

It further appears that in implement of this obligation the vendors granted a bond of guarantee dated 16th July and 8th September 1897, by which they bound themselves, conjunctly and severally, to pay to Sir James Russell, and certain other persons therein named, as trustees for the holders from time to time of the preference shares in question, £1750 yearly for three years subsequent to 22nd February 1897, being the annual amount of £5 per cent. per annum upon the said 3500 preference shares of £10 each, but, *inter alia*, under the condition and declaration that the said annual amount should only be prestable to the extent to which such dividends should be due and payable during said period on said 3500 preference shares so far as paid-up from time to time, and not met and paid out of the free yearly and termly profits out of each respective year of such period. There are other declarations and conditions in the deed, but I do not think they call for notice. The obligation, therefore, undertaken by the vendors was to make good to the holders of preference shares any deficiency there might be in the profits of the company to yield them a dividend of 5 per cent. on their shares in each of the three years.

It is said by the company that the guarantee is still current and will continue to be current until the 22nd February 1900, and they maintain their right of lien on the shares held by Mr Thomson in respect thereof.

I do not think that this contention is well founded.

It appears to me that the vendors fulfilled the obligation undertaken by them to the company in the original agreement of January 1897 when they granted the bond of guarantee. But the company are not the creditors in this bond. It is not granted for the benefit of the company, but for the benefit of the preference shareholders only. It appears to me further that if the company had any claim on Thomson's estate they should have claimed in the sequestration, when the value of the alleged lien, if any, would have been ascertained, the amount paid, and the lien discharged.

I do not think, therefore, that the company have a lien over the shares held by the late Mr Thomson in respect of this guarantee, and therefore that the application should be granted.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Orr. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Clyde. Agents—J. K. & W. P. Lindsay, W.S.

Tuesday, July 18.

FIRST DIVISION.

SHAW STEWART AND OTHERS,
PETITIONERS.

Trust—Charitable Trust—Gift of Charitable Trust Funds to Society—Failure of Objects of Society—Absolute Donation or Trust.

An association was formed for the purpose of founding a school for destitute children. Subscriptions were collected and a property purchased to use as a schoolhouse. By the disposition it was declared that it was to be used as a school for destitute children "until the same shall be sold or the destination thereof otherwise changed by a majority of subscribers." Among the subscriptions was a donation from certain trustees, who were directed by their trust to set apart a certain sum "to and for the benefit of and among such ragged or industrial schools in Scotland as my said trustees shall select."

The purpose of the school having failed, the association craved the authority of the Court to sell it, and to devote the proceeds to giving certain gratuities to the officials of the school and to benefiting other charitable institutions consisting of a town mission, a cottage hospital, and certain Science and Art evening classes.

The trustees claimed that their subscription should be returned to them, on the ground that the new purposes were not in accordance with those contemplated by their trust.

Held that the gift by the trustees was unconditional and not affected by the terms of the Ferguson Trust, and that the trustees were not entitled to repayment.

In 1857 an association was formed for the purpose of establishing an industrial school in Falkirk, and funds were raised for the purpose of carrying out that purpose partly by local subscription and partly by a grant of £150 from the trustees of the Ferguson Bequest Fund, the receipt for which bore that it was a grant "on condition that the association should raise £350, and erect a building . . . from the £10,000 legacy for ragged and industrial schools in Scotland." A constitution and rules were drawn up, in which it was stated that "It is the object of this school to reclaim the neglected or profligate children of Falkirk and neighbourhood by affording them the means of a good common and Christian education, and by training them to habits of industry so as to enable them to earn an honest livelihood and fit them for the duties of life."

Certain heritable property was purchased to be used as a schoolhouse, the disposition being granted in favour of the trustees of the Industrial School.

By the disposition it was, *inter alia*, declared that "The said piece of ground and the buildings erected or to be erected thereon shall be held, used, and occupied as a school and pertiments for the education and support of destitute children until the same be sold or the destination otherwise changed by a majority of subscribers for the time being to the funds of the said Falkirk Ragged Industrial School, convened for that purpose, and shall be managed under such rules and regulations as presently exist, or shall hereafter be made and agreed on by a majority of subscribers at any general meeting of the subscribers, or by their committee authorised by them, with power to the trustees named or to be assumed, and the survivors and sole survivor, acting under directions of such general meeting convened as aforesaid, to sell and dispose of the said lands and others, or to alter the foresaid destination thereof as such general meeting may direct, and for that purpose to grant and subscribe all writs and deeds requisite and necessary."

A school was carried on in accordance with the constitution and rules down to 1867, when the school was certified by the Home Secretary as an Industrial School in terms of the Industrial Schools Act 1866 (29 and 30 Vict. cap. 118).

A new set of rules were drawn up and approved by the Home Secretary, which provided, *inter alia*, that the object of the institution was "to reclaim abandoned boys and girls, and to rescue those whose unhappy circumstances would inevitably lead them to crime and profligacy; such children to be admitted as inmates, to be clothed, fed, and boarded under the powers and provisions of the Industrial Schools Act 1866," and that its affairs were to be conducted by a committee of subscribers. The School was carried on down to 1898, when it was found that it could no longer be carried on with advantage, the Home Secretary having intimated the withdrawal of the certificate of the school, and suggested that the committee should consider how they should deal with the school funds, &c., in the future, and whether the teachers could not be granted gratuities out of the proceeds of the sale of the property. The available assets at this time were the heritable subjects, valued as worth from £1600 to £1800, furniture, &c., valued at £50, and the balance of the current year's Government grant.

A meeting of subscribers was held at which it was resolved to direct the trustees and Committee of Management to sell the school, and to apply to the Court for its approval. The Committee was also instructed to give certain gratuities to the officials of the school, and to allocate the balance to certain charitable objects.

A petition was presented by the trustees and Committee of Management in which they craved the Court to authorise the petitioners to carry out the sale, to pay the gratuities resolved upon at the meeting of subscribers, and to allocate the balance remaining as provided at the meeting, viz., two-fifths to the Falkirk Town Mission;

two-fifths to the Falkirk Cottage Hospital; and one-fifth to the Falkirk Science and Art School Evening Classes. No answers were lodged.

The Court remitted to Mr Charles Cook, W.S., to inquire into the regularity of the proceedings and the reasons for the proposal to sell the subjects, and to report as to the petitioner's proposal as to the disposal of the proceeds of the sale and other free assets.

Mr Cook, after narrating the circumstances giving rise to the petition, stated in his report that "the trustees of the Ferguson Bequest Fund have demanded repayment of their donation of £150 made in 1859 towards the establishment of the school. The grounds on which such repayments are demanded are, that the gift was one for a special purpose, viz., the establishment of the Falkirk Ragged School; and that if the school is now to be sold, the managers are not entitled to divert the money to any other purpose without the consent of the Ferguson Trustees, but are bound to repay the donation of £150 to the Ferguson Trustees, it being *ultra vires* for them to allow the money to be applied for any purpose other than that for which it was originally granted. The petitioners maintain that Mr Ferguson of Cairnbrock having left a special legacy of £10,000 for ragged and industrial schools, his trustees, out of this fund, made the donation in 1859 of £150 to the Falkirk Ragged School; that this donation was made voluntarily and without condition save that a building should be purchased and converted into a school; that the house in Kerse Lane, Falkirk, was so purchased and converted, and that a Ragged or Industrial School was therein maintained for thirty-nine years; that in these circumstances the Ferguson Trustees are not entitled to repayment of an unconditional donation made nearly forty years ago, but are bound by the resolution of the subscribers formally passed at the meeting of 20th September 1898."

The reporter, on the assumption that the gift was unconditional, recommended the Court to grant the prayer of the petition.

The Court refused to grant authority to the petitioners to sell the subjects, on the ground that they did not require authority to do so.

The Ferguson Trustees lodged a minute whereby they craved the Court to refuse the prayer of the petition in so far as it proposed to divert the sum received from the Ferguson Bequest from the Ragged or Industrial Schools of Scotland, or to amend the scheme by directing the petitioners to pay the said sum to the minuters, to be applied for the benefit of the said schools.

The minuters averred that Sir John Ferguson had directed his trustees to set apart the sum of £10,000 "to and for the benefit and among such Ragged or Industrial Schools in Scotland as my said trustees shall select," and that the grant to the Falkirk School had been made out of this fund. They maintained that the division of the funds proposed by the petitioners

would involve the diversion of the fund specially dedicated by Sir John Ferguson to these schools, to other charities for which he had made no provision. They averred that there were schools in Scotland eligible objects for his bequest.

Argued for petitioners—There was sufficient similarity in the new objects to the original object of the institution to justify the transference of the funds from the committee of subscribers, especially look to the powers given to them in the conveyance. The distribution of gratuities to the officials of the school was justified by the authority of *Governors of Heriot Trust*, November 17, 1897, 25 R. 91. The majority of the subscribers convened for that purpose were satisfied, and there was no opposition except on the part of the Ferguson Trustees. But they having made an unconditional gift of this money forty years ago, were not now entitled to oppose its application to cognate purposes to that for which it was originally used. The terms of the Ferguson Bequest were not made a condition of the gift, and the present question had nothing to do with its purposes. As soon as the trustees had made their gift to an industrial school they had discharged their duty and had nothing further to do with it. They were just in the same position as if Sir John Ferguson had left a legacy to the school and they had paid it, and were in no better position than any other donor—*Connell v. Ferguson*, March 5, 1861, 23 D. 683.

Argued for Ferguson Trustees—They were bound by their trust to give this fund to particular schools, and could not consent to its alienation. The case of *Young's Trustees v. Deacon of the Eight Incorporated Trades of Perth*, June 9, 1893, 20 R. 778, showed that it was competent to refer to their trust-deed as showing the purposes to which the gift must be applied. So long as the original objects of the trust existed, it was incompetent to divert a gift made from it to other purposes however cognate—*Young's Trustees*, at p. 786; *Mitchell v. Burness*, June 19, 1878, 5 R. 954, at 599.

LORD ADAM—[After narrating the circumstances giving rise to the petition and quoting the terms of the disposition of the subjects set out above, his Lordship proceeded as follows]—It appears to me to be clear that the petitioners are not in a position to carry on this school any longer, and that the assets ought to be disposed of. It appears to me, as it does to the reporter, that the manner in which the petitioners propose to do so is very fit and proper. No one objects or suggests any other mode except the Ferguson Trustees, who object to a limited extent on grounds which I shall now state. It appears that the Ferguson Trustees had at their disposal a sum of £10,000, which they had power to apply for the benefit of and among such ragged and industrial schools in Scotland as they should select.

Out of this fund they made, as we have seen, a donation of £150 to the Original Ragged Industrial Association of Falkirk,

but, as far as I see, under no other condition than that a building should be purchased and erected into a Ragged and Industrial School. The money was so applied. The trustees now say that out of the proceeds of the sale of the subjects they are entitled to repayment of this £150. They say that it formed part of the £10,000 dedicated by their truster to ragged and industrial schools; that they have no power to apply it otherwise, and a duty to see that it is not otherwise applied, as it would if the prayer of the petition were granted. It will be observed that it is doubtful how far that question could be competently disposed of in the present proceedings, but the difficulty may be got over, as the counsel for the trustees consented that it should be so disposed of.

Now, this donation was made by the trustees in 1859, that is, nearly 40 years ago. It is not disputed that it was at the time applied to the purpose for which it was given, as were all the other subscriptions. I do not think that the trustees are now in any different position from the other donors and subscribers. No doubt the original purpose has failed, but a majority of the subscribers for the time being had power to change the destination of the subjects, or of the proceeds. They propose to do so, as it appears to me, in a proper and legitimate way. I therefore think that the trustees are not entitled to have the money repaid, and that the petition should be granted.

LORD M'LAREN—I think it is consistent with the general understanding regarding subscriptions to societies for public purposes that money paid by a subscriber does not constitute a trust, but is a gift under conditions. That is a material difference, because if it did constitute a trust, then on the failure of the objects of the society the subscription would fall to be returned to the donor or to his representatives. But if such a subscription is a gift under conditions, then on the failure of the purposes of the society, or the impossibility of giving effect to the conditions, the gift vests absolutely. I am far from saying that a gift may not be made in such terms as to constitute a trust, but I think that there are few societies which would be willing to accept subscriptions on a footing which would make every individual subscriber a truster entitled to call the society to account, and would put upon the society the burden of discovering the donor or his heir if its objects become impracticable. But as I have always thought the common law to be nothing more than the quintessence of the common sense of mankind applied to the ordinary affairs of life, with regard to subscriptions to societies, the general understanding that they are mere gifts may be taken to be the rule of law applicable to all cases where there is no special bargain. The Ferguson Trustees being duly authorised by the trust-deed under which they acted made a gift to the Falkirk Industrial School, and we are informed that it is no longer possible to carry on that school. It follows, in my opinion, that the managers are entitled

to apply the gift to other purposes cognate to that to which it was formerly applied. At the same time, as they ask our opinion as to the disposal of the money, it seems reasonable, although not necessary, that we should give it. At all events, we may give judgment to the effect that no trust was constituted which laid the managers under obligation to return the gift to the donee in case of the failure of the objects for which it was intended.

LORD KINNEAR — I agree with Lord Adam that the property in question and the price that may be obtained for it are impressed with a trust in the hands of the petitioners, because in the conveyance to them the subjects are stated to be conveyed for certain specified purposes. Accordingly, the petitioners were right in supposing that when they sold the subjects they were not entitled to divide the price among themselves, or to appropriate it to any purpose they pleased, but were bound to apply it to some purpose falling within the general objects of the trust, though the specific object could no longer be carried out. I agree with Lord Adam and on the clear report of Mr Cook that the purposes proposed by the petitioners are exceedingly suitable for the application of the money, and no reason has been suggested why we should not grant the authority craved.

On the only question which has been discussed at the bar, the right of the Ferguson Trustees, I agree with your Lordships that the trustees having been empowered by their truster to give donations out-and-out to ragged and industrial schools, gave this donation of £150 in 1859 without consideration save that a building should be purchased and converted into a school. By making that grant to the petitioners they were discharged of their trust so far as it applied to the particular sum of money in question, and of their duties and obligations to the extent of the grant; on the other hand, they were precluded from interfering further with money which they had absolutely given away.

The LORD PRESIDENT concurred.

The Court found that the Ferguson Trustees were not entitled to receive repayment of the £150 claimed by them, and authorised the petitioners to dispose of the free proceeds of the sale of the subjects, and of the other assets in the manner set out in the petition.

Counsel for the Petitioners—H. Johnston—Cook. Agent—Robert D. Ker, W.S.

Counsel for the Ferguson Trustees—Tait. Agents — Carment, Wedderburn, & Watson, W.S.

Wednesday, July 19.

FIRST DIVISION.

[Sheriff of Fife.

DOUGALL v. LORNIE.

Accounting—Appropriation of Payments—Indefinite Payment—Tradesman's Accounts.

Where a tradesman's account is paid by instalments, the payments are not applicable to the items charged in order of date so as to preclude the debtor from challenging any of these items.

The rule in *De Vaynes'* case (*De Vaynes v. Noble, Clayton's case*, 1816, 1 Mer. 529, 15 RR. 161) does not apply to tradesmen's accounts.

George Dougall, plumber, Kirkcaldy, raised this action in the Sheriff Court of Fife against John Guthrie Lornie, for payment of £196, 18s. 7d., being the balance of an account due by the defender to the pursuer for work executed upon a linoleum factory belonging to the defender.

The account in question began on 10th November 1891, and ended on 27th May 1895. It was rendered in instalments to the defender, who made the following payments to account:—(1) On 9th February 1893, £70, (2) on 24th August 1893, £163, (3) on 21st May 1894, £170, and (4) on March 9, 1895, £50.

The defence was that the pursuer's whole account was overcharged, and that the pursuer had failed to render an account so detailed that it could be scrutinised and checked.

The pursuer pleaded, *inter alia*—“(2) The defender is barred from raising any objection to the account sued for so far as the same has been extinguished by the payments made by him to account.”

The defender pleaded, *inter alia*—“(4) The account libelled on being continuous, and the payments by defender to account thereof having been made on the condition that the accounts would be adjusted on completion of the work embraced therein, none of the items in the account have been extinguished by such payments, and the defender is not barred from objecting to any of these items.”

On 15th December 1897, after a proof on certain matters, the Sheriff-Substitute (GILLESPIE) pronounced an interlocutor in which he found in law that “the payments by the defender must be held to have extinguished the items of the accounts in order of date, and that the defender is not entitled to raise objections of the kind which he seeks to raise except to the last account, and to the latter part of the previous account so far as not covered by the last payment to account;” and remitted to a man of skill to examine and report on the work contained in the last account and the latter part of the previous account.

The Sheriff (MACKAY) on 18th March 1898 adhered to this interlocutor, and thereafter, on the report by the man of skill, the Sheriff-