proprietors trusts for creditors, and Robert Haldane was himself the principal creditor. He attempted several times to sell the property, but without success, and in 1846 he himself made offer at a public roup to buy the subjects and distribute the price among the creditors. The requisite consents of creditors, however, not being obtained, this attempted sale became abortive. He died in 1855. His sons and heirs, William and Richard Haldane, writers, and Robert Haldane, farmer, entered on the management and possession of the subjects, and continued to manage them, without making up any title whatever to them, till 1858, when by minute of agreement, in which they designed themselves proprietors of the subjects, they sold them to Alexander Yellowlees for £225, £200 of which price was to be in cash, and £25 by promissory-note at nine days' date, "it being understood that he" (Yellowlees, the purchaser) "is not to be called on to pay this latter sum till a title as after mentioned is ready for delivery to him, said sum of £25 to bear interest at 5 per cent. per annum till paid, the interest to be payable yearly at Whitsunday." The 5th, 7th, 8th, and 9th conditions of the minute of agreement were as follows—“(Fifth) It having been very fully explained to the said second party (Yellowlees) how the said first parties (the Haldanes) stand in regard to a title to the subjects above mentioned, and that in consequence a title cannot be given at the settlement of the price above mentioned, he hereby agrees to dispense with the same until the said first parties make up as fair a title, taking the circumstances into account, as can be got, it being understood and agreed to that the sellers are not to be bound to give a complete and valid title, and, it being a part of the bargain, the purchaser hereby agrees to dispense with a complete and valid title, and the sellers will not be bound to remove any doubts or admitted defects therein; but it being for their own interests to make up as good a title as possible, they are to employ Adam Paterson, Esquire, Writer to the Signet, Edinburgh, with powers to him to do what he may consider prudent and necessary, taking everything into account in the position in which they are placed, to make up a title in the persons

of the sellers, or any one of them, as may seem proper, so that they or he may convey to the purchaser, and that the purchaser may have as good a title in his person as the sellers will be able to get themselves within a reasonable time from the date hereof, and at a reasonable expense, considering the value of the property hereby agreed to be sold: And in the event of any dispute or difference arising between the parties concerning what may be considered a title in terms of this article, or in regard to the interpretation and meaning thereof, they do hereby agree to, and bind and oblige themselves and their heirs and successors to, submit all disputes and differences and the interpretation and meaning hereof, as after mentioned. . . . (Seventh) In respect that the said Alexander Yellowlees intends executing considerable repairs and alterations on the property, it is hereby distinctly understood and agreed upon, in the event of the said first parties not being able to give a proper title as above mentioned, or in the event of the subjects being evicted from them or their heirs and assignees by any person or persons, or in any manner of way whatever, that the said Alexander Yellowlees, or his heirs, successors, or representatives, or his assignees, or his or their creditors, are not to have any claim upon the said first parties or their foresaids for any compensation for such repairs or alterations, additions, improvements, or claim for repayment of money to be expended in any manner upon the property; and the said first parties and their foresaids shall only be bound to repay the purchase price of £225 to the party or parties having right thereto, and he hereby accordingly takes all risk thereof upon himself and his foresaids; and in such event taking place, the use and possession of the property, or the rents derived therefrom during the time that the said Alexander Yellowlees and his foresaids shall have been in possession, shall be held to be, and are hereby agreed to be, taken as an equivalent for the interest which the said first parties and their foresaids may receive on said £200 and £25 respectively, and there will thus be no accounting for rents, &c., to and by either party: (Eighth) In any question or difference which may arise under this agreement or writing, the said second party is not to dispute or question the right of the said first parties to the subjects above mentioned for want of a legal or other title, but is to hold that they are in all respects the proprietors of the same as fully as if they had a complete and valid legal title and were infeft upon the same: (Ninth) That in event of any dispute or difference arising between the parties as aforesaid concerning what may be considered a title in terms hereof, or in regard to the interpretation or meaning of article fifth hereof, or of any part or the whole of these presents, or with regard to the bargain or sale in any respect or particular, they do hereby submit and refer all such disputes and differences to the amicable decision, final sentence, and decret-arbitral of the said Adam Paterson, and failing him by death or non-acceptance, to John Romanes, Esquire, Solicitor to the Supreme Courts, Edinburgh, partner of the said Adam Paterson.”

Yellowlees entered into possession of the subjects at Whitsunday 1858, and immediately began to execute certain alterations upon the buildings. In the first of the two actions hereinafter nar-

rated he averred that these alterations consisted in rebuilding the front wall, placing a new roof upon part of the subjects, re-flooring a part, and converting the whole into a good shop, cellar, and warehouses. He averred that in these necessary repairs and alterations and improvements he had expended £330, and that the value of the subjects was enhanced to the amount of at least £260. In 1870 he sold the subjects to his brother John Yellowlees for £500, and he possessed the subjects as proprietor till 1879. In 1873 William, Richard, and Robert Haldane, who never made up any title to the subjects, obtained the appointment as judicial factor on the trust estates of John Haldane and Walter Scott Haldane, on which their father had, as already mentioned, been the original trustee, of Mr. D. C. Alexander, writer in Selkirk. Mr. Alexander obtained warrant to make up a title to the subjects by interlocutor dated 13th and extracted 27th May 1873, but was prevented by various causes from making up a feudal title till December 1878. He thereafter exposed the subjects for public sale, and John Yellowlees bought them from him for £820, the price of £200 which Alexander Yellowlees had already paid for them to the Haldanes being imputed to that sum. In this action John Yellowlees averred that he had been forced to buy them by a threat of eviction from them on the part of Mr. Alexander, and that he was in ignorance of his legal and equitable right to the subjects. He maintained and reserved his right to claim repetition of the £620 thus paid to Mr. Alexander. At the settling of the transaction the legal rights of all parties both as to this and the other questions between them were reserved. In December 1879 John and Alexander Yellowlees raised this action against Mr. Alexander, as judicial factor on the trust estate of John and Walter Scott Haldane, to have it found and declared that they were not bound to account for the rents of the subjects from the first purchase of them by Alexander Yellowlees in 1858 to the purchase by John from Mr. Alexander in 1879, or otherwise that all claims in respect of the said rents had been extinguished and discharged. The summons also concluded for payment of the £260 by which the subjects had been enhanced in value by the operations above narrated. The declaratory conclusion of the summons was founded on the *bona fide* possession of the pursuers under the minute of agreement in 1858.

The pursuers averred that Alexander Yellowlees in entering on the subjects, and making outlays thereon, acted in good faith, and in the *bona fide* belief that he had acquired the right of property, and that all that remained to be done would be done by the Haldanes arranging to give him a formal conveyance; further, that his possession and that of his brother was in good faith, and open and known to all the creditors.

They also pleaded that the defender, as representing the creditors on the trust-estate, was barred by their *mora* and negligence, and by their acquiescence in the management of the Haldanes, from demanding any accounting for past rents.

Mr. Alexander defended the action, and denied that the subjects had been enhanced in value as stated by the pursuers.

He pleaded, *inter alia*—" (1) The pursuers' statements are not relevant to support the conclu-

sions of the summons. (3) The pursuers are not entitled to recompense for meliorations, in respect they did not possess in the *bona fide* belief that they were the true proprietors."

He also raised a separate action against the Messrs Yellowlees for an accounting for the rents from 1858 to 1879, in the proportions corresponding to their respective periods of possession.

The Messrs Yellowlees maintained in this action pleas similar to those which they maintained in the action in which they were pursuers.

The two actions were conjoined, and the Lord Ordinary (LEE) pronounced this interlocutor:—" Finds, in the action at the instance of David C. Alexander, as judicial factor on the trust-estate of John Haldane and Walter Scott Haldane, that the allegations of the pursuer are not relevant to support the conclusions of the action, and therefore assoilzies the defenders, and decerns, but without prejudice to any claim competent to the pursuer against William, Richard, and Robert Haldane referred to on record; and in the action at the instance of John and Alexander Yellowlees, sustains the first plea-in-law for the defender, assoilzies the said David C. Alexander from the conclusions of the action, and decerns, reserving to the pursuers any claim competent to them, or either of them, against the said William, Richard, and Robert Haldane, and to them their answers as accords: Finds in each case the defenders entitled to expenses down to the date of conjoining the actions; and *quoad ultra*, finds neither party entitled to expenses," &c.

His Lordship added this note:—" The agreement between Alexander Yellowlees and William, Richard, and Robert Haldane is of a very peculiar character. It bears that the Haldanes, as proprietors of the subjects, had agreed to sell, and did thereby sell, and that Mr. Yellowlees had agreed to purchase, and did thereby purchase, from them 'All their right and interest in and to All and whole that dwelling-house in the burgh of Selkirk,' &c.

"It is now averred by John and Alexander Yellowlees that after obtaining possession at Whitsunday 1858 considerable alterations and improvements were made upon the subjects by Alexander Yellowlees. The house facing the street was reconstructed, and the brew-house at the back was covered with a new slate roof, and otherwise improved. The expense of these alterations is said to have been not less than £330, and it is alleged that John Yellowlees in 1870 paid to his brother the sum of £500 for his right under the minute of agreement. It is further alleged that in making the said outlays Alexander Yellowlees acted in good faith, and in the belief that the said William, Richard, and Robert Haldane were proprietors, and would so arrange as to grant him a conveyance in terms of the agreement of lease. It is said that he believed he had acquired, in substance and reality, the right of property, and that all that remained to be done was to satisfy the forms of conveyancing. His possession, and that of his brother, the other pursuer, are stated to have been all along in the like good faith. But it is admitted that William, Richard, and Robert Haldane never made up any title, and it is not alleged that either of the pursuers ever had or ever attempted to obtain any title of possession excepting the minute of agreement above mentioned.

"It is in these circumstances that John and

Alexander Yellowlees' claim from the judicial factor on the trust-estate of John and Walter Scott Haldane, in addition to the £200 paid in 1858, and which the factor has recovered from Messrs Haldane, a sum of £260 on account of meliorations, and as the extent to which the factory estates are *lucrata* by the expenditure; and they further demand to be declared free from all claim for rents or annual profits during their possession. They plead that the factor, as representing the creditors on the trust-estate, is barred by their *mora* and acquiescence from demanding any accounting for past rents, except upon giving recompense as claimed, and they plead separately that they are entitled to that recompense in respect of the alleged *bona fides* in making the alteration.

"On the other hand, the judicial factor, in the action at his instance, claims from the Messrs Yellowlees a sum of £712, as the yearly rent or annual value of the subjects from the period from Whitsunday 1858 to Whitsunday 1879, when he succeeded in recovering possession and sold the property to John Yellowlees.

"Although the action at the instance of Messrs Yellowlees is in one sense the leading action, it appears to the Lord Ordinary to be convenient to consider, firstly, the action at the instance of the judicial factor. If he has any claim against John and Alexander Yellowlees, or either of them, to account for the rents or yearly profits of the subjects, it will naturally fall to be considered upon what conditions, if any, that claim can be enforced. If, on the other hand, no such claim lies against John and Alexander Yellowlees, their demand for recompense on account of the alleged meliorations will have to be considered in a different aspect.

"The Lord Ordinary has difficulty in ascertaining the grounds upon which the judicial factor has directed his action against the Messrs Yellowlees. His natural and most obvious course would appear to have been to call to account the trustees of Mr Robert Haldane. In the state of facts set out on record they seem to be clearly liable to account for the trust-estates in Mr Robert Haldane's hands, both in respect of their representing him and also as having actively intruded with the subjects in question. Nothing is suggested which should lead the Lord Ordinary to doubt that they are responsible for the possession had by Alexander and John Yellowlees. No reason is given for not proceeding directly against them. It is not said that they are persons of no means and unable to account. Nor is it alleged that the Messrs Yellowlees did anything which should make them responsible for the actings and intrusions of Robert Haldane's representatives. The factor seems to have had no occasion to take any notice of the Messrs Yellowlees, unless they had stood in the way of his selling the subjects and obtaining the necessary title and possession.

"The only ground of action suggested, either in the condescendence or in the pleas for the judicial factor, is that Alexander and John Yellowlees possessed the subjects, and that these formed parts of the trust estates. But this is in the opinion of the Lord Ordinary insufficient. Their possession from 1858 until they purchased the property from the factor was by virtue of the right which they purchased from Robert Haldane's representatives in terms of the minute of agreement, and for which Robert Haldane's representatives received payment. Neither Alexander nor

John Yellowlees had any contract with the judicial factor, and the notion of their being liable to him in recompense for a possession which they obtained from Robert Haldane's trustees is, in the opinion of the Lord Ordinary, untenable. Had it been alleged that their possession was obtained by concert with the Messrs Haldane for the purpose of effecting an illegal appropriation of the subjects, the case might have been different. But in the absence of any suggestion of that kind, and of any intelligible ground for proceeding against them, the Lord Ordinary must hold that the present action is not well laid.

"With regard to the action at the instance of the Messrs Yellowlees, the Lord Ordinary is unable to distinguish the present case in principle from that of *Barbour v. Halliday*, July 3, 1840 (2 D. 1279); for he holds that there is no relevant allegation that the alterations and improvements were made *in bona fide*. It is clear from the minute of agreement that the Messrs Haldane, while calling themselves proprietors of the subjects, knew that they had no title, and had no right which would enable them to obtain a valid title; and it further appears that Alexander Yellowlees was informed how they stood in regard to a title, and agreed to take the subjects on the condition of accepting such a right only as they might be able to give, and of having no claim against them in case of eviction for any compensation for the alterations which they contemplated making, or for the payment of their outlay. He agreed that his only claim should be for repayment of the purchase price, and that the use and possession of the property should be held as an equivalent for the interest during the period of possession. He agreed to take all the risk of making the alterations and expending money upon the property on himself and his heirs, successors, or representatives or assignees. Now, the Lord Ordinary is of opinion that Alexander Yellowlees can have no better claim against the judicial factor than he has against Messrs Haldane, and that the position of John Yellowlees is no better than that of Alexander Yellowlees, from whom he acquired right only to his right under the minute of agreement. It is impossible to consider the allegation of *bona fides* apart from the minute of agreement to which reference is made, and which was the sole title of possession; for Mr Robert Haldane's purchase of the subjects from himself *qua* trustee evidently never came to anything. It is not said that the price of £300 was ever paid, or that Robert Haldane's purchase was in fact relied on. The question therefore is, in this case, how far Alexander Yellowlees in making the outlay had, by virtue of the minute of agreement, a title which placed him *in bona fide* and upon which he could rely. The Lord Ordinary holds that he had no title at all, and that he knew it and undertook the risk of it. As against the true owner, therefore, the claim of Messrs Yellowlees appears to be excluded on the principle stated in *Burns v. The Creditors of M'Lellan* (M. 13,402), viz.—that 'no law subjects a man to recompense or remuneration who reaps an occasional or consequential benefit from the deed of another done with no view to his interest.'

"But it was argued there was great delay on the part of the creditors in taking up their right, and that ultimately it was upon the application of the

Messrs Haldane that the judicial factor was appointed. These circumstances may make it appear somewhat hard upon the pursuers that they should now have to pay for the premises a price increased to some extent by their improvements; but it must be observed that the improvements were made at or soon after 1858; that Mr Yellowlees had it in his power to take steps at once to ascertain his position; and that whatever effect may be attributable to the action of the Haldanes in a question with them, it can give to the pursuers no claim against the judicial factor that he was appointed on the petition of the Haldanes, and after considerable delay. The cases of *Rutherford v. Rankine* (M. 13,422) and *Fernie v. Robertson* (9 Macph. 437) and *Nelson v. Gordon* (1 Rettie, 1093) all appear to the Lord Ordinary to be distinguished from the present by the fact that in each there was a title of possession which could not be ignored by the owner in asserting his right. In the case of the *York Buildings Company v. Mackenzie* (3. Pat. App., pp. 378 and 579) it was held, on the sale being annulled, that Mr Mackenzie must account for the rents and profits, and might deduct the expenses and outlays so far as beneficial. But he had a title which, though challengeable on the ground of his disability to purchase, was *ex facie* valid, and indeed judicially sanctioned. The opinion of Lord Young in *Reedie v. Yeaman* (14 S. L. R. 625) contains a valuable exposition, to which the Lord Ordinary entirely assents, of the principles upon which, in the general case, possessors upon a temporary or precarious title laying out money in improvements are deemed to have done so for their own purposes, and without giving rise to any claim of recompense. The title of the pursuers in the present action was, on the face of it, no title at all against the real owner of the subjects, and the Lord Ordinary is unable to sustain it as affording any foundation for a plea of *bona fide* expenditure such as should affect the owner with a claim of recompense for improvements made without his consent.

“As the Lord Ordinary has held that the judicial factor has no claim against the Messrs Yellowlees for rents or yearly profits, it is unnecessary to consider what conditions would have been attachable to such a claim if sustained.

“The result at which he has arrived is that both actions are untenable, and that in each case there must be decree of absolvitor, and with expenses down to the date of conjunction.”

Alexander reclaimed.

The authorities founded on are quoted in the note of the Lord Ordinary.

At advising—

LOED YOUNG.—The material facts are these:—In 1841 certain house property in Selkirk belonging to John Haldane and Walter Scott Haldane was conveyed in trust to Robert Haldane, writer in Galashiels. The purpose of the trust was to pay debts, the trustee himself being the principal creditor. There was a power of sale. The trustee died in 1855 without having executed the trust. He left a trust-settlement of his own property in favour of his three sons William, Richard, and Robert, who not only entered on their father's property, but also on the trust-estate of John and Walter Scott Haldane, which they possessed and managed, though without a

title, as *de facto* trustees in succession to their father, the creditors or beneficiaries permitting this—at least not interfering. They were themselves the principal creditors. In 1858 these *de facto* trustees sold the trust property to Alexander Yellowlees for £225 by the minute of agreement. He possessed it till 1870, when he sold it to his brother John Yellowlees for £500, having during his possession laid out £330 on buildings and improvements, which increased its value. John Yellowlees has been in possession since. It is admitted that William, Richard, and Robert Haldane had no title to the property, and gave none other than the minute of sale to Alexander Yellowlees. They, however, received the price from him, and put him in possession, and there being no allegation against the honesty and good faith of the transaction, it is not doubtful that as between the parties to it the minute of sale was binding according to its terms. The doubt as to title referred to in the fifth head of the minute plainly does not regard the right of the sellers to act as trustees in succession to their father, but to the alleged defect in the radical title of the trusters referred to by the judicial factor in his answer to the condescendence, and which was eventually overcome by himself, as he explains, although not till 1878. There could be no difficulty about the trust title, for that as mere machinery would have been at once and inexpensively supplied by the Court, as it in fact was, on the application of William, Richard, and Robert Haldane themselves. No reason is suggested why this was not done till 1873. It might have been done equally well in 1858. The Messrs Haldane had sufficient title to invoke the aid of the Court to supply the necessary machinery in 1858, and it was their duty by their bargain with Mr Yellowlees to use it. That they guarded themselves against liability beyond repetition of the price in case of eviction by a stranger impeaching the trust has no bearing on their duty in this respect. Now, I must assume that their sale to Yellowlees was an honest and *bona fide* sale for a fair price, and altogether a fair act of trust administration, apart from the question of title—first, because there is no averment to the contrary; second, because they who made it were permitted by all interested to administer the trust, and had themselves the chief beneficial interest, being the principal creditors; and third, because during the twenty-four years that have since elapsed no other creditor or beneficiary has complained of it. Assuming this, that the sale was *bona fide* for a fair price with the approval of all interested, it is reasonable to believe that had the Messrs Haldane done their duty by Mr Yellowlees in 1858 he would then have got the title which they had bargained to give him—that is, subject to the risk of the challenge by a third party opposed to the trust, which the judicial factor tells us he has overcome. I am of opinion that this is a good legal and equitable consideration in dealing now with the pecuniary rights of parties.

In 1878 the judicial factor, appointed on the application of the Messrs Haldane to execute the trust which they themselves had been administering for a quarter of a century without objection, though certainly without a title, threatened to eject Mr Yellowlees unless he agreed to purchase the property over again, and to this threat he

yielded, and bought from the factor for £820, receiving credit for £200 paid to the Messrs Haldane in 1858. It is not for me to say whether this was a proper proceeding, for Mr Yellowlee agreed to it, and it is now an accomplished fact. I should have been disposed to think that although he had no title he had an equitable right, such as the Court will recognise and give effect to by ordering a title to be given when it can be done without injustice to others.

The first question which we have now to consider is, whether the Messrs Yellowlees are liable in rent as tenants for the period of their possession prior to the sale by the factor in 1878, viz., Alexander from 1858 to 1870, and John from 1870 to 1878? and I am of opinion with the Lord Ordinary that they are not, although not on the same grounds. I think their possession is to be attributed to the contract with the Messrs Haldane when they were in the "possession and management" of the trust-estate as trustees, with the assent, as I must assume, of all parties interested. I have already stated my reasons for regarding their administration and the contract with Yellowlees in the course of it as honest and in good faith, and as no one even now, after such a lapse of time during which the possession was openly held, objects that it was unfair or inequitable, I have no hesitation in allowing it effect as an honest right of possession while it subsisted. The *de facto* administrators of the trust had the use and interest of the agreed-on price, and although the transaction is not now to have effect as a sale, I think it must have effect as the terms of the possession which followed and continued on it, while allowed to subsist. I am therefore of opinion that the Messrs Yellowlees ought to be assoiized with expenses from the action for rent against them.

The second question is, whether the Messrs Yellowlees are entitled to be recompensed for the expenditure made by Alexander on the property, whereby it was, as alleged, ameliorated and increased in value to the extent of £260, so that the price paid by John to the factor in 1878 was greater by that sum than it would otherwise have been? The facts are not admitted, and the question is therefore one of relevancy, and I am of opinion that the claim is relevantly stated. I have already explained my reasons for thinking that Alexander Yellowlees possessed in the *bona fide* belief, justified by the facts, that he had not a title, but a right as proprietor on which a title was to follow, and I cannot doubt that it is well averred that he made the expenditure when possessing in this belief, and that it increased the value of the property and the price which the factor received from John, and has now in his hands. I am therefore of opinion that the case is within the equitable doctrine of recompense, and that it would be inequitable and contrary to that doctrine to allow the trust-estate to benefit at the expense of the Yellowlees by receiving and retaining without recompense the fruits or value of the expenditure made by them. It is unnecessary to point out that the question is really with John, who bought the property from Alexander at a price increased by the value of his expenditure at the date of the sale.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

This interlocutor was pronounced—

"Recal the interlocutor" of Lord Lee, dated 14th February 1881, and "disjoin the conjoined actions: In the action at the instance of the said David Carnegie Alexander, judicial factor foresaid, against Alexander Yellowlees and John Yellowlees, assoiize the defenders from the conclusions of the action, and decern; find the defenders entitled to expenses; and remit to the Auditor to tax the same and to report: In the action at the instance of the said John Yellowlees and Alexander Yellowlees against the said David Carnegie Alexander, judicial factor foresaid, repel the first plea-in-law for the defender; allow the parties a proof of their averments respectively, and to the pursuers a conjunct probation; find the pursuers entitled to expenses from the date of closing the record," &c.

Counsel for Yellowlees—R. V. Campbell.  
Agent—A. Kirk Mackie, S.S.C.

Counsel for Alexander—Rankine. Agents—Romanes & Simson, W.S.

Saturday, March 11.

OUTER HOUSE.

[Junior Lord Ordinary,  
Lord Kinnear.

SAUNDERS, PETITIONER.

Curator bonis—*Special Powers—Remit to a Man of Business.*

Special powers granted to the *curator bonis* of a lunatic to accept personal instead of real security for an annuity settled upon the lunatic, and, in respect of the approval of the Accountant of Court, without any remit to a man of business.

On 3d July 1875 William Saunders junior, C.A., Edinburgh, was appointed *curator bonis*, with the usual powers, to Mrs Lawrie, who was then, and still was at the date of the petition, in a mental condition rendering her incapable of managing her own affairs, and since that time he has administered the estate. Her first husband at his death left her an annuity of £52, to be paid out of the revenue derived from lands left by him situated in South Australia. The lands had been sold to Mr J. J. Stuckey, Adelaide, for £300, subject to the annuity and a mortgage of £300, which formed, and still forms, a preferable burden on the estate. The lands had been recently let at a rent of £52, which, after paying interest on the mortgage, left only £24, 10s. per annum available to meet the said annuity, without taking into account any necessary outlays and charges connected with the collection and payment thereof. Mr Stuckey, however, agreed, on condition of the aforesaid annuity and all arrears being discharged, to grant an annuity of £32, 10s. to the ward for her natural life. In compliance with section 7 of the Pupils Protection Act (12 and 13 Vict. cap. 51) the curator lodged with the Accountant of Court a report detailing at length all the circumstances,